

# **Scottish Law Commission**

**Discussion Paper No 108**

**Attachment Orders and Money Attachment**

**December 1998**

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

The Commission would be grateful if comments on this discussion paper were submitted by 26 March 1999. Comments may be made on all or any of the matters raised in the paper. All correspondence should be addressed to:

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## NOTES

1. In writing a later report on this subject, the Commission may find it useful to be able to refer to, and attribute, comments submitted in response to this paper. If no request for confidentiality is made, the Commission will assume that comments on the paper may be used in this way.
2. Those who wish copies, or further copies, of this paper for the purpose of commenting on it should contact the Commission at the above address.

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## ABBREVIATIONS

Cornish, *Intellectual Property*

W R Cornish, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (3d edn) (London, 1996)

Graham Stewart

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

Gretton

G L Gretton, *The Law of Inhibition and Adjudication* (2d edn) (Edinburgh, 1996)

# PART 1 INTRODUCTION

## Purpose of Discussion Paper

1.1 In this discussion paper<sup>1</sup> we provisionally propose the introduction of two new forms of diligence. One would replace the process of adjudication for debt in its role as a residual diligence, that is to say, the form of diligence which is competent against property not attachable by any other form of diligence. The other would allow, in appropriate cases, money to be taken from a debtor's possession in order to satisfy his creditor's claims. This paper is the last in a series of discussion papers on the creation of new modes of diligence<sup>2</sup> and the reform of existing diligences.<sup>3</sup> It is therefore fitting that it should deal with the reform of the residual diligence.

## The law reform context

1.2 This paper complements our recent Discussion Paper No 107 on *Diligence against Land*, where we propose the introduction of a new diligence - to be called land attachment - which would attach heritable property registrable in the property registers. The new diligence of land attachment would replace adjudication for debt in its main role as a diligence against registrable heritable property. That form of diligence is cumbersome, archaic and based on principles which have no relevance to modern conditions. Its abolition is long overdue.

## Attachment orders as the residual diligence

1.3 Adjudication for debt is at present not only the competent diligence for attaching registered or registrable heritable property, but it is also a residual diligence in the sense that it can be used to attach every other kind of property (whether heritable or moveable) which is not attachable<sup>4</sup> by any of the other modes of diligence. In this discussion paper we propose the introduction of a new form of diligence, to be called an attachment order, which would fill the role of adjudication for debt as the residual diligence. An adjudication for debt makes no provision for sale, utilises the remedy of foreclosure as the primary remedy and provides for an unduly long legal period of redemption (10 years), all of which is unsatisfactory. By contrast, an attachment order (like the proposed new land attachment) would take the modern form of an attachment followed by sale after a reasonable period, with foreclosure being a subsidiary remedy available only in default of sale.

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<sup>1</sup> This discussion paper is issued under our *Fifth Programme of Law Reform* (1997) Scot Law Com No 159, Item 1, Civil Remedies - Diligence.

<sup>2</sup> Eg earnings arrestment, current maintenance arrestment, and conjoined arrestment order (all introduced by the Debtors (Scotland) Act 1987, Part III); interim attachment (proposed in our Report No 164 on *Diligence on the Dependence and Admiralty Arrestments* (1998) Part 4); and land attachment (proposed in our Discussion Paper No 107 on *Diligence against Land* (1998), Part 2).

<sup>3</sup> Eg poinding and warrant sale; and inhibition.

<sup>4</sup> Adjudgeable heritable rights are affected by an inhibition, but inhibition is not an attaching diligence.

## The need for a residual diligence

1.4 **Categories of adjudgeable property not covered by land attachment.** As mentioned above, at present adjudication for debt is a diligence available against every kind of heritable right and it is also a diligence of last resort.<sup>5</sup> Four main classes of property are at present adjudgeable but would not be attachable by land attachment, poiding, or arrestment (including arrestment of earnings). These are:

- (1) non-attachable heritable rights, such as the interest of a tenant in an unregistered or short lease or the right of a beneficiary under a will or trust to a conveyance of heritable property in his favour;
- (2) incorporeal moveable rights where arrestment is incompetent, such as patents, copyright, trade marks and other forms of intellectual property;
- (3) rights having a tract of future time, for example a liferent<sup>6</sup> or an annuity; and
- (4) miscellaneous personal rights relating to heritable property, such as the right to reduce a deed.

Certain public offices which passed to the holder's heirs, for example heritable sheriffships and the position of chief usher to the King,<sup>7</sup> are or were adjudgeable. These have either been abolished or (it can be assumed) are no longer transmissible between living persons.

1.5 Some property is exempted from diligence by virtue of an enactment or rule of law primarily designed to protect a debtor or his family from undue hardship. Examples are alimentary provisions from trust funds or the exemption of furniture and plenishings from poiding.<sup>8</sup> In these cases, the rule that adjudication is the residual diligence competent where no other diligence is competent cannot be invoked to evade the exemption. We deal with the position of money and negotiable instruments in the debtor's possession later.<sup>9</sup>

1.6 **First possible option: retain adjudication as residual diligence.** As mentioned above, if land attachment were to replace adjudication of heritable property registrable in the property registers, adjudication would nevertheless remain competent for attaching heritable rights not attachable by land attachment, rights having a tract of future time and moveable assets for which there is no other competent diligence. As we also pointed out, it is unsatisfactory that an adjudication for debt utilises foreclosure rather than sale as the only remedy following attachment and provides for an unduly long legal period of redemption (10 years). The 10 year period is particularly inappropriate for items like patents and annuities which have a limited lifetime. The law relating to adjudication is not well known, even more so in its application to moveable property. Its retention would entail the

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<sup>5</sup> In relation to subjects adjudgeable, Graham Stewart p 600 states: "All heritable estate, corporeal or incorporeal, belonging to the debtor whether he is infert or uninfert, may be adjudged. Not only proper feudal estate, but all rights and interests connected with land-as liferents, heritable securities, real burdens, leases; and also rights of a heritable character, although unconnected with land - as annuities, personal bonds heritable *destinatione* - and generally every right for which there is no other competent diligence, may be attached by adjudication".

<sup>6</sup> *Hay v Littlejohn* (1666) Mor 13974. Arrestment will attach only the payment or instalment due for the period in which it is served plus arrears.

<sup>7</sup> *Cockburn v Langton's Creditors* (1755) 1 Paton 603.

<sup>8</sup> Debtors (Scotland) Act 1987, s 16.

<sup>9</sup> Part 3.

retention of much obscure law, which because of its obscurity would not be used by creditors.

1.7 **Second possible option: abolish adjudication without replacement.** Another possible option would be to abolish adjudication for debt without any replacement. The result would be that unless property could be arrested, poinded or attached by land attachment, it could not be attached outside insolvency proceedings. There would be no residual diligence at all. We believe that this would be a serious error. Scots law has had a residual diligence for centuries<sup>10</sup> and it would be a retrograde step to abolish it without replacement: "where there is a right, there must be the means of explicating that right".<sup>11</sup>

1.8 **Preferred option: attachment orders replacing adjudication as residual diligence.** The existence of a residual diligence affirms the principle that diligence should be available against all the debtor's property, subject to certain limited exceptions designed to prevent undue hardship. We consider that this principle should be preserved and indeed strengthened. Decrees for payment of money may be worthless and unenforceable if execution against all the debtor's assets cannot follow on them. We note that the Alberta Institute of Law Reform in its *Report on the Enforcement of Money Judgments*,<sup>12</sup> affirming the principle of "universal exigibility", has recommended:

"All the property of a judgment debtor should be subject to enforcement regardless of its form or character, excepting only property that has been excluded deliberately from enforcement. No property should be 'exempt' from enforcement for lack of an enforcement procedure."

This solution is consistent with the rule in sequestration under which "the whole estate" of the debtor vests in the permanent trustee for the benefit of the creditors.<sup>13</sup> If the law on creditors' remedies is to be coherent, the same approach must be adopted for diligence, unless there are good reasons for limiting the scope of diligence. We can see no such reasons.

1.9 It might be argued that a residual diligence is unnecessary because creditors could use sequestration or liquidation to reach property not subject to diligence. Such a solution would be unsatisfactory. First, sequestration may not be competent because of the threshold of indebtedness. Sequestration will not be granted on a creditor's petition unless the creditor is owed at least £1,500, or if more than one creditor applies their debts are in aggregate at least that sum.<sup>14</sup> A modest debt due by a debtor whose only attachable asset was a lease for less than 20 years or a copyright would be unenforceable. Second, sequestration may also be unavailable through the court's lack of jurisdiction. The Scottish courts have jurisdiction in a petition for sequestration only if the debtor has an established place of business, or is habitually resident, in Scotland at any time in the year immediately preceding the

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<sup>10</sup> Cf *Royal Bank of Scotland v Fairholm* (1770) Mor, Appendix Adjudication No 3; Hailes 338 per Lord Monbodd: "Strange, if creditors were to be debarred from every sort of diligence"; cf Kames, *Historical Law Tracts* (4th edn) p 355: "The subjects that lie open to execution for payment of debt are first, the debtor's moveables. Secondly, his land. And thirdly, his person". Execution against the person by imprisonment is now competent only for alimant.

<sup>11</sup> *Royal Bank of Scotland v Fairholm* (1770) Mor, Appendix Adjudication No 3; Hailes 338 at p 339 per Lord Pitfour.

<sup>12</sup> Report No 61 (1991).

<sup>13</sup> Bankruptcy (Scotland) Act 1985, s 31(1).

<sup>14</sup> Bankruptcy (Scotland) Act 1985, s 5.

presentation of the petition.<sup>15</sup> Third, a creditor should not be forced to use the expensive and drastic remedy of sequestration simply because of deficiencies in the law of diligence which the legislature could remove.

1.10 The frequency of use of attachment orders would be lessened if certain types of adjudgeable property became arrestable. Adjudication rather than arrestment may have to be used simply because the right in question is heritable. At the end of Part 2 we put forward proposals for widening the scope of arrestment.<sup>16</sup>

### **Money attachments**

1.11 It is generally thought that cash and negotiable instruments in the debtor's possession are not liable to poinding<sup>17</sup> or other mode of diligence. It is highly anomalous that these assets are not attachable for debt. The reason does not seem to be a deliberate choice but simply an accident of haphazard legal development. Comparative law shows that in this respect Scots law is out of step with other legal systems. On the principle of universal attachability just discussed, we believe that cash and negotiable instruments should be attachable by the new diligence of money attachment proposed in Part 3. Considerations of social and economic policy, e.g. the need to protect social security payments or wages from attachment, require that the diligence should be subject to stringent safeguards. We envisage that it would be available only in exceptional circumstances.

1.12 We propose that:

1. (1) **The diligence of adjudication for debt should be abolished.**
- (2) **Money and negotiable instruments should be attachable by a new diligence (to be called a money attachment) as set out in Part 3 below.**
- (3) **Property attachable for debt which is not attachable by any other mode of diligence should be attachable by a new diligence (to be called an attachment order) as set out in Part 2 below.**

### **Which Parliament?**

1.13 The Scotland Act 1998 makes it clear that diligence is among the matters over which the Scottish Parliament will have legislative competence.<sup>18</sup> In principle, legislation introducing new forms of diligence should be enacted by that Parliament. Under the 1998 Act,<sup>19</sup> however, intellectual property is reserved to the Westminster Parliament except for the subject matter of Parts I and II of the Plant Varieties Act 1997 (plant varieties and the Plant Varieties and Seeds Tribunal).<sup>20</sup> In our provisional view, legislation introducing attachment orders applicable to intellectual property would pass the tests on legislative competence for Acts of the Scottish Parliament.<sup>21</sup> Accordingly we think that the draft Bill appended to the

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<sup>15</sup> 1985 Act, s 9.

<sup>16</sup> Paras 2.126 to 2.135.

<sup>17</sup> See para 3.1 below.

<sup>18</sup> Cf Scotland Act 1998, s 126(4)(e).

<sup>19</sup> Scotland Act 1998, Schedule 5, Head C, Section C4.

<sup>20</sup> The latter is the only type of intellectual property for which the Secretary of State for Scotland has ministerial responsibility, the remainder being the responsibility of the Secretary of State for Trade and Industry.

<sup>21</sup> Scotland Act 1988, ss 28 - 30; Sch 4, paras 2 and 3.

report following on this discussion paper should be framed on that assumption. This however is a novel question of statutory interpretation for consideration by the competent authorities after our report has been submitted. We revert at para 2.101 below to questions of the rules for the assumption of jurisdiction in the international sense in applications for attachment orders.

### **Acknowledgements**

1.14 We are most grateful to officials of the Patent Office and of the Plant Variety Rights Office for much assistance in revising the passages on intellectual property in Part 2 below. The Commission is however wholly responsible for any errors which remain and for the views stated on possible reforms of the law.

## PART 2 ATTACHMENT ORDERS

### A. INTRODUCTION

2.1 The existing diligence of adjudication for debt may be used against a wide variety of classes of property including, for example, heritable interests under trusts, the tenant's interest under a lease, intellectual property rights (such as patents and copyright) and annuities. It seems neither practicable nor desirable to devise a special and different diligence or diligences for each of the various classes of property. They are too numerous and diverse. Moreover, from time to time new types of intellectual property can be recognised or invented.<sup>1</sup>

2.2 A flexible diligence is needed which can be tailored to the property in question. The wide variety of orders which could be made and the conditions which might be attached to the orders mean that a court has to be involved. The law of diligence would become needlessly complex if rules were to be enacted to deal with all the various possible situations.

#### Scope of attachment orders

2.3 An attachment order should only be available against property which is not subject to any other kind of diligence, including the special diligence we propose in Part 3 below for cash and negotiable instruments in the debtor's possession. Its area of competence should not overlap with that of any of the other modes of diligence. It would be pointless for the law carefully to regulate these other modes of diligence in detail if the creditor could simply evade these rules by applying for an attachment order. It would, for example, not be right for the sheriff to have power to authorise the attachment of that portion of a debtor's pay or those household goods which are exempt from diligence by the law on earnings arrestments and poindings respectively.<sup>2</sup>

2.4 Since an attachment order will be the new residual diligence, it will be used to attach property which in principle is attachable for debt by diligence but which cannot be reached by any other diligence. It would be both unnecessary and undesirable to attempt to embody in statute the criterion defining what property is attachable for debt. Over the long period during which the law of diligence has developed, the concept of attachability for debt has not raised significant problems. It is best left to be developed by the courts.

2.5 In successive Bankruptcy Acts, the common law concept of property attachable for debt was adopted as an element in the definition of estate of the debtor which vests in the trustee in a sequestration under those Acts.<sup>3</sup> Our Bankruptcy Report commented that while the phrase "attachable for debt" is appropriate as a general principle, it presented certain problems when applied to sequestrations.<sup>4</sup> The Bankruptcy (Scotland) Act 1985 now

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<sup>1</sup> Eg performers' property rights and semi-conductor topography design rights.

<sup>2</sup> Debtors (Scotland) Act 1987, ss 49 and 16.

<sup>3</sup> See eg Bankruptcy (Scotland) Act 1913, s 3: "every kind of property, heritable or moveable, wherever situated, and all rights, powers, and interests therein capable of legal or voluntary alienation, of being affected by diligences or attached for debt"; s 97(2): "moveable estate...so far as attachable for debt, or capable of voluntary alienation by the bankrupt".

<sup>4</sup> Report on *Bankruptcy and Related Aspects of Insolvency and Liquidation* (1981) Scot Law Com No 68, para 11.3.

provides that the permanent trustee is vested in "the whole estate" of the debtor<sup>5</sup> at the date of sequestration and clarifies certain doubtful points. On balance we do not consider that this formula should replace the common law concept of attachability for debt.

2.6 Generally it is a necessary - though not always a sufficient - pre-condition of diligence at common law that the property to be attached is freely transferable by the debtor. Some items are transferable but for one reason or another not attachable by diligence, including property deliberately exempted by statute from diligence to protect the debtor and his family from undue hardship,<sup>6</sup> property outside Scotland over which the Scottish courts have no jurisdiction; property of no commercial value, such as business books or certificates.<sup>7</sup> These items of property should not be attachable by diligence and therefore should not be subject to an attachment order.

2.7 Non-vested contingent rights or interests (expectancies, for short) are probably the most important category of transmissible "property" which is not attachable by diligence<sup>8</sup> but is attachable by sequestration. The formal reason why an expectancy cannot be attached for debt is that it is not property in the strict sense<sup>9</sup> and at one time it was attachable neither by diligence nor by sequestration. The Bankruptcy (Scotland) Act 1985 now provides that, in a sequestration, a non-vested contingent interest of the debtor vests in the permanent trustee as if an assignation of that interest had been executed by the debtor and intimation thereof made at the date of sequestration.<sup>10</sup>

2.8 We think however that, as a matter of policy, an expectancy should not be attachable by a diligence used by a single creditor. It is one thing to extend the limits of attachability for the benefit of all creditors and quite another to extend it for the benefit of one creditor. Such an extension would be inconsistent with the fact that with few exceptions (for example, future earnings<sup>11</sup>) "after-acquired" items of property (*acquirenda*) are not attachable by the diligence of a single creditor<sup>12</sup> whereas they vest in the permanent trustee in the debtor's sequestration on behalf of all the creditors.<sup>13</sup> Even if an expectancy should be attachable, the appropriate diligence would be arrestment rather than attachment order.

2.9 It may be noted that a trustee in sequestration becomes vested in the capacity to exercise, and to take proceedings for exercising, all such powers over the debtor's property as the debtor might have exercised for his own benefit at the date of sequestration.<sup>14</sup> In our provisional view, such extensive and drastic powers, which might for example involve exercising a power of appointment under a trust to the disappointment of other potential beneficiaries, are appropriate for a permanent trustee in sequestration who becomes vested in the debtor's whole estate for the general creditors but not for a creditor using an

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<sup>5</sup> Bankruptcy (Scotland) Act 1985, s 31(1).

<sup>6</sup> Eg essential household furniture and other items exempt from pouncing under the Debtors (Scotland) Act 1987, s 16; wages exempt from earnings arrestment under Part III of that Act.

<sup>7</sup> Graham Stewart, p 344.

<sup>8</sup> Graham Stewart, p 82; *Trappes v Meredith* (1871) 10 M 38 (*spes successionis* assignable by voluntary deed but not attachable for debt); *Reid v Morison* (1893) 20 R 510.

<sup>9</sup> *Reid v Morison* (1893) 20 R 510 (Court of Seven Judges) at p 512 per Lord Rutherford Clark.

<sup>10</sup> 1985 Act, s.31(5).

<sup>11</sup> To avoid repeated arrestments these are attachable by diligence against earnings under the Debtors (Scotland) Act 1987 Part III.

<sup>12</sup> Since 1868 not even by inhibition: Graham Stewart, p 550.

<sup>13</sup> 1985 Act s 32, especially subsection (6).

<sup>14</sup> 1985 Act, s.31(8).

attachment order for his own benefit. Such a creditor (unlike a trustee in sequestration) has never been treated as the universal successor of his debtor.

2.10 Summing up the preceding paragraphs we propose that:

2. (1) **It should be competent to attach by attachment order any property of the debtor which is:**

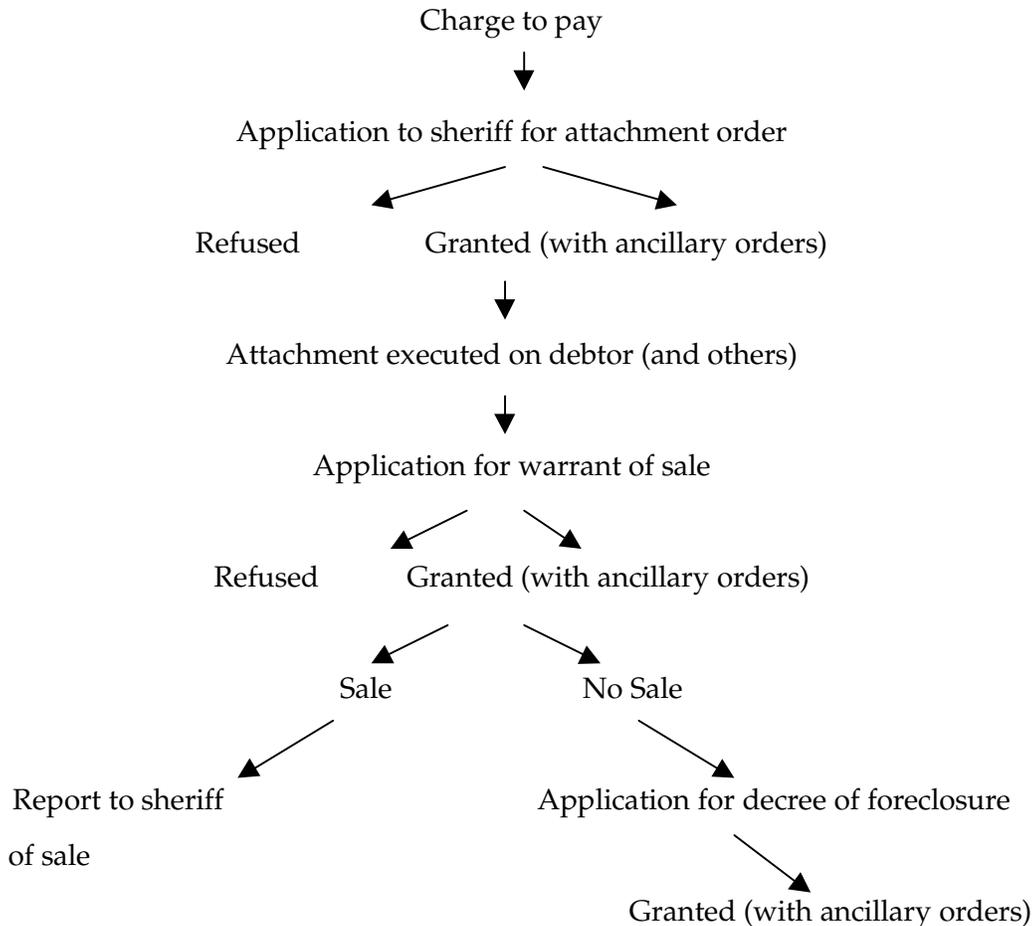
(a) **attachable for debt by diligence at common law; but**

(b) **not attachable by any other diligence.**

(2) **Any property of the debtor which is exempt from diligence by or under any enactment or rule of law designed to protect him or a third party (such as a member of his family) from undue hardship should not be attachable by an attachment order.**

2.11 An outline of the main features of attachment orders is shown below.

### ATTACHMENT ORDERS



## B. MAIN FEATURES OF ATTACHMENT ORDERS

### Attachment orders only in execution

2.12 Adjudication at present is available in security of a future or contingent debt or in execution of a decree or writ registered for execution.<sup>15</sup> It is not competent on the dependence of an action. In our Report on *Diligence on the Dependence and Admiralty Arrestments*<sup>16</sup> we recommended that adjudication should not be introduced on the dependence of an action and should cease to be available in security of a future or contingent debt on the ground that inhibition on the dependence or in security would adequately secure the interests of creditors.

2.13 For the sake of simplicity, attachment orders should be available only in execution. Few debtors are likely to possess only property liable to attachment orders. Inhibition or arrestment on the dependence or in security and our recommended new diligence on the dependence and in security against specified corporeal moveable property, called interim attachment,<sup>17</sup> would be available to creditors seeking security for future decrees or contingent debts.

### Need for a charge?

2.14 Should it be a requirement that, before an application for an attachment order is made, a charge for payment must have been served on the debtor and the days of charge must have expired without payment? Charges are required in poindings and earnings arrestments but not for arrestments, inhibitions and adjudications. Our proposals for land attachment include a requirement for an expired charge.<sup>18</sup> The charge does have a useful part to play in formally notifying the decree to the debtor and evidencing the creditor's determination to enforce payment on pain of diligence. A possible disadvantage of a charge is that it may prompt the debtor to take evasive action. It would be possible for debtors to dispose of property such as patents or tenancies within the days of charge. But more often charges operate as a spur to payment thereby making further diligence unnecessary. The normal form of charge does not inform the debtor as to whether the creditor is minded to use a particular form of diligence or indeed sequestration. The proposed schedule of attachment which would be served on the debtor after the sheriff had granted the creditor's application for an attachment order would prohibit the debtor from disposing of the specified property even if he was already under an obligation to do so.<sup>19</sup> This suggests that a certain amount of warning should be given since debtors may be liable for damages if they have entered into transactions which they are unable to implement. Our provisional view is that an expired charge should be a prelude to an application for an attachment order.

2.15 We propose that:

- 3. An application for an attachment order should be competent only if a charge has been served on the debtor to pay the debt concerned and the days of charge have expired without payment.**

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<sup>15</sup> Graham Stewart, p 578.

<sup>16</sup> (1998) Scot Law Com No 164, recommendation 48, para 6.58.

<sup>17</sup> *Ibid*, Part 4.

<sup>18</sup> See Discussion Paper No 107 on *Diligence against Land*, Part 2, Section B, proposition 4.

<sup>19</sup> Para 2.26 below.

## Which court?

2.16 One of the disadvantages of adjudication is that the action has to be raised in the Court of Session. Sheriff courts have exclusive jurisdiction in relation to poindings and arrestments against earnings. In a recent report,<sup>20</sup> we recommended that the sheriff courts should have jurisdiction to grant warrant for inhibition on the dependence and also to recall arrestments and inhibitions.<sup>21</sup> In a recent discussion paper, we provisionally proposed that extracts of sheriff court decrees should authorise inhibition in execution<sup>22</sup> and that the sheriff should supervise land attachment.<sup>23</sup> The proposed new attachment orders will not be sufficiently complex or difficult to be entrusted to the Court of Session and we think that applications for such orders should be within the privative jurisdiction of the sheriff. The Court of Session has exclusive jurisdiction in proceedings principally concerned with the validity or registration in the United Kingdom of patents and similar rights,<sup>24</sup> but that is a separate matter from attachment orders on intellectual property.

2.17 Schedule 8 to the Civil Jurisdiction and Judgments Act 1982 allocates jurisdiction within Scotland between the various Scottish courts. Under rule 4(1)(d) in that Schedule, in proceedings for the enforcement of judgments, the court for the place where the judgment has been, or is to be, enforced has exclusive jurisdiction. This rule is appropriate in the usual case where the location of the property to be attached, e.g. the subjects of an unregistrable lease, can be identified. The rule is not however appropriate for the assumption by the sheriff court of jurisdiction to make an attachment order attaching patents, copyright and other forms of intellectual property because such property has no geographical location to which the rule's connecting factor (the place of enforcement) can be applied. We therefore propose below a special rule of jurisdiction in their case.<sup>25</sup> If necessary, the sheriff could exercise his general power to transfer the application to another sheriff court where it was necessary or expedient in the interests of justice.<sup>26</sup> We propose that:

4. (1) **The sheriff court should have exclusive jurisdiction in applications for attachment orders.**
- (2) **Except where the subjects to be attached are intellectual property (for which a special jurisdictional rule is proposed in proposal 17), the sheriff court for the place where the property sought to be attached is situated (being the place where the judgment is to be enforced) should have exclusive jurisdiction to make an attachment order in accordance with the Civil Jurisdiction and Judgments Act 1982, Schedule 8, rule 4(1)(d).**

## Application for an attachment order

2.18 The application to the sheriff for an attachment order should be made by way of summary application, which (subject to any specific rules of court which may be enacted) would give the sheriff ample power to shape the procedure as the circumstances require.

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<sup>20</sup> Report on *Diligence on the Dependence and Admiralty Arrestments* (1998) Scot Law Com No 164, recommendations 10 (para 3.97) and 40 (para 5.78).

<sup>21</sup> Other than those used on the dependence of a Court of Session action which was still in dependence.

<sup>22</sup> Discussion Paper No 107, *Diligence against Land*, proposal 6 (para 3.39).

<sup>23</sup> *Ibid*, Part 2.

<sup>24</sup> Civil Jurisdiction and Judgments Act 1982, Sch 8, rule 2(14).

<sup>25</sup> See paras 2.101 *et seq.* below.

<sup>26</sup> Ordinary Cause Rules, rule 26.1.

The application should, among other things,<sup>27</sup> clearly identify the property sought to be attached. The application should in the first instance not be intimated to the debtor, but the sheriff should have power, of his own motion, to order intimation to the debtor, and to any other person affected by the application, in order to give him an opportunity to object. One would expect that the sheriff would normally grant applications which were *prima facie* in order without a hearing. An application for an attachment order should be refused by the sheriff, of his own motion, where another diligence is clearly competent,<sup>28</sup> after giving the creditor an opportunity to be heard.

2.19 The attachment order would authorise a sheriff officer to serve a schedule of attachment on the debtor.<sup>29</sup> Additional ancillary orders may be necessary or appropriate, particularly in complicated cases or where the property is of an unusual nature. For example, the sheriff should be able to authorise the service of a copy of the schedule of attachment on the keeper of any register in which the attached property was or could be registered.<sup>30</sup> Where the order struck at the debtor's attachable interest in trust property, a copy of the schedule of attachment should be served on the trustees. In complex cases the sheriff might appoint the creditor's agent (or another person) as a judicial factor with power to in-gather and safeguard the property attached though this would have implications for the expense of the diligence.

2.20 It is for consideration whether the sheriff should be empowered to authorise the attaching creditor to complete the debtor's title in the debtor's name for the benefit of the creditor. Where a debtor has an uncompleted title to any heritable property in Scotland, the permanent trustee in his sequestration is entitled to complete title in his own name (since the property is vested in him by virtue of his act and warrant) or in the name of the debtor for the benefit of his creditors.<sup>31</sup> Normally this power is exercised only in special circumstances, for example, if there is a risk of a competing title being registered first or the property is likely to take a long time to sell.<sup>32</sup> Likewise a judicial factor appointed to administer a trust estate may complete title using the act and warrant as a link in title.<sup>33</sup> Such a power is not available in other diligences and we doubt whether it would be used to any great extent. The creditor would have to be in possession of all the links in title.<sup>34</sup> We seek views on this question.

2.21 The sheriff should also have power to authorise an attaching creditor to require delivery or exhibition of the debtor's titles in the possession of a third party.<sup>35</sup> The attaching creditor may have sufficient information about the debtor's property to obtain an attachment order, but lack the titles necessary to give a good and marketable title to any purchaser. An adjudger who lacks any necessary deeds can bring an action of exhibition and delivery<sup>36</sup> and

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<sup>27</sup> Eg describing the parties and the decree sought to be enforced.

<sup>28</sup> See proposal 2 at para 2.10 above..

<sup>29</sup> For the effect of a service of the schedule, see paras 2.25 to 2.32 below.

<sup>30</sup> Eg patent rights and rights under patents, Patents Act 1977, ss 32 and 33; European patent applications, see European Patents Convention Regulations, rules 20 and 21; registered design rights, Registered Designs Act 1949, s 19(2); plant breeders' rights, Plant Breeders' Rights Regulations 1978, reg 19 (SI 1978/1100); European Community plant variety rights, E C Council Regulation 2100/94, article 87; Trade Marks Act 1994, ss 1, 2, 9 and 63.

<sup>31</sup> Bankruptcy (Scotland) Act 1985, s 31(3).

<sup>32</sup> McBryde, *Bankruptcy* (2d edn) para 9-34.

<sup>33</sup> Conveyancing Amendment (Scotland) Act 1938, s 1.

<sup>34</sup> See next paragraph for orders for delivery or exhibition of the debtor's titles.

<sup>35</sup> Bankruptcy (Scotland) Act 1985, s 38.

<sup>36</sup> J Parker, *Notes on the Diligence of Adjudication* (3d edn; 1858) p 47.

this form of action remains competent in the modern law.<sup>37</sup> To save the expense of a separate action, this remedy should be available as an ancillary order in the attachment order process.

2.22 A debtor whose estate is sequestrated is under a general statutory duty (backed by penal sanctions) to co-operate with the permanent trustee, which includes giving information about his affairs and producing all relevant documents.<sup>38</sup> Such coercive measures are not available in other diligences,<sup>39</sup> and should not be extended to attachment orders lest they introduce fines or imprisonment for debt by the back door.

2.23 We propose that:

5. **(1) An application for an attachment order should be made by way of summary application.**

**(2) The sheriff should have power on making an attachment order to make such ancillary orders as he thinks fit for the purpose of facilitating the fair and reasonable operation of the attachment.**

2.24 The attachment order should authorise a sheriff officer to serve a schedule of attachment on the debtor. A copy would be served on other persons where the sheriff so ordered. The schedule would normally specify the property in the same terms as in the application for the order. The schedule should be served in accordance with the normal rules for the service of court documents by officers of court (except that postal service within Scotland or service by way of newspaper advertisement should not be competent).<sup>40</sup>

### **Attachment as personal prohibition and as real right or preference**

2.25 An attachment effected under an attachment order should confer on the creditor a right over the attached property in security of payment of the debt, interest and expenses chargeable against the debtor. In consonance with the rules on poindings and our recommendations on interim attachment of goods on the dependence,<sup>41</sup> we suggest that an attachment should have certain other effects. In particular, an attachment under an attachment order would operate (a) as a personal prohibition against the debtor and third parties who know of the attachment, and (b) (so far as consistent with the general law on specific types of property, notably intellectual property), as a real right or preference in competition with third parties.

2.26 The attachment should, as from the date of service of the schedule of attachment on the debtor, be effectual as a personal prohibition on the debtor from transferring or assigning ownership of the attached property or from encumbering it with a subordinate real right, while the attachment is in effect, even if he was under an obligation to do so at the date of service. The date of service would be evidenced by the sheriff officer's certificate of execution. An assignation or other deed in favour of a third party in breach of this

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<sup>37</sup> I M Macphail, *Sheriff Court Practice* para 24-01.

<sup>38</sup> If the debtor fails to comply with a demand from the permanent trustee the permanent trustee may apply to the sheriff for an order requiring the debtor to comply. Refusal to obey the order is an offence punishable by a fine or imprisonment or both. Bankruptcy (Scotland) Act 1985, s 64.

<sup>39</sup> Except where there has been a deliberate breach of the diligence, eg removing money or goods in breach of arrestment, Graham Stewart, pp 222-3; removal of poinded goods, Debtors (Scotland) Act 1985, s 28(3).

<sup>40</sup> Ordinary Cause Rules, rules 5.4 - 5.6.

<sup>41</sup> Report on *Diligence on the Dependence and Admiralty Arrestments* Scot Law Com No 164 (1998), paras 4.76-4.115.

prohibition should be voidable at the instance of the attaching creditor, unless the third party had acted in good faith and without knowledge of the attachment and for value. Such a bona fide, onerous third party should however be bound to retain, for the benefit of the creditor, any unpaid balance of the price in his hands on being informed of the attachment.

2.27 The time when the attachment takes effect for the purposes of ranking should depend among other things on whether the property attached is capable of being registered in a public register of title. For unregistrable property, such as copyright, the attachment should have effect as a real right or preference in a competition with third parties as from the date of service of the schedule on the debtor. Where the attached property is registrable in a register of title, the attachment should be effectual as a real right or preference in a competition with third parties as from the date of registration of the attachment order in the register. Patent applications are not registered until they are published,<sup>42</sup> but notice of any transaction relating to them may be given to the comptroller which confers priority.<sup>43</sup> The attachment should therefore have effect from the date of notification of the schedule to the comptroller.

2.28 In order to ensure that an attachment which had been served on the keeper of a register is also served on the debtor, it should be provided that if a schedule of attachment is not served on the debtor, then the expenses of the diligence would not be chargeable against the debtor.<sup>44</sup> The registration should not however be invalidated by the failure to serve.

2.29 When actions of adjudication were common, the creditor normally registered a notice of summons of adjudication in the personal register if an inhibition had not already been registered there, and may still do so. This makes the property sought to be adjudged litigious and alerts third parties proposing to transact with the debtor to the impending decree of adjudication.<sup>45</sup> This requirement is appropriate for property registrable in the land registers since a search of the personal register is, as a matter of normal conveyancing practice, carried out in transactions involving such property. It is not suitable however for the miscellaneous categories of property attachable by attachment order. A schedule of attachment should therefore not be registrable in the personal register.

2.30 Competing attachments under attachment orders held by different creditors over the same item of property should rank in order of the dates when they came into effect as a real right or preference as mentioned above. The ranking of attachments in competition with other rights over the attached property should be regulated by any special enactment or rule of law relating to the particular property concerned. So for example (assuming that an attachment order is treated like an arrestment or poinding) then under the current interpretation of the expression "effectually executed diligence ... on the property" in the floating charges legislation,<sup>46</sup> a floating charge would have priority over an attachment taking effect after the creation of the floating charge<sup>47</sup> but not over an attachment taking effect before such creation. In general, ranking should be left to specific legislation or the common law and development by the courts. This seems especially necessary in the case of

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<sup>42</sup> See para 2.70 and footnote 95 below.

<sup>43</sup> Patents Act 1977, s 33(1)(b).

<sup>44</sup> Cf. the solution for land attachment put forward in Discussion Paper No 107 on *Diligence against Land* (1998) Part 2, proposition 10(2).

<sup>45</sup> Gretton, p 211.

<sup>46</sup> Companies Act 1985, s 463(1); Insolvency Act 1986, s 55(3).

<sup>47</sup> *Lord Advocate v Bank of Scotland* 1977 SC 155; *Iona Hotels Ltd v Craig* 1990 SC 330.

attachment orders relating to most types of intellectual property where there is one unitary register for the whole of the United Kingdom and legislation applying only to Scotland could not regulate the priority in ranking of rights recorded in the register.

2.31 On the model of legislation relating to poindings and arrestments executed prior to sequestration,<sup>48</sup> an attachment coming into effect within a statutory period before sequestration should be ineffectual in a question with the trustee, but the creditor should obtain a preference for the expenses of attachment so far as chargeable against the debtor. An attachment coming into effect earlier than the statutory period should confer a preference on the attaching creditor for the debt and expenses. We have proposed for land attachment a period of six months.<sup>49</sup> For poindings, arrestments and inhibitions, the period is 60 days.<sup>50</sup> The shorter period seems more appropriate for attachment orders.

2.32 We propose that

6.
  - (1) **An attachment under an attachment order should confer on the creditor a right over the attached property in security of payment of the debt, interest and expenses chargeable against the debtor.**
  - (2) **As from the date of service on the debtor of the schedule of attachment, the attachment should have the effect of a personal prohibition of the debtor from:**
    - (a) **assigning or otherwise transferring ownership of the attached property to a third party whether for onerous causes or not; or**
    - (b) **creating any subordinate real right (such as a right in security or lease) over the property in favour of a third party.**
  - (3) **Infringement of the attachment's prohibition by the debtor, or by a third party who knows that the property is attached, should be treated as a breach of attachment and punishable as a contempt of court.**
  - (4) **Any transfer made, or subordinate real right created, by a debtor in breach of the attachment should be voidable at the instance of the creditor unless the debtor's singular successor or grantee acquired right in good faith without notice of the attachment and for value.**
  - (5) **An attachment should:**
    - (a) **where the attached property is not registrable in a public register of title, operate as a real right or preference in a competition with third parties as from the date of service of the schedule of attachment on the debtor; and**
    - (b) **where the attached property is so registrable, operate as such a real right or preference from the date fixed by any enactment or rule of law on**

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<sup>48</sup> Bankruptcy (Scotland) Act 1985, s 37(4) and (5) as extended to winding up by Insolvency Act 1986, s 185.

<sup>49</sup> Discussion Paper No 107, *Diligence against Land*, Part 2, proposition 31.

<sup>50</sup> Bankruptcy (Scotland) Act 1985, s 37(4) and (5). A similar period is recommended for interim attachment: Scot Law Com No 164 (1998), recommendation 28 (para 4.114).

**the ranking of diligences or other rights transmitting by operation of law registered in that register.**

**(6) An attachment coming into effect within 60 days before the debtor's sequestration or liquidation should be ineffectual in a question with the trustee or liquidator, except as to the expenses of attachment.**

**(7) If the attachment order is registered but the schedule of attachment is not served on the debtor, then the expenses of the diligence should not be chargeable against the debtor.**

### **Duration of an attachment**

2.33 For how long should an attachment subsist? Periods vary as between the various diligences. Poidings last one year unless extended.<sup>51</sup> Arrestments last three years.<sup>52</sup> Under our current proposals, notices of land attachment would last five years.<sup>53</sup> In the case of attachment orders, one year may be too short a period within which to bring the attached property to a sale. Unlike ordinary poidable goods, attached property may not be easily sold. Three years from the coming into effect of the attachment by service of the schedule seems more appropriate. The diligence would have to be completed by sale or foreclosure within this period otherwise it would lapse. The creditor could then reapply for a further attachment order but would lose any priority conferred by the earlier lapsed attachment.

2.34 We propose that:

**7. An attachment should remain in effect for a period of three years following its coming into effect by service of the schedule of attachment.**

### **Warrant of sale**

2.35 The next stage in the diligence should be the creditor's application to the sheriff for a warrant of sale of the attached property. Following the analogy of other attachment-and-sale diligences, the creditor should not have an automatic right to sell the attached property as soon as the attachment comes into effect. In poidings and arrestments and (if our proposals are implemented) land attachments, the sale is, or would be, subject to some degree of judicial control and we favour the same rule for attachment orders. The creditor's application and the date of the hearing at which it would be considered should be intimated to the debtor and others on whom the schedule of attachment had been served (apart from the keepers of public registers). These persons would then be entitled to object or make representations. In the absence of any objections or representations the sheriff should normally grant warrant. He should not refuse warrant of his own motion on any of the grounds set out below without giving the creditor an opportunity to make representations.

2.36 The sheriff should have power to refuse warrant of sale where the value of the attached property greatly exceeds the amount of the debt and it is not practicable to sell part

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<sup>51</sup> Debtors (Scotland) Act 1987, s 27.

<sup>52</sup> Debtors (Scotland) Act 1838, s 22. We have made recommendations to clarify the terminus *a quo* but recommend retaining the three year period: see Report on *Diligence on the Dependence and Admiralty Arrestments* Scot Law Com No 164, recommendation 47 (para 6.54).

<sup>53</sup> Discussion Paper No 107 on *Diligence against Land* (1998) Part 2, Section B, proposition 19.

of the property. Another ground of refusal should be that the likely net proceeds of sale accruing to the attaching creditor are less than the likely expenses of sale. The sheriff should exercise these powers of his own accord or on the motion of the debtor or any other interested party.

2.37 The sheriff should be able to postpone warrant of sale where the sale of the attached property would be unduly harsh. In line with our proposals for land attachment,<sup>54</sup> where the property was an attachable dwellinghouse in which the debtor, the debtor's spouse or a child of the debtor or the spouse lived, the maximum period of postponement would be 12 months. For other residential property the maximum period would be six months. The sheriff should be empowered to postpone warrant on these grounds only on application by the debtor or any other interested person.

2.38 We propose that:

8. (1) **A creditor should be entitled to sell the attached property provided that the sheriff grants a warrant of sale. The sheriff clerk should fix a date for the hearing of the creditor's application at which the debtor, the creditor and other interested parties should be entitled to be heard.**
- (2) **The sheriff should have power to refuse to grant a warrant of sale of his own accord or on an objection by any interested person on the ground that:**
  - (a) **the attachment is invalid or has ceased to have effect;**
  - (b) **the debt is disproportionately small in relation to the value of the attached property; or**
  - (c) **the net free proceeds of sale receivable by the attaching creditor are unlikely to exceed the expenses of sale.**
- (3) **The sheriff should have power, on an objection by any interested person, to refuse to grant a warrant of sale or to postpone the grant for a specified period not exceeding 12 months on the ground that a sale of the attached property would be unduly harsh in the circumstances.**
- (4) **The sheriff should have power, on an objection by any interested person, to postpone the grant of a warrant of sale:**
  - (a) **for up to 12 months, where the property attached comprises or includes the principal or only residence of the debtor and one or more close relatives of the debtor; or, as the case may be,**
  - (b) **for up to six months, where the property attached comprises or includes the principal or only residence of one or more individuals (except where they occupy under a lease from the debtor binding on the creditor).**

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<sup>54</sup> *Ibid*, Part 2, Section B, proposition 11.

**In sub-paragraph (a), the expression "close relative" has reference to a spouse, a child of the debtor or his spouse, or a child treated by the debtor as such a child.**

**(5) The sheriff should have power to refuse or to sist the application where another creditor has already obtained a warrant of sale, or intends to exercise a power of sale, of the attached property.**

## **The sale**

2.39 A creditor holding a warrant of sale should be under a general duty to advertise the sale and to take all reasonable steps to ensure that the price at which the attached property is sold is the best that can be reasonably obtained. This is the duty imposed on heritable creditors in standard securities.<sup>55</sup> The method of advertisement and the mode of sale should be left to the creditor, but the sheriff should be able to make ancillary orders on these matters.

2.40 The creditor should be entitled to grant any necessary deeds conveying the debtor's right in the attached property to a purchaser. A deed by the creditor which was expressed to be in exercise of the warrant of sale should be deemed equivalent to one by the debtor himself. This avoids the problems of having to seek the debtor's co-operation and providing sanctions for non-co-operation. We have already provisionally proposed<sup>56</sup> that the sheriff should have power to make orders to facilitate the attachment and sale.

2.41 We propose that:

9. **(1) A creditor should be under a duty to advertise and generally take all reasonable steps to ensure that the attached property is sold for the best price that can reasonably be obtained. The sheriff should be empowered to make orders relating to the manner in which the attached property is to be sold.**

**(2) A conveyance of the attached property granted in implement of the warrant of sale by the creditor to a purchaser should have the same effect as if it had been granted by the debtor.**

## **Expenses**

2.42 The creditor's expenses of attachment and sale should in general be chargeable against the debtor. These expenses should include the expenses of the application to the sheriff for an attachment order and for a warrant of sale as they are essential steps in the diligence. The expenses of either of these applications should generally be limited to what would have been incurred if the application were unopposed. The creditor should have to bear his own expenses of further procedure occasioned by the debtor's application and the debtor should bear his own expenses in this regard. As regards other applications each party should bear his own expenses. However, the sheriff should be able to vary the rules about expenses of proceedings before him where he considers that a party has acted frivolously.

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<sup>55</sup> Conveyancing and Feudal Reform (Scotland) Act 1970, s 25.

<sup>56</sup> Proposal 5(2) (para 2.23) above.

2.43 The expenses would be recoverable out of the proceeds of the attached property, or where the debtor was sequestrated out of the proceeds of sale of the debtor's estate. The creditor should not be entitled to bring an action for recovery of any expenses that have not been recovered as above or use other diligence to recover them or set them off. This prevents diligence expenses multiplying and would act as a restraint on speculative attachments or attachments designed to harass the debtor rather than recover the debt.

2.44 These proposals on expenses of attachment are modelled on sections 92 to 95 of the Debtors (Scotland) Act 1987 which deal with the expenses of diligence against moveables, especially those relating to poiding. At present an adjudging creditor is not entitled to charge the debtor with any of the expenses of adjudication, except that the debtor is liable for the extra expense occasioned by unsuccessful opposition. The rule for adjudications has to be viewed against the background that the adjudger will, if the debt remains unpaid, eventually become owner of the land, however valuable it is in relation to the debt.

2.45 We propose that:

10. (1) **The expenses properly incurred by a creditor in executing the diligence of attachment and sale under an attachment order should be chargeable against the debtor. The expenses should, unless paid by the debtor, be recoverable from the proceeds of the attachment concerned but (apart from the expenses of the charge) not by any other legal process except supervening insolvency processes or processes for ranking creditors' claims on the attached property.**

(2) **Any expenses not recovered by the time the diligence is completed or ceases to have effect should cease to be chargeable against the debtor, except as aforesaid.**

(3) **Each party should bear his own expenses in relation to incidental court applications, but the debtor should be liable for the expenses of an application for an attachment order and an application for warrant to sell on the basis that it was unopposed and the court should be empowered to award expenses not exceeding a prescribed sum if an application or an objection was frivolous.**

### **Proceeds and report of sale**

2.46 The creditor should be entitled to deduct the expenses of sale in so far as they are chargeable against the debtor, before dealing with his own claim and the claims of other creditors. These claims would be ranked according to the normal rules of ranking. Creditors with prior attachments or securities over the subjects of sale would rank immediately after the attaching creditor's expenses. Then would come the selling creditor and other creditors ranking *pari passu* with him. Creditors with later attachments should rank last. Any balance would be payable to the debtor.

2.47 The selling creditor should be required to submit a report of sale in prescribed form to the sheriff within 28 days of the sale. The report should be audited and the diligence

expenses taxed by the auditor of court and then submitted to the sheriff for approval or otherwise, in much the same way as for reports of sale following on poinding.<sup>57</sup>

2.48 We propose that:

11. (1) The creditor executing a warrant of sale should be required to submit to the sheriff a report on sale and diligence expenses in prescribed form within 28 days of the date of settlement of the sale.

(2) The sheriff should have power to make an order imposing on a creditor who makes a report late without reasonable excuse or refuses to make a report, liability in whole or in part for the expenses of attachment otherwise chargeable against the debtor.

(3) The report of sale should be remitted by the sheriff to the auditor of court who should:

- (a) tax the expenses chargeable against the debtor;
- (b) certify the balance due to or by the debtor; and
- (c) report to the sheriff,

after giving interested persons an opportunity to make representations on any alteration of the expenses or balance.

(4) On receiving the auditor's report, the sheriff, after giving interested persons an opportunity to be heard, should have power;

- (a) to declare the above-mentioned balance to be due to or by the debtor, with or without modifications; or
- (b) if the sheriff is satisfied that there has been a substantial irregularity in the diligence, declare it to be void and make consequential orders.

## Foreclosure

2.49 The attached property should be made over to the creditor if it cannot be sold. This is the position for sales by standard security holders<sup>58</sup> and poinding creditors.<sup>59</sup> Where a purchaser cannot be found, the creditor should be entitled to apply to the sheriff for an order of foreclosure. The sheriff should be empowered to order a valuation of the property, advertisement or re-advertisement for sale and, in default of sale, decree of foreclosure vesting the property in the creditor at valuation. Ancillary orders may be needed to ensure that the creditor obtains a good title.

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<sup>57</sup> Debtors (Scotland) Act 1987, s 39.

<sup>58</sup> Conveyancing and Feudal Reform (Scotland) Act 1970, s 28.

<sup>59</sup> Debtors (Scotland) Act 1987, s 37(6).

2.50 We propose that:

12. (1) A creditor who fails to sell the attached property should be entitled to apply to the sheriff for an order of foreclosure vesting the property in him at a price to be fixed by the sheriff.
- (2) The sheriff should have power to sist the application to allow more time for a purchaser to be found and generally to make any appropriate ancillary order facilitating the foreclosure.

### Common ownership

2.51 Some forms of property attachable by attachment order may be held by the debtor and a third party in common ownership, for example leases or intellectual property. Two possible methods of applying attachment orders to common property may be identified. The first is the same solution as we proposed elsewhere for land attachment,<sup>60</sup> namely that only the debtor's *pro indiviso* share should be attached and that the creditor should have a title to raise an action for division and sale which should be combined with an application for warrant of sale in a manner prescribed by rules of court.

2.52 Under the second option, on the analogy of poinding and sale of corporeal moveables,<sup>61</sup> the whole property would be attachable for the debts of one co-owner and the other co-owners would be entitled to obtain release of the property from the attachment on paying the value of the debtor's *pro indiviso* share. The procedure might be on the following lines.

- (1) The whole item would be attached (including the shares of third party co-owners) and valued by a valuer appointed by the sheriff.
- (2) Where after the attachment and before the warrant sale, a third party claims to be co-owner and pays to the officer of court who served the schedule of attachment a sum equal to the value of the debtor's share, then unless the debtor denies the claim, the officer of court would release the item from the attachment.
- (3) Where at any time between the attachment and the warrant sale the sheriff, on application by a third party, is satisfied that the attached item is owned in common by the debtor and the third party, and the third party undertakes to pay to the officer of court a sum equal to the value of the debtor's share, the sheriff should make an order releasing the item from the attachment. A release under the sheriff's order would take effect, and ownership of the debtor's share would vest in the third party, at the time when the officer of court gives the third party a receipt for his payment.
- (4) The officer of court would report the release to the sheriff.
- (5) Where the third party does not seek release and his claim is admitted by the parties or established in an application to the sheriff, the creditor should be bound to

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<sup>60</sup> Discussion Paper No 107 on *Diligence against Land* Part 2, Section B, proposition 10(2).

<sup>61</sup> Debtors (Scotland) Act 1987, s 41.

pay to the third party either (a) the fraction of the proceeds of sale or of the valuation, whichever is greater, corresponding to the third party's share, or (b) if ownership of the item passes to the creditor by foreclosure in default of sale, the fraction of the valuation corresponding to the third party's share in the item.

2.53 The second option has some disadvantages. It would require all attached co-owned property to be valued, which might add to the expense of the diligence. It seems preferable that in general only the debtor's share should be attachable for his own debt. It has been represented to us that co-owned intellectual property may present special problems and we revert to these at paragraph 2.102 below.

2.54

13. **As regards the method of adapting attachment orders for use against the debtor's undivided (*pro indiviso*) share of common property, views are invited on which of the following two options is preferable.**

(a) **The creditor should have a title to raise an action of division and sale which should be combined with proceedings in the diligence in a manner to be prescribed by rules of court. The provisions on applications for warrant of sale proposed above should apply subject to those rules.**

(b) **Alternatively, on the analogy of poinding and sale of corporeal moveables, the whole property would be attachable under an attachment order for the debts of one co-owner and the other co-owners would be entitled to obtain release of the property from the attachment on paying the value of the debtor's share, all in the manner described at paragraph 2.52 above.**

### **Time to pay**

2.55 While time to pay directions contained in a decree are in effect it should be incompetent to apply for an attachment order. No additional provisions are needed to achieve this because a charge, which we propose should be an essential precursor of the application, could not be served unless the debtor defaults.

2.56 The debtor should be entitled to apply for a time to pay order under the Debtors (Scotland) Act 1987 at any time after service of the charge and up until the granting by the sheriff of a warrant of sale. An interim order sisting diligence under section 6(3) should prevent the creditor taking any further steps in the diligence and the sheriff should not be entitled to grant a pending application for an attachment order or a warrant of sale which should therefore fall. The time to pay order itself should prohibit the creditor from taking any further steps in the diligence or the diligence progressing in any way. Any attachment would remain in effect (unless recalled) so that if the debtor defaulted the creditor would then be entitled to apply (or re-apply) for a warrant of sale.

2.57 Time orders, allowing debtors time to pay, may be granted under section 129 of the Consumer Credit Act 1974. While a time order was in effect it should be incompetent to take any steps or take any further steps in the diligence of attachment and sale.

2.58 We propose that:

14. (1) An application for a time to pay order under the Debtors (Scotland) Act 1987 should be competent at any time after the service of a charge until the creditor's application to sell the attached property is granted. An interim order sisting diligence (under section 6(3)) should prevent the creditor taking further steps in the diligence, other than serving a schedule of attachment in pursuance of an existing attachment order. It should be incompetent for the sheriff to grant an attachment order or a warrant of sale and any pending application should fall.

(2) The making of a time to pay order should preclude the creditor from serving a schedule of attachment, and where a schedule has been served the sheriff should prohibit the creditor from taking any further steps in the diligence.

(3) While a time order under section 129 of the Consumer Credit Act 1974 is in effect, it should be incompetent to commence or continue the diligence (other than serving a schedule of attachment in pursuance of an existing attachment order) against the debtor.

## C. TYPES OF PROPERTY ATTACHABLE BY ATTACHMENT ORDER

### (1) Introduction

2.59 In principle all types of property which are not attachable by one of the other modes of diligence should be attachable by an attachment order. It is of course a prerequisite that the property be either freely assignable or transmissible by operation of law. We consider various types of property, namely (1) intellectual property rights; (2) unregistrable interests in land; and (3) miscellaneous rights. Adjudication is available in relation to sums due under personal bonds and possibly also floating charges over the company's heritable property, and shares in the Bank of Scotland. We propose in Section D at the end of this Part that such items should be attachable by arrestment rather than by an attachment order.

### (2) Intellectual property

#### (a) The case for introducing attachment orders

2.60 **Preliminary** The nineteenth century saw the development of incorporeal moveable property both as cause and effect of the industrial revolution, i.e. new forms of intellectual property to drive the revolution, and new forms of wealth (stocks and shares of limited companies) to finance it and distribute its profits. It was established that shares in a limited company formed under the Companies Acts are arrestable and not adjudgeable.<sup>62</sup> In the case of shares there is a proper arrestee, namely the company. Patent rights, copyright and other

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<sup>62</sup> *Sinclair v Staples* (1860) 22 D 600; *American Mortgage Co of Scotland Ltd v Sidway* 1908 SC 500. The Companies Acts expressly provide that shares of companies formed under them are moveable property and not in the nature of heritage: see now Companies Act 1985, s 182(1)(a). In *Royal Bank of Scotland v Fairholm* (1770) Mor "Adjudication" App'x No 3. stock of the Royal Bank was held adjudgeable in circumstances where the stock was declared, by statute and the bank's charter of erection, not to be liable to any arrestments or attachments. The Royal Bank of Scotland is now incorporated under the Companies legislation and its shares are arrestable.

forms of intellectual property, however, cannot be held arrestable if only because (unlike shares) there is no arrestable liability to account and therefore no proper arrestee.

**2.61 Intellectual property rights adjudgeable under existing law.** It has long been established that patent rights and copyright transmit to and vest in the permanent trustee in sequestration under bankruptcy legislation.<sup>63</sup> It was at one time suggested by Bell<sup>64</sup> and More<sup>65</sup> that patent rights and copyright, and (in More's view) other exclusive privileges, belonging to an individual for a term of years were heritable as having a tract of future time, and thus descendible to heirs and adjudgeable. In *Advocate-General v Oswald*<sup>66</sup> however it was held that patent rights are moveable in character. Though that case concerned succession not diligence, Bell's opinion that adjudication is the only diligence by which patent rights (and by analogy other forms of intellectual property) can be affected<sup>67</sup> may nevertheless be correct, not upon the ground that these rights have a tract of future time, but upon the different ground that such rights are moveable property which cannot be competently attached by any other form of ordinary diligence.<sup>68</sup> It is thought therefore that at common law patent rights and copyright belonging to a debtor are adjudgeable at the instance of his creditors.<sup>69</sup>

**2.62 Categories of intellectual property.** The categories of "intellectual property" which are in principle attachable by diligence consist of or include patents, applications for patents, licences, and sub-licences; plant variety rights; copyright and licences; industrial designs and design rights; author's and performer's rights to equitable remuneration after transfer of rental right; performers' property rights; and trade marks and names.<sup>70</sup> Hume classified patents and copyright (as well as other forms of exclusive privilege) as real rights.<sup>71</sup> This classification is not without difficulty<sup>72</sup> but it has been observed that "there are obvious points of resemblance between intellectual property rights and real rights in the traditional sense, in particular the fact that both types of right are enforceable against the world at large, and it is plain that intellectual property rights cannot be classified as personal rights. Consequently, unless they form a third category of right *sui generis*, as in some legal systems, it may be that Hume's classification ought to be accepted".<sup>73</sup>

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<sup>63</sup> Bell, *Principles* para 1355; Bell, *Commentaries* (7th edn) vol 1, p 110 (patents); Bankruptcy (Scotland) Act 1913, s 102 (now repealed) which assumed transmissibility of copyright to the trustee.

<sup>64</sup> Bell, *Principles* (4th edn, 1839) para 1480; *Commentaries* (7th edn) vol 1, pp 110-111 (patents); p 119 (copyright).

<sup>65</sup> Notes to Stair's *Institutions*, (1832 edn) vol 1, Note R, p 141.

<sup>66</sup> (1848) 10 D 969.

<sup>67</sup> Bell, *Commentaries* (7th edn) vol 1, pp 110-111.

<sup>68</sup> A pouncing would be incompetent since it affects only corporeal moveable property whereas patent rights and copyright are incorporeal, distinct from the goods produced by the patented invention or the books or other documents subject to the copyright. An arrestment would appear likewise to be incompetent because the incorporeal rights are not in the possession of a third party, nor does any third party have an obligation to account to the debtor in respect of them and so there is no analogy with shares in incorporated companies. There is thus no third party in whose hands the arrestment could be laid, though of course royalties may be attached by arrestment.

<sup>69</sup> See *Stair Memorial Encyclopaedia* vol 8 (1992) sv "Diligence and Enforcement of Judgments" (G L Gretton) para 200, note 2: "it is difficult to see how the procedure for arrestment could be applied, and accordingly the better view is that intellectual property rights, though moveable, are adjudgeable"; G L Gretton, (2d edn; 1996) pp 215,216: "Intellectual property rights are incorporeal but cannot be arrested since there is no possible arrestee. Hence they are in general adjudgeable".

<sup>70</sup> These are described at paras 2.53 *et seq.* below.

<sup>71</sup> Hume, *Lectures* vol IV, pp 62 - 64 (patents); 64 - 72 (copyright).

<sup>72</sup> On the ground that "a real right is a right in a thing, and in the case of exclusive privilege it is not clear that there is a separate thing in respect of which a right can arise": *Stair Memorial Encyclopaedia* vol 18, para 5.

<sup>73</sup> *Idem.*

2.63 In fact it is not now necessary to refer the matter to common law principles because statutes on most intellectual property rights generally make provision broadly on the lines that those rights are moveable property, and as such transmissible by assignation (including assignation in security of debt), testamentary disposition or operation of law.<sup>74</sup> Transmission by operation of law is generally held to include vesting in the trustee in the proprietor's bankruptcy and by parity of reasoning should include attachment by creditors' diligence.

2.64 **Comparative law.** To obtain assistance in formulating proposals, we have paid regard to the English law on execution against intellectual property. It seems to be accepted however that this branch of English law is not well developed, and it may be in danger of falling behind other Commonwealth systems. Apparently there is no process whereby copyright can be taken in execution, because of the technical limitations of the writ of *fiery facias*.<sup>75</sup> In Canada in 1990 a court, refusing to follow an outmoded English precedent,<sup>76</sup> held that copyright was attachable in execution<sup>77</sup> and there are law reform agency reports affirming a principle of "universal exigibility".<sup>78</sup> Again, in England it had been held at one time that a patentee's right, being merely that of preventing others from working his invention, was a "chose in action" and incapable of seizure by *fiery facias*.<sup>79</sup> The Patents Act 1977 now expressly provides that a patent is personal property but not a thing in action. It is unclear whether the patent can be seized by *fiery facias*. It seems that the English law on enforcing judgments has not yet given effect to "the basic principle that whatever is a valuable asset to a debtor should prima facie be available to satisfy the claims of a creditor".<sup>80</sup>

2.65 **Considerations of policy supporting attachability.** In our view the main categories of intellectual property mentioned above should be attachable by diligence for the following reasons.

- (1) They are valuable items of incorporeal moveable property which should be available to pay their owner's debts.
- (2) This is already recognised by the law since they form part of a debtor's estate which vests in his trustee in sequestration under the Bankruptcy Act (which has been judicially described as a combination of all the diligences).
- (3) Since they are assignable by assignation in security of a debt, it is difficult to see why they should not be attachable for debt.

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<sup>74</sup> See eg Patents Act 1977, s 31(2)(3) and (5); European Patent Convention, article 74; Plant Varieties Act 1997, s 12; Copyright, Designs and Patents Act 1988, s 90(1)(copyright); *ibid*, s 222(1)(unregistered design rights); Registered Designs Act 1949 ss 2(1) and (2); 19(1) and (2); 1988 Act, s 93B(2) (inserted by Copyright and Related Rights Regulations 1996 reg 14); (author's right to equitable remuneration); 1988 Act, s 191B(1) inserted by 1996 Regulations, reg 21; Trade Marks Act 1994, ss 2; 22; 24(1); 102.

<sup>75</sup> *Edwards & Co v Picard* [1909] 2 KB 903; E P Skone James *et al*, *Copinger and Skone-James on Copyright* (13th edn; 1991) para 5-6; H Laddie, P Prescott and M Vitoria, *The Modern Law of Copyright and Designs* (2d edn; 1995) para 12.18 rely on this case for the proposition that that the court will not appoint a receiver in respect of a judgment debtor's interest in an unexploited copyright but add that the court may appoint a receiver to receive royalties from copyright licensees.

<sup>76</sup> *Re Baldwin, Ex p Foss* (1858) 2 De G & J 230; 44 E R 977.

<sup>77</sup> *Planet Earth Productions Inc v Rowlands* (1990) 69 DLR (4th) 715.

<sup>78</sup> Ontario Law Reform Commission, Report on *The Enforcement of Judgment Debts and Related Matters*, Pt II (1981) pp 25 *et seq.*; Alberta Law Reform Institute Report No 61 on *Enforcement of Money Judgments* (1991) vol 1, pp 24, 25; vol 2, Chapter 8; pp 131-135.

<sup>79</sup> *British Mutoscope and Biograph Co v Homer* 18 R PC 177.

<sup>80</sup> New Brunswick Law Reform Division, *Third Report of the Consumer Protection Project*; Vol II *Legal Remedies of the Unsecured Creditor after Judgment* (1976) p 215.

(4) Recent European Community Regulations having direct effect in the United Kingdom already expressly provide that certain types of intellectual property rights may be "levied in execution",<sup>81</sup> an English expression meaning "attached by diligence". So the principle has been accepted at the European level.

2.66 Intellectual property rights only subsist for limited periods of time. Some are quite lengthy e.g. 70 years from an author's death<sup>82</sup> but others are short e.g. five years.<sup>83</sup> The diligence of adjudication, with its ten year legal period of redemption, is peculiarly unsuited to temporary property rights.

## **(b) Types of intellectual property**

2.67 The various types of intellectual property which might be attachable under an attachment order includes the following:

- (i) patents, applications for patents, licences, and sub-licences;
- (ii) plant variety rights;
- (iii) copyright and licences;
- (iv) industrial designs and design rights and associated licences;
- (v) author's and performer's rights to equitable remuneration after transfer of rental right;
- (vi) performers' property rights; and
- (vii) trade marks and associated applications.

### **(i) Patents**

2.68 The legal regime for patents is primarily governed by the Patents Act 1977.<sup>84</sup> The grant of a patent confers on the holder the right to prevent others from using the patented invention initially for four years but with provision for annual renewal for up to 20 years in all.<sup>85</sup>

2.69 Section 31 of the 1977 Act has the sidenote "Nature of, and transactions in, patents and applications for patents in Scotland". It has been argued that this section "applies to a

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<sup>81</sup> E.g. EC Council Regulation 2100/94 on Community Plant Variety Rights, article 25; Community Trade Mark Regulation 40/94 of 20 December 1993, article 20.1. See also Community Patent Convention 1975, article 42 (Cmnd 6553)(not yet in force).

<sup>82</sup> Copyright, Designs and Patents Act 1988, s 12(2) as substituted by the Duration of Copyright and Rights in Performances Regulations 1995, reg 5 (SI 1995/3297). A lesser period may apply if the author is not a national of an European Economic Area state and such a state is not the country of origin of the work. Performers' property rights also endure generally for 50 years after the year of the performance, 1988 Act, s 191 as substituted by the 1995 Regulations, reg 10. Plant breeders' rights have effect for 25 or 30 years: Plant Varieties Act 1997, s 11(1).

<sup>83</sup> A registered patent subsists for 4 years subject to annual renewal thereafter up to 20 years: Patents Act 1977, s 25. A registered design right subsists for five years renewable for further five-year periods not exceeding 25 years: Registered Designs Act 1949, s 8. A registration of a trade mark subsists for 10 years renewable for further periods of 10 years: Trade Marks Act 1994, ss 42 and 43.

<sup>84</sup> For patents generally see *Stair Memorial Encyclopaedia* vol 18, paras 811 - 889 (I J Lloyd).

<sup>85</sup> Patents Act 1977, s 25.

patent governed by Scots law and not to Scotland in the territorial sense";<sup>86</sup> that is, it does not apply only to the rights given by the patent within Scotland as a territory.<sup>87</sup> The section provides *inter alia* that a patent or application for a patent, and any right in or under a patent or such application, is incorporeal moveable property.<sup>88</sup> Further, any patent or any such application, or any right in it, may be assigned, and security may be granted over it.<sup>89</sup> Any assignation or grant of security may be carried out only by writing subscribed in accordance with the Requirements of Writing (Scotland) Act 1995.<sup>90</sup> A licence may be granted, under any patent or application for a patent, for working the invention which is the subject of the patent or application.<sup>91</sup> To the extent that any such licence so provides, a sub-licence to work the patented invention may be granted under the licence, and any such licence or sub-licence may be assigned and security granted over it.<sup>92</sup>

2.70 The patent is a unitary patent giving rights throughout the United Kingdom. The register of patents is kept under the Act by the Comptroller-General of Patents, Designs and Trade Marks.<sup>93</sup> Patents, published applications for patents and transactions, instruments or events affecting rights in or under patents are registered.<sup>94</sup> An application for a patent is not registrable until it has been published.<sup>95</sup> This usually takes 18 months from the date of filing. Section 33 of the 1977 Act makes provision as to the effect of registration on rights in patents. Registration confers precedence over an earlier unregistered transaction, provided the person registering the later transaction was not aware of the earlier one.<sup>96</sup> An assignation of a patent in security must be registered in the register of patents in order to constitute the security as a real right and where the cedent is a company, must be registered within 21 days thereafter in the Companies Office register of charges.<sup>97</sup>

2.71 It is thought that in principle a patent, an application for a patent, a licence, and a sub-licence, are adjudgeable under the existing law<sup>98</sup> and should be attachable by attachment order. The fact that there are different tiers or levels of rights (patent or application; licence; sub-licence) which may co-exist should not present problems. At common law, an attachment order used by the creditor of the owner of a patent, application or licence would attach it *tantum et tale* as it stood in the hands of the debtor,<sup>99</sup> so that the creditor would not take any higher right than his debtor had in a question with third parties. Accordingly a creditor of the owner of a patent or application would attach it subject to any licence and the rights of the licensee. A creditor of the holder of a licence would attach it subject to any sub-licence and the rights of the sub-licensee.

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<sup>86</sup> D P Sellar, "Rights in Security over 'Scottish Patents' " (1995-96) 1 SLPQ 137 at pp 137 to 139; 143.

<sup>87</sup> *Ibid*, p 138.

<sup>88</sup> Patents Act 1977, s 31(2).

<sup>89</sup> 1977 Act, s 31(3). See J McLean, "Security over Intellectual Property - A Scottish Perspective" (1988) 4 *European Intellectual Property Review* 115; D P Sellar, "Rights in Security over 'Scottish Patents' " (1995-96) 1 SLPQ 137.

<sup>90</sup> 1977 Act s 31(6) as amended by the Requirements of Writing (Scotland) Act 1995, Sch 4, para 49.

<sup>91</sup> 1977 Act, s 31(4).

<sup>92</sup> 1977 Act, s 31(5).

<sup>93</sup> 1977 Act, s 32. The separate Scottish register of separate territorial patents was abolished by the Patent Law Amendment Act 1852.

<sup>94</sup> 1977 Act, ss 32 and 33 and Patents Rules 1990, rr 44 and 46 (SI 1990/2384).

<sup>95</sup> 1990 Rules, r 44(1).

<sup>96</sup> 1977 Act, s 33(1).

<sup>97</sup> Companies Act 1985, s 410. The same is true of all assignations by a company of other forms of intellectual property in security.

<sup>98</sup> See para 2.61 above.

<sup>99</sup> Graham Stewart, pp 128, 606, 620; *Stair Memorial Encyclopaedia* vol 8 (G L Gretton) para 262.

## The European Patent Convention

2.72 The European Patent Convention,<sup>100</sup> by articles 71-74, regulates the proprietary aspects of European Patent applications. Article 74 provides: "The European patent application as an object of property shall, in each designated Contracting State and with effect for such State, be subject to the law applicable in that State to national patent applications."<sup>101</sup> Transfers of European patent applications, and of rights *in rem* in respect of such applications, are recorded in the Register of European Patents in order to be effective *vis a vis* the European Patents Office.<sup>102</sup>

### (ii) Plant variety rights

2.73 Under United Kingdom law, proprietary rights called "plant breeders' rights" may be granted to those who breed or discover and develop plant varieties.<sup>103</sup> This form of intellectual property confers on plant breeders an exclusive privilege to exploit new varieties and enables them to obtain royalties by licensing their exploitation by others. The Plant Varieties Act 1997 implements revisions in 1991 of the UPOV Convention<sup>104</sup> and brings the United Kingdom's system into line with the European Community regime.<sup>105</sup> The two legal regimes - national and European - co-exist and a plant breeder can choose.

### United Kingdom legislation on plant varieties

2.74 Under the United Kingdom regime, the rights are granted by the Controller of Plant Variety Rights who controls the statutory Plant Variety Rights Office.<sup>106</sup> The rights may have effect for 25 years or (in the case of trees, vines and potatoes) 30 years.<sup>107</sup> The period may be extended by regulations by up to five years for particular species or groups of plant varieties.<sup>108</sup> The 1997 Act confers on the holder of the plant breeders' rights the right to prohibit others from doing a range of acts including the production, reproduction, sale, export, import, etc. of propagating material of the protected variety.<sup>109</sup> A register of varieties in respect of which rights have been granted is kept and shows the persons entitled to such rights, but does not record securities over such rights.<sup>110</sup>

2.75 Plant breeders' rights are declared by the Act to be "assignable like other kinds of proprietary rights".<sup>111</sup> Licences may be granted by the holder,<sup>112</sup> but these are not the object of property rights and should not be attachable by the new diligence of attachment order, though royalties would be arrestable.

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<sup>100</sup> Convention on the Grant of European Patents (Munich, 5 October 1973; TS 16 (1982) Cmnd 8510). See *Stair Memorial Encyclopaedia*, paras 894 - 901.

<sup>101</sup> See Patents Act 1977, s 78; J McLean, (1988) 4 *European Intellectual Property Review* 115 at pp 116,117.

<sup>102</sup> European Patent Convention Regulations, rules 20 and 21.

<sup>103</sup> Plant Varieties Act 1997, s 1. The regime was first established by the Plant Varieties and Seeds Act 1964 on which see *Stair Memorial Encyclopaedia* vol 18, paras 911 - 930 (H L MacQueen).

<sup>104</sup> The International Convention for the Protection of New Varieties of Plants revised in 1991 (UPOV being short for the International Union for the Protection of Varieties).

<sup>105</sup> Council Regulation 2100/94 of 27 April 1995 on Community Plant Variety Rights.

<sup>106</sup> 1997 Act, ss 2, 3(1), and Schedule 1.

<sup>107</sup> 1997 Act, s 11(1).

<sup>108</sup> 1997 Act, s 11(2).

<sup>109</sup> 1997 Act, s 6(1).

<sup>110</sup> Plant Breeders' Rights Regulations 1998, reg 12 (SI 1998/1027).

<sup>111</sup> 1997 Act, s 12.

<sup>112</sup> 1997 Act, s 6(2); s 17 provides for compulsory licences.

2.76 The holder may acquire a statutory "right to reasonable compensation" for anything done during the period between publication of the application and the grant of plant breeders' rights.<sup>113</sup> The right is assignable<sup>114</sup> and the correlative obligation to pay compensation appears to be attachable by arrestment by the holder's creditors. It should not be attachable by attachment order.

### Community plant variety rights

2.77 A Council regulation of 1994 provides for a system of community plant variety rights valid throughout the European Union.<sup>115</sup> Article 24 of the regulation provides expressly that a "Community plant variety may be levied in execution".<sup>116</sup> In Scots law adjudication for debt is the only competent form of execution and this should in future be replaced by attachment order.

### (iii) Copyright

2.78 Under the Copyright, Designs and Patents Act 1988 many different forms of work are protected by copyright.<sup>117</sup> These include books, plays, music, films sound recordings, computer software and broadcasts.<sup>118</sup> The term of copyright varies with its type but is generally 70 years from the death of the author or from some other event specified by law.<sup>119</sup> In consonance with the common law, copyright is declared by statute to be moveable property and capable of transmission by assignation, testamentary disposition or operation of law.<sup>120</sup> Operation of law would include sequestration on bankruptcy. An assignation must be in writing.<sup>121</sup> In contrast to the general rule on assignation of debts, an assignation of copyright does not require either registration or intimation to vest the assignee with a real right.<sup>122</sup> There is no register of copyright.<sup>123</sup> Moreover, intimation is impossible because the subjects assigned are not a debt or obligation and accordingly there is no person (debtor or obligant) to whom intimation could be made.

2.79 The copyright holder may also grant licences authorising the licensee to exercise a right of the copyright holder. An exclusive licence must be in writing.<sup>124</sup>

2.80 The "moral rights" of copyright conferred by Chapter IV of Part I of the 1988 Act are not assignable.<sup>125</sup> They should therefore not be liable to attachment and sale by means of an attachment order.

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<sup>113</sup> 1997 Act, s 5.

<sup>114</sup> It seems to be a plant breeders' right such as is mentioned in the 1997 Act, s 12 (Transmission).

<sup>115</sup> Council Regulation 2100/94 of 27 April 1995 on Community Plant Variety Rights.

<sup>116</sup> Article 24 further provides that the right may "be the subject of provisional, including protective, measures" within the meaning of the Lugano convention. Article 23 provides for transfer of title and article 25 for inclusion of the right in bankruptcy proceedings.

<sup>117</sup> On copyright generally, see *Stair Memorial Encyclopaedia*, vol 18, paras 931 - 1150 (H L MacQueen).

<sup>118</sup> *Idem*, para 933.

<sup>119</sup> Copyright, Designs and Patents Act 1988, s 12(2) as substituted by Duration of Copyright and Rights in Performances Regulations 1995, reg 5 (SI 1995/3297).

<sup>120</sup> 1988 Act, s 90(1).

<sup>121</sup> 1988 Act, s 90(4).

<sup>122</sup> J McLean, (1988) 4 *European Intellectual Property Review* 115 at p 117 states that "it is the execution of the assignation itself that vests the real right in the assignee". What is execution for this purpose may be in some doubt. It might be expected that the assignation would require to be not only signed by the cedent but also delivered to the assignee before a real right is constituted.

<sup>123</sup> Though securities by a company over copyright require to be registered in the Companies Office register of charges within 21 days. See footnote 97 above.

<sup>124</sup> 1988 Act, s 92.

#### (iv) Industrial designs and design rights

2.81 Design rights<sup>126</sup> for protecting the design of goods may be registered or unregistered.<sup>127</sup> The regime for registered design rights is regulated by the Registered Designs Act 1949.<sup>128</sup> A registered design right subsists for five years from the date of registration and provision is made for extending the period for further periods of five years not exceeding 25 years in all.<sup>129</sup> Registered design rights are declared by the Act to be transferable by assignation (including assignation in security), transmission or operation of law.<sup>130</sup> The assignee, secured creditor or licensee may apply for registration of his title or interest.<sup>131</sup> Where an application is made for registration of title, the registrar on proof of title must register the applicant as proprietor or co-proprietor or, as the case may be, enter in the register notice of any other interest of the applicant (eg as secured creditor) with particulars of the instrument (if any) creating it.<sup>132</sup> Where design right subsists in a registered design, the registrar must not register an interest unless he is satisfied that the person entitled to that interest is also entitled to a corresponding interest in the design right.<sup>133</sup> Where design right subsists in a registered design and the proprietor of the registered design is also the design right owner, an assignation of the design right carries a corresponding interest in the registered design right.<sup>134</sup>

2.82 Unregistered design rights were introduced by the Copyright, Designs and Patents Act 1988, Part III. An unregistered design right is a property right. It is moveable property and declared by the Act to be transferable by assignation, testamentary disposition or operation of law.<sup>135</sup> An assignation<sup>136</sup> may be partial but must be in writing signed by or on behalf of the cedent.<sup>137</sup> An assignee of a registered design right is permitted to transfer the unregistered design right where the cedent is also the owner of the unregistered right.<sup>138</sup> Exclusive licences may also be granted in relation to unregistered design rights.<sup>139</sup> A commercially important design right relates to the pattern or typography of semi-conductor devices.<sup>140</sup>

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<sup>125</sup> 1988 Act, s 94.

<sup>126</sup> On the law of industrial design generally, see *Stair Memorial Encyclopaedia* vol 18, paras 1151 - 1260 (H L MacQueen); H L MacQueen, *Copyright, Competition and Industrial Design* (1993) (Hume Papers on Public Policy, vol 3, No 2).

<sup>127</sup> The registrar is the Comptroller-General of Patents, Designs and Trade Marks: 1949 Act, ss 17; 44(1).

<sup>128</sup> Extensively amended by the Copyright, Designs and Patents Act 1988, Part IV (ss 265 - 273) and Sch 3 and set out in full with amendments in a "Keeling Schedule", - 1988 Act, Sch 4.

<sup>129</sup> 1949 Act, s 8.

<sup>130</sup> 1949 Act, ss 2(1) -(2), 19(1) and (2). On assignation in security, see the reference to "mortgagee" in s 19(1) and "mortgage" in s 19(1).

<sup>131</sup> 1949 Act, s 19(1).

<sup>132</sup> 1949 Act, s 19(3).

<sup>133</sup> 1949 Act, s 19(3A).

<sup>134</sup> 1949 Act, s 19(3B).

<sup>135</sup> 1988 Act, s 222(1).

<sup>136</sup> 1988 Act, s 19(3A).

<sup>137</sup> 1988 Act, s 222(2), (3).

<sup>138</sup> 1988 Act, s 224.

<sup>139</sup> 1988 Act, s 225.

<sup>140</sup> Design Rights (Semi-Conductor Topographies) Regulations 1989 (SI 1989/1100) (as amended), applying Part III of the 1988 Act subject to modifications which do not affect transmissibility.

**(v) Author's and performer's rights to equitable remuneration after transfer of rental right**

2.83 Implementing the European Rental Directive,<sup>141</sup> recent legislation has conferred on an author,<sup>142</sup> who has transferred his rental right concerning a sound recording or a film to its producer, a right to equitable remuneration for the rental.<sup>143</sup> This right may not be assigned by the author except to a collecting society to enforce it.<sup>144</sup> The right is, however, transmissible by testamentary disposition or by operation of law as moveable property, and it may be assigned or further transmitted by any person into whose hands it passes.<sup>145</sup> It is thought that, notwithstanding the prohibition of a voluntary assignation *inter vivos* by the author - which does not extend to an assignation by his successor in title - the statutory reference to transmissibility by operation of law imports attachability by diligence as well as sequestration in bankruptcy.

2.84 There are two other similar provisions regarding equitable remuneration. First, a performer who has transferred his rental right concerning a sound recording or a film to its producer retains a right to equitable remuneration for the rental.<sup>146</sup> Second, a performer in a commercially published sound recording is entitled to equitable remuneration from the copyright owner where the recording is played in public or included in a broadcast or cable programme service.<sup>147</sup>

2.85 Equitable remuneration is payable by the person for the time being entitled to the rental right or copyright.<sup>148</sup> It is thought that the payer has an arrestable liability to account in respect of individual payments of equitable remuneration but, unlike the liability of a company to its shareholders, is not under any liability to account in respect of the capitalised value of the equitable remuneration. It follows that, in principle, equitable remuneration is adjudgeable under the present law and in future should be attachable by the new diligence of attachment order.

**(vi) Performers' property rights**

2.86 While entrepreneurs have copyright in sound recordings, films, broadcasts and cable-casts, until recently performers had lesser rights which did not attain the status of property rights.<sup>149</sup> Implementing the Community Rental Directive,<sup>150</sup> regulations<sup>151</sup> amend the Copyright, Designs and Patents Act 1988 so as to introduce new statutory rights - called "performers' property rights"<sup>152</sup> - which consist of a reproduction right,<sup>153</sup> a distribution right,<sup>154</sup>

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<sup>141</sup> Council Directive No 92/100/EEC of 19 November 1992 (O J No L 346, 27.11.92, page 61).

<sup>142</sup> Is the author of a literary, dramatic, musical or artistic work, or the principal director of a film.

<sup>143</sup> 1988 Act, s 93B(1) inserted (on 1st December 1996) by the Copyright and Related Rights Regulations 1996 (SI 1996/2967), reg 14.

<sup>144</sup> 1988 Act, s 93B(2).

<sup>145</sup> *Idem*.

<sup>146</sup> 1988 Act, s 191G and H inserted by the 1996 Regulations, reg 21.

<sup>147</sup> 1988 Act, s 182D added by the 1996 Regulations, reg 20.

<sup>148</sup> 1988 Act, s 93B(3).

<sup>149</sup> See Cornish, *Intellectual Property* pp 471 - 475.

<sup>150</sup> Council Directive No 92/100/EEC of 19 November 1992 (O J No L346, 27.11.92, page 61).

<sup>151</sup> Copyright and Related Rights Regulations 1996 (SI 1996/2967).

<sup>152</sup> Copyright, Designs and Patents Act 1988, s 191A inserted by Copyright and Related Rights Regulations 1996, reg 21.

<sup>153</sup> 1988 Act s 182A inserted by the 1996 Regulations, reg 20.

<sup>154</sup> 1988 Act s 182B inserted by the 1996 Regulations, reg 20.

a rental right and a lending right<sup>155</sup> all of which are objects of property. The rights continue to subsist in relation to a performance for 50 years from the end of the calendar year in which the performance takes place.<sup>156</sup> As in the case of copyright, where different persons are entitled to different aspects of a performer's property rights in relation to a performance, the rights owner for any purpose is the person entitled to the aspect of those rights relevant for that purpose.<sup>157</sup> A performer's property rights are declared by statute to be transmissible by assignation, by testamentary disposition or by operation of law, as moveable property.<sup>158</sup> An assignation may be partial or limited.<sup>159</sup> In principle performers' property rights are adjudgeable and should be attachable by the proposed attachment order.

2.87 Performers may give consent for the commercial recording or transmission of their live performances and are entitled to prevent infringement of their rights by illicit recordings.<sup>160</sup> These "non-property rights" are generally not assignable or transmissible<sup>161</sup> and should therefore not be attachable by diligence. However, a person may enter into an exclusive recording contract with performers in respect of their live performances. That person's exclusive recording right should be attachable by diligence as he may assign it.<sup>162</sup>

### **(vii) Trade marks**

2.88 Trade marks are now regulated mainly by the Trade Marks Act 1994.<sup>163</sup> A trade mark is defined by the Act as "any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings".<sup>164</sup> A register of trade marks<sup>165</sup> is maintained by the Comptroller-General of Patents, Designs and Trade Marks.<sup>166</sup> A registration subsists for 10 years and may be renewed in some circumstances for further periods of 10 years.<sup>167</sup>

2.89 The Act provides that a registered trade mark is incorporeal moveable property in Scotland<sup>168</sup> and transmissible by assignation, testamentary disposition or operation of law in the same way as other moveable property, either in connection with the goodwill of a business or independently.<sup>169</sup> An assignation may be "partial, that is, limited so as to apply (a) in relation to some but not all of the goods or services for which the trade mark is registered, or (b) in relation to use of the trade mark in a particular manner or a particular locality".<sup>170</sup> A registered trade mark may be the subject of a security in the same way as other moveable property<sup>171</sup> and the above-mentioned provisions apply to an assignation of a

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<sup>155</sup> 1988 Act, s 182C inserted by the 1996 Regulations, reg 20.

<sup>156</sup> 1988 Act, s 191.

<sup>157</sup> 1988 Act, s 191A(3) inserted by the 1996 Regulations, reg 21.

<sup>158</sup> 1988 Act, 191B(1) inserted by the 1996 Regulations, reg 21.

<sup>159</sup> 1988 Act, 191B(2) inserted by the 1996 Regulations, reg 21.

<sup>160</sup> 1988 Act, ss 182 to 184.

<sup>161</sup> 1988 Act, s 192B(1) inserted by the 1996 Regulations, reg 21(2).

<sup>162</sup> 1988 Act, s 185(2) saved by s 192B(2) from the general non-assignability and non-transmissibility rule in s 192B(1).

<sup>163</sup> See *Stair Memorial Encyclopaedia* vol 18, para 1261 inserted by *Cumulative Supplement 1997*.

<sup>164</sup> Trade Marks Act 1994, s 1(1).

<sup>165</sup> 1994 Act, s 63.

<sup>166</sup> 1994 Act, s 62. On registration procedure, see ss 38 - 44.

<sup>167</sup> 1994 Act, ss 42 and 43.

<sup>168</sup> 1994 Act, s 2: "A registered trade mark is a property right obtained by the registration of the trade mark under this Act..."; s 22: "A registered trade mark is personal property (in Scotland, incorporeal moveable property)".

<sup>169</sup> 1994 Act, s 24(1) and 102.

<sup>170</sup> 1994 Act, s 24(2).

<sup>171</sup> 1994 Act, s 24(5).

registered trade mark by way of security as in relation to any other assignation.<sup>172</sup> An assignation in writing, when duly signed, is registrable.<sup>173</sup> A registered trade mark, being transmissible by operation of law,<sup>174</sup> passes to the permanent trustee in the proprietor's sequestration,<sup>175</sup> and it seems to follow that it is and should be attachable by diligence. The provisions of the 1994 Act on registered trade marks as objects of property apply with any necessary modifications to applications for the registration of a trade mark.<sup>176</sup> A licence to use a trade mark, however, is not treated as an object of property<sup>177</sup> and should therefore not be attachable by diligence.

## The Community Trade Mark

2.90 The Community Trade Mark Regulation<sup>178</sup> introduces a unitary trade mark for the whole European Community and establishes a Register of Community Trade Marks. Title 2, Section 4 (Articles 16 - 24) make provision on trade marks as objects of property. Article 20 (Levy of execution) provides:

- "1. A Community trade mark may be levied in execution.
2. As regards the procedure for levy in execution in respect of a Community trade mark, the courts and authorities of the Member states determined in accordance with Article 16 shall have exclusive jurisdiction.<sup>179</sup>
3. On request of one of the parties, levy of execution shall be entered in the Register and published."

"Levy of execution" is an English term of art meaning the execution of diligence. Under the present law of Scotland, a Community Trade Mark would be attachable pursuant to Article 20.1 by an adjudication for debt. In future it should be attachable by attachment order.

### (viii) Other forms of intellectual property?

2.91 The categories of intellectual property are not closed. New forms may be recognised by statute<sup>180</sup> and possibly at common law.<sup>181</sup> Any list in legislation on attachment orders should not be exhaustive.<sup>182</sup>

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<sup>172</sup> 1994 Act, s 24(4).

<sup>173</sup> Registration creates a presumption of validity of the assignation: 1994 Act, s 72.

<sup>174</sup> 1994 Act, s 24(1).

<sup>175</sup> *Hansard*, HL Deb [24 February 1994] vol 552, col 745.

<sup>176</sup> 1994 Act, s 27.

<sup>177</sup> Cornish, *Intellectual Property* paras 17-14 - 17-17.

<sup>178</sup> EC Council Regulation 40/94 of 20 December 1993 on the Community trade mark. The 1994 Act, s 52 empowers the Secretary of State to make regulations in connection with the Community Trade Mark Regulation but the power has not yet been exercised.

<sup>179</sup> We suggest below that the rules for the assumption by the Scottish courts of jurisdiction to make attachment orders relating to intellectual property should be based on Article 16.

<sup>180</sup> Eg performers' property rights and authors' and performers' rights to equitable remuneration, both recognised by the Copyright and Related Rights Regulations 1996.

<sup>181</sup> Though Scottish property law does not in principle allow parties to invent new forms of real right which the courts then recognise. There is no freedom of property akin to freedom of contract.

<sup>182</sup> In the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s 15 (which withdraws the privilege against self-incrimination in certain proceedings relating to intellectual property), subsection (5) defines "intellectual property" as "any patent, trade mark, copyright or design right, registered design, technical or commercial information or other intellectual property".

2.92 Personal rights to trade secrets and other confidential information are protected by the remedies of interdict and damages and the fact that these remedies lie against indirect recipients down the information chain shows that the rights are not purely personal. Moreover in business affairs, trade secrets and technical know-how are sometimes treated as a type of property. The predominant view in England is that confidential information is not "property in any normal sense".<sup>183</sup> If that view holds in English law, with its fragmentation and flexible definition of the notion of property, it is even more likely to hold under Scots law which in principle recognises a well nigh closed and definite list of real rights.<sup>184</sup> From the fact that a *bona fide* and reasonably careful recipient of confidential information is not liable in damages for its disclosure, it has been said that confidential information is not property<sup>185</sup> but may be intellectual property.<sup>186</sup> That question of classification need not be resolved here. Suffice it to say that in our view, rights to trade secrets and other confidential information have not yet been recognised by law as freely transmissible objects of property and therefore should not be attachable by diligence. The same is true of rights under the Data Protection Act 1984.<sup>187</sup>

2.93 We propose that:

15. (1) **It should be competent to use an attachment order against any type of intellectual property which, though not attachable by arrestment, is freely assignable or declared by statute as being transmissible by operation of law.**

(2) **Without prejudice to that generality, the types of intellectual property attachable by attachment order should include:**

- (i) **patents, applications for patents, and associated licences, and sub-licences;**
- (ii) **plant variety rights;**
- (iii) **copyright and associated licences;**
- (iv) **industrial designs, design rights and associated licences;**
- (v) **author's and performer's rights to equitable remuneration after transfer of rental right;**
- (vi) **performers' property rights; and**
- (vii) **trade marks and associated applications.**

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<sup>183</sup> *Boardman v Phipps* [1967] 2 A C 46 at p 128 per Lord Upjohn quoted in Cornish, *Intellectual Property* para 8-49 who regards the subject matter to be too disparate and ephemeral to qualify as property.

<sup>184</sup> *Stair Memorial Encyclopaedia* vol 18, para 5.

<sup>185</sup> *Stair Memorial Encyclopaedia* vol 18, para 1453. It is difficult to see that the conclusion follows from the premise. Unlike English law, damages is not a proprietary remedy in Scots law.

<sup>186</sup> *Stair Memorial Encyclopaedia* vol 18, para 1453: "it seems best not to regard confidential information as having all the consequences of property. This would not be fatal to the argument that confidential information is intellectual property, since again the rights conferred by intellectual property do not go as far as ordinary property law: for example innocent infringement often does not give rise to a damages claim".

<sup>187</sup> *Stair Memorial Encyclopaedia* vol 18 paras 1501-1561.

For avoidance of doubt, however, the statutory right to compensation under the Plant Varieties Act 1997, section 5, should not be attachable by attachment order since its correlative obligation is arrestable.

(c) Attachment of intellectual property in common ownership

2.94 Should co-owned intellectual property be attachable? Common (*pro indiviso*) ownership of a patent can arise either because the patent is initially granted to two co-inventors<sup>188</sup> or through subsequent transactions.<sup>189</sup> A *pro indiviso* share in a patent is separately transmissible.<sup>190</sup> One co-owner however cannot without the consent of the other co-owners assign a share in the patent or cause or permit security to be granted over it.<sup>191</sup> The same provisions apply to applications for patents.<sup>192</sup>

2.95 Copyright may be held by the authors or their successors as common property, each co-owner having an undivided *pro indiviso* share which is transmissible by assignation or testate or intestate succession<sup>193</sup> and to the co-owner's permanent trustee on his sequestration.<sup>194</sup> Where different persons are entitled to different aspects of copyright in a work, the copyright owner for any purpose under the 1988 Act is the person entitled to the aspect of copyright relevant for that purpose.<sup>195</sup> However, this is not common ownership: there are distinct copyrights each with its own duration.<sup>196</sup> The 1988 Act provides that "where copyright (or any aspect of copyright) is owned by more than one person jointly, ... any requirement of the licence of the copyright holder requires the licence of all of them".<sup>197</sup> It is thought that the word "jointly" is used in the English sense and in Scotland imports common ownership.<sup>198</sup> There is English authority to the effect that, differing from the rule in patents, a co-owner is not entitled to do acts within its scope without the consent of other co-owners<sup>199</sup> and this seems consonant with the requirement of joint management under the Scots law on common ownership.<sup>200</sup> Where a performer's property rights (or any aspect of them) is owned by more than one person jointly, any requirement of the licence of the rights owner requires the licence of all the owners.<sup>201</sup>

2.96 Common ownership of industrial designs and design rights is recognised by statute.<sup>202</sup>

2.97 Common ownership of a registered trade mark arises either because the registered trade mark is initially granted to the co-owners "jointly" - when the Act provides that each of them is entitled, subject to any agreement to the contrary, to an equal undivided share in the

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<sup>188</sup> 1977 Act, s 36(1).

<sup>189</sup> Cornish, *Intellectual Property* p 238.

<sup>190</sup> 1977 Act, s 31(7).

<sup>191</sup> 1977 Act, s 36(3).

<sup>192</sup> 1977 Act, s 36(7).

<sup>193</sup> *Stair Memorial Encyclopaedia* vol 18, para 985.

<sup>194</sup> Bankruptcy (Scotland) Act 1985, s 31.

<sup>195</sup> 1988 Act, s 173(1).

<sup>196</sup> Cornish, *Intellectual Property* para 12-19.

<sup>197</sup> 1988 Act, s 173(2).

<sup>198</sup> For the distinction between "common" and "joint" ownership in Scots law, see *Stair Memorial Encyclopaedia* vol 18, paras 17 - 21. It is not translated by s 177 (adaptation of expressions for Scotland).

<sup>199</sup> Cornish, *Intellectual Property* (3d edn) para 12-21, citing *Cescinsky v Routledge* [1916] 2 KB 325.

<sup>200</sup> *Stair Memorial Encyclopaedia* vol 18, para 1011.

<sup>201</sup> Copyright, Designs and Patents Act 1988, s 191A(4) inserted by Copyright and Related Rights Regulations 1996, reg 21.

<sup>202</sup> Registered Designs Act 1949, s 19(3) (registrar on proof of title must register co-proprietor).

registered trade mark (i.e. in Scottish legal terminology, "common" rather than "joint" ownership)<sup>203</sup> - or by subsequent transmission. Each co-proprietor is entitled, without the others' consent, to do any act otherwise amounting to an infringement.

2.98 A co-owner of a patent or a patent application cannot assign, or grant security over, his share without the consent of the other co-owners nor grant a licence without such consent.<sup>204</sup> Registered trade marks,<sup>205</sup> performers' property rights<sup>206</sup> and copyright<sup>207</sup> are in broadly the same position. To exempt a debtor's share in these forms of intellectual property from attachment, however, would be inconsistent with the principle of universal attachability. Any exemption would be open to abuse since a debtor could then escape enforcement simply by making a collusive assignation of a small *pro indiviso* share to a relative or associate. On the other hand, there may be policy considerations favouring exemption of which we are unaware and we should be grateful for views especially from persons with expertise in intellectual property.

2.99 **Method of attachment and sale.** We sought views above<sup>208</sup> on two possible ways of attaching items owned by the debtor and third parties in common ownership namely either (a) an action of division and sale combined with proceedings in the diligence of attachment order; or (b) attachment of all shares for the debts of one co-owner coupled with a right, exercisable by the third party co-owners, to obtain release of the property on paying the value of the debtor's share.<sup>209</sup>

2.100 Whatever solution is adopted in the general case, it has been suggested to us that third parties might prefer that solution (b) should apply to co-owned intellectual property since it would allow the third party co-owner a mechanism for acquiring the debtor's share in the attached item of intellectual property and thus free up the exercise of rights. If solution (a) were to be adopted for the general case, it would nevertheless be possible to adopt solution (b) for intellectual property, or indeed *vice versa*. We should be grateful for assistance in resolving this issue.

16. (1) **Views are sought on what procedure should apply to the attachment of intellectual property where the debtor is a co-owner, along with a third party, of the property?**

(2) **Our tentative preference is for the second option in Proposal 13 (paragraph 2.54) above, namely attachment of all shares for the debts of one co-owner coupled with a right on the part of third party co-owners to obtain release of the property on paying the value of the debtor's share.**

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<sup>203</sup> 1994 Act, s 23(1).

<sup>204</sup> Patents Act 1977, s 36(3).

<sup>205</sup> Trade Marks Act 1994, s 23.

<sup>206</sup> Copyright, Designs and Patents Act 1988, s 191A added by the Copyright and Related Rights Regulations 1996, reg 21 (SI 1996/2967).

<sup>207</sup> Copyright, Designs and Patents Act 1988, s 173(2).

<sup>208</sup> See proposal 13 (para 2.54).

<sup>209</sup> Modelled on the provisions on sale of co-owned pointed property in the Debtors (Scotland) Act 1987, s 41.

**(d) Jurisdiction in attachment orders against intellectual property.**

2.101 **Legislative competence and the scope of our proposals.** In framing rules for the assumption by a Scottish court of jurisdiction to make an attachment order, three levels of rules must be considered, namely:

- (1) the rules of the Brussels and Lugano Conventions<sup>210</sup> allocating jurisdiction among the Contracting States;
- (2) the rules of the Civil Jurisdiction and Judgments Act 1982, Schedules 4 and 5, allocating jurisdiction between the three parts of the United Kingdom; and
- (3) the rules of the Civil Jurisdiction and Judgments Act 1982, Schedules 8 and 9, allocating jurisdiction between courts within Scotland and as between Scotland and non-Contracting States.

Neither the United Kingdom Parliament nor the Scottish Parliament will have freedom to change the rules at the first level. Once the Scottish Parliament has been established, the United Kingdom Parliament will retain legislative competence to change the rules at the second level. Since the Scottish rules of private international law will be a devolved matter,<sup>211</sup> it is possible that the Scottish Parliament will also have (concurrent) legislative competence to amend the rules on the assumption of jurisdiction by the Scottish courts in cases with a UK non-Scottish element at this level, though the matter is not free from doubt. There are obvious advantages in reciprocity and uniformity as between the different parts of the United Kingdom. Under the Scotland Act, however, the Scottish Parliament will have legislative competence to amend the rules on the assumption of jurisdiction by the Scottish courts at the third level. In this discussion paper we concentrate on the second and third levels.

2.102 **Existing private international law rules on diligence against intellectual property.** Under the European Judgments Conventions (the Brussels and Lugano Conventions) and the Civil Jurisdiction and Judgments Act 1982, the courts of the place where a judgment has been, or is to be, enforced have exclusive jurisdiction in proceedings relating to its enforcement.<sup>212</sup> This rule requires one to identify the location or *situs* of the property which is to be attached by diligence. Where the property is intellectual property, however, the rules for determining the location or *situs* are unclear, at least in Scots law. The reason may be that the granting of a patent or similar exclusive privilege or monopoly relating to intellectual property is an act of national sovereignty.<sup>213</sup> Accordingly the normal rule is that the *situs* of the right is the territory of the state which granted the monopoly<sup>214</sup> and questions of transference and enforcement would be governed by the law of that state.

2.103 Unfortunately this approach cannot apply within the United Kingdom since it is not a unitary state but has three separate legal systems. The standard work on Scottish private

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<sup>210</sup> As defined in the Civil Jurisdiction and Judgments Act 1982, s 1(1).

<sup>211</sup> Scotland Act 1998, ss 29 and 126(4)(a).

<sup>212</sup> 1968 Convention, art 16(5); 1982 Act, Sch 4, art 16(5); Sch 8, rule 4(1)(d); A E Anton, *Private International Law* (2d edn; 1990) p 166.

<sup>213</sup> Anton, *Private International Law* (2d edn) p 166 citing the *Jenard Report* on the European Judgments Convention, O J 1979, C 59/31.

<sup>214</sup> Cf. *James Burrough Distillers plc v Speymalt Whisky Distributors Ltd* 1989 SLT 561 (OH) on the territorial character of trade marks.

international law deals with the conflicts rules on some classes of incorporeal moveable property, notably assignable debts.<sup>215</sup> The assignability of a debt is governed by the law applicable to the creation of the debt.<sup>216</sup> Referring to forms of incorporeal moveable property which do not consist essentially in a claim to recover money from a debtor (including rights emerging from patents, trade marks and copyright), the learned author conjectures that similar rules apply but notes the absence of Scottish authority.<sup>217</sup> According to *Dicey and Morris*, the standard English work, "patents<sup>218</sup> and trademarks<sup>219</sup> are situate in the country where they can be effectively transferred under the law governing their creation".<sup>220</sup> But within the United Kingdom, with its three separate legal systems, it is not clear by what test "the law governing their creation" is to be identified. To augment the uncertainty, this rule is said to be subject to the qualification that it "does not necessarily apply to rights arising between patentee and assignee or between patentee and licensee".<sup>221</sup> By analogy the rule does not necessarily apply to rights arising between a patentee and an adjudger or attaching creditor. In relation to patents, it has been contended that "in the absence of a separate register, the most obvious way of deciding when a patent is regulated by Scots law is to relate it to the owner's domicile (in the common law sense) or to his residence",<sup>222</sup> but no authority is cited in support of this contention.

2.104 Under the European Judgments Convention, the courts of the Contracting State where the registration of the right has been applied for or taken place have exclusive jurisdiction in proceedings concerned with the registration or validity of patents, trade marks, designs and similar intellectual property rights.<sup>223</sup> A similar rule for allocating jurisdiction among the courts of the United Kingdom would at present confer jurisdiction on the English courts since all applications for registration have to be sent to addresses in that country. Where such a register is not situated in another Contracting State, the ordinary non-exclusive rules of jurisdiction in Schedules 4 and 8 to the 1982 Act will apply within the United Kingdom.<sup>224</sup> These could be used for proceedings for attachment of intellectual property generally.

2.105 **The connecting factors in the Community Trade Mark Regulation, 40/94, Article 16.** A possible legislative model for jurisdiction in attachment orders over intellectual property is to be found in Article 16 of the Community Trade Mark Regulation<sup>225</sup> which (as mentioned above)<sup>226</sup> introduces a unitary trade mark for the whole European Community. Article 16 treats a Community Trade Mark as a national trade mark and for this purpose allocates trade marks to Member States. Article 16 provides:

"Unless Articles 17 to 24 otherwise provide, a Community trade mark as an object of property shall be dealt with in its entirety, and for the whole area of the Community,

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<sup>215</sup> Anton, *Private International Law* (2nd edn) pp 620 - 626.

<sup>216</sup> *Ibid*, pp 621 - 623.

<sup>217</sup> *Ibid*, p 621, adding at footnote 62: "Such decisions as exist seem inconclusive: see *Jeffreys v Kyle* (1856) 18 D 906 (copyright);..."

<sup>218</sup> Citing *Wilderman v F W Berk & Co* [1925] Ch 116; *British Nylon Spinners Ltd v ICI Ltd* [1953] Ch 19, at p 26 (CA); *Re Usine de Melle's Patent* (1954) 91 CLR 42 at p 48.

<sup>219</sup> *Lecouturier v Rey* [1910] AC 262 at p 273; *R J Reuter Co Ltd v Mulhens* [1954] Ch 50 at pp 95,96 (CA).

<sup>220</sup> L Collins *et al* (eds), *Dicey and Morris, The Conflict of Laws* (12th edn; 1993) vol 2, p 934.

<sup>221</sup> *Dicey and Morris, The Conflict of Laws* (12th edn) vol 2, p 934, footnote 27.

<sup>222</sup> D P Sellar, "Rights in Security over 'Scottish Patents' " (1995-96) 1 SLPQ 137 at p 138.

<sup>223</sup> European Judgments Convention 1968, article 16(4).

<sup>224</sup> Anton, *Private International Law* (2d edn; 1990) p 166.

<sup>225</sup> EC Council Regulation 40/94 of 20 December 1993 on the Community trade mark.

<sup>226</sup> See para 2.90.

as a national trade mark registered in the Member State in which, according to the Register of Community trade marks,

- (a) the proprietor has his seat or domicile on the relevant date; or
- (b) where subparagraph (a) does not apply, the proprietor has an establishment on the relevant date."

It will be seen that Article 16 adopts connecting factors (seat, domicile or establishment of proprietor) which are more practical and useful for enforcement measures against intellectual property than the connecting factors used by the existing law (the place of enforcement or the State which granted the intellectual property right). We suggest that a similar rule should apply at the second and third levels. It may be for consideration whether legislation at the second level should be passed by the United Kingdom Parliament.

2.106 We propose that:

17. (1) **The provisions of the Civil Jurisdiction and Judgments Act 1982, Schedule 8, rule 4(1)(d) (which provides that, in proceedings concerned with the enforcement of judgments, the courts for the place where the judgment has been or is to be enforced has exclusive jurisdiction) should not apply to an application for an attachment order for the attachment of a form of intellectual property. Instead, jurisdiction in such an application should be conferred on the court for the place where:**
  - (a) **the proprietor of the intellectual property has his seat or domicile on the date of the commencement of the proceedings in the application; or**
  - (b) **where subparagraph (a) does not apply, the proprietor has an establishment on that date,**
- (2) **The competent authorities should consider whether a similar amendment should be made to the Civil Jurisdiction and Judgments Act 1982, Schedule 4, so that article 16(5) (which provides that, in proceedings concerned with the enforcement of judgments, the courts of the part of the United Kingdom in which the judgment has been or is to be enforced has exclusive jurisdiction) would not apply to an application for an attachment order attaching a form of intellectual property. Instead, jurisdiction in such an application should be conferred on the courts of the part of the United Kingdom where:**
  - (a) **the proprietor of the intellectual property has his seat or domicile on the date of the commencement of the proceedings; or**
  - (b) **where subparagraph (a) does not apply, the proprietor has an establishment on that date.**
- (3) **Unregistrable interests in land**

## **(a) Timeshares**

2.107 A timeshare is the right to occupy (usually for holiday purposes) accommodation for a specified period each year, generally in perpetuity.<sup>227</sup> The legal structure of timeshares varies. One method is for a bank or other company to hold title to the property. The timesharers then have personal rights to occupy granted by the owner. Another method is for the timesharers to own shares in the holding company. In either case the timesharers' rights are not rights which can be registered in the property registers. Timeshares are nowadays freely marketable, either back to the holding company or to a purchaser or may be exchanged for a timeshare in another scheme.<sup>228</sup> Timeshares which confer personal rights of occupation of accommodation and non-exclusive enjoyment of associated facilities are thought to be moveable property. A timeshare could be regarded as a lease with discontinuous periods of occupation and therefore a heritable asset,<sup>229</sup> but not if the rights were purportedly granted in perpetuity, because a lease must have a definite term.

2.108 Timeshares are generally not registered in the property registers and therefore would not be attachable by land attachment.<sup>230</sup> Timeshares which are freely transmissible personal rights of occupation would in principle be attachable by attachment order. If the timeshare took the form of a share in the holding company which was registered in Scotland, then that would be arrestable.

## **(b) Kindly tenancies and tenancies-at-will**

2.109 Both kindly tenancies and tenancies-at-will are perpetual "leases" existing by virtue of ancient local custom. They are freely assignable. Dispositions of kindly tenancies were in recent practice registered in the Sasine Register<sup>231</sup> and as such would be attachable by land attachment. Section 3(3)(c) of the Land Registration (Scotland) Act 1979 provides that once the county in which the kindly tenancy is situated becomes operational the tenant obtains a real right only by registration in the Land Register. All the kindly tenancies are in Dumfries which is now an operational area so that all future dispositions have to be registered in the Land Register. In our forthcoming report on the abolition of the feudal system, we shall also recommend the legislative conversion of kindly tenancies into full rights of ownership.

2.110 Tenancies-at-will are not registered in either the Sasines Register or the Land Register but are freely transferable by assignation and intimation of the assignation to the landlord. A tenancy-at-will should therefore be attachable by attachment order. A tenant-at-will is entitled to purchase compulsorily the landlord's interest and become absolute proprietor.<sup>232</sup> The former tenant-at-will's title as proprietor would then be registrable in the Register of Sasines or the Land Register and under our proposals would become attachable by land attachment rather than attachment order. In our forthcoming report on the abolition of the feudal system we shall not be recommending the legislative conversion of tenancies-at-will

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<sup>227</sup> Timeshares have been recognised by statute: see Timeshare Act 1992 (providing for cooling off periods after timeshare agreements).

<sup>228</sup> *Stair Memorial Encyclopaedia*, vol 18, para 39; W M Gordon, *Scottish Land Law*, para 15-08; C R M Franks, "Time Share Schemes" (1984) 29 *JLSS* 21.

<sup>229</sup> Gordon, *Scottish Land Law* para 19-13.

<sup>230</sup> See Discussion Paper No 107, Part 2, Section B, proposition 1.

<sup>231</sup> They used to be intimated to the Earl of Mansfield who kept the book of kindly tenants.

<sup>232</sup> Land Registration (Scotland) Act 1979, ss 20-22.

to ownership, although we would expect them to wither away due to tenants using the existing provisions for purchase mentioned above.

**(c) Registrable but unregistered leases**

2.111 Leases may be registered in the Sasine Register if they are for a period longer than 20 years and are self-proving (in terms of the requirements of Requirements of Writing (Scotland) Act 1995).<sup>233</sup> Registration in the Register of Sasines is equivalent to possession by the tenant and creates a real right valid against the landlord's singular successors.<sup>234</sup> A tenant in an unregistered lease, if in possession, has a real right available in a question with singular successors of the landlord under the Leases Act 1449.

2.112 In land registration operational areas, registration in the Land Register is the only way to acquire a real right against the landlord's successors.<sup>235</sup> Only a long lease may be registered in the Land Register and it is defined<sup>236</sup> as:

"a probative lease -

(a) exceeding 20 years; or

(b) which is subject to any provision whereby any person holding the interest of the grantor is under a future obligation, if so requested by the grantee, to renew the lease so that the total duration could (in terms of the lease, as renewed, and without any subsequent agreement, express or implied, between the persons holding the interests of the grantor and the grantee) extend for more than 20 years".

2.113 In long leases granted after the date of commencement<sup>237</sup> of the Land Tenure Reform (Scotland) Act 1974 no part of the property let is to be used as a dwelling-house.<sup>238</sup> Until the lease has been registered it would not be competent for a land attachment to be registered against the tenant's interest under the lease. If the creditor can obtain the lease itself or an extract then he should be entitled to register it and the notice of land attachment at the same time. This would be the same practice as for securities over registrable leases.<sup>239</sup> We considered whether registrable but unregistered long leases should be subject to attachment orders. There would then be an overlap with land attachments which would be inconsistent with the residual character of attachment orders. Great difficulty would arise if the lease was registered after an attachment order had been granted. It could be provided that in such a situation, the attachment order should fall and the creditor should begin all over again with land attachment. But this would mean that the debtor could defeat the attachment order merely by registration. Most long leases, especially in operational areas, are likely to be registered so that the problem, already small, is likely to diminish further. It would complicate the legislation unduly to make attachment orders registrable merely to cater for this unusual type of case. We conclude that attachment orders should not be competent against registrable but unregistered long leases.

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<sup>233</sup> Registration of Leases (Scotland) 1857, s 1, as amended by Land Tenure Reform (Scotland) Act 1974, Sch 6, para 1.

<sup>234</sup> 1857 Act, s 1, 16(1) as amended by 1974 Act, Sch 6, para 3.

<sup>235</sup> Land Registration (Scotland) Act 1979, s 3(3).

<sup>236</sup> 1979 Act, s 28(1).

<sup>237</sup> 1 September 1974, 1974 Act, s 24(2).

<sup>238</sup> 1974 Act, s 8.

<sup>239</sup> See *Registration of Title Handbook*, para D4.19.

#### **(d) Unregistrable leases**

2.114 These are leases for a period not exceeding 20 years. Leases of unfurnished urban subjects - houses, shops, factories etc. do not involve an element of *delectus personae* and are at common law assignable without the landlord's consent.<sup>240</sup> In practice such leases contain a standard clause requiring consent, so excluding the common law.<sup>241</sup>

2.115 In leases of rural subjects there is an implied exclusion of assignees and sub-tenants, unless the lease is of an extraordinary duration. A lease of 19 or 21 years has been held to be of ordinary duration, while one of 38 years was regarded as being of extraordinary duration. The standard styles of agricultural leases invariably exclude assignees and sub-tenants. Such leases whatever their formal duration are potentially of unlimited duration by reason of the provisions of the Agricultural Holdings (Scotland) Act 1991 relating to security of tenure and those of the Succession (Scotland) Act 1964 and the 1991 Act relating to succession to leases.

#### **(e) Leases of dwelling houses**

2.116 Section 23 of the Housing (Scotland) Act 1988 provides that an assured tenancy may not be assigned or sublet without the consent of the landlord. A regulated tenancy may be assigned only with the landlord's consent,<sup>242</sup> but sub-letting is permitted unless it is against the terms of the lease.<sup>243</sup> A secure public sector tenancy may be assigned with the consent of the landlord, which consent is not to be unreasonably withheld.<sup>244</sup> The tenant wishing to assign may serve a notice on the landlord. If the landlord fails to reply within a month consent is deemed to have been given. A refusal of consent may be appealed to the sheriff.<sup>245</sup> In terms of Proposal 18 below,<sup>246</sup> a secure public sector tenancy would be attachable by means of an attachment order.

#### **(f) Attachability and restriction on assignability of leases**

2.117 There seems to be some doubt as to the adjudgeability of certain leases. First, is a lease adjudgeable unless there is an express exclusion of assignees? Graham Stewart<sup>247</sup> states that if a lease contains an implied prohibition against assignation and sub-letting stemming from *delectus personae* this does not exclude adjudgers. In order to exclude adjudgers the prohibition against assignation and sub-letting must be express. Professor Gretton on the other hand states:<sup>248</sup> "Non-assignability may be as a result of an express destination to that effect, or, in the absence of a destination, by operation of law. If a lease is non-assignable it cannot be adjudged...". We prefer Professor Gretton's view as the parties to a lease may have relied on an exclusion of assignation implied by common law and so did not insert express provisions in the lease. Secondly, what is the position where the lease is assignable with the consent of the landlord, but that consent is not to be unreasonably withheld?

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<sup>240</sup> *Robb v Brearton* (1895) 22R 885; Cameron and Paton, *Landlord and Tenant* (1967) p 151.

<sup>241</sup> A McAllister, *Scottish Law of Leases* (2d edn; 1995) p 68.

<sup>242</sup> Rent (Scotland) Act 1984, s 17.

<sup>243</sup> 1984 Act, s 19.

<sup>244</sup> Housing (Scotland) Act 1987, s 55(1).

<sup>245</sup> 1987 Act, Sch 4, paras 3 and 4.

<sup>246</sup> Para 2.119.

<sup>247</sup> *Diligence*, p 601.

<sup>248</sup> *Inhibition and Adjudication* (2d edn), p 73.

Professor Gretton's tentative view is that such a lease is adjudgeable<sup>249</sup> and we think that this should be the position. Many valuable commercial leases contain such a provision and the tenant's interest ought to be available to his creditors. The creditor ought to be able to find a new tenant to whom the landlord could not reasonably object.

2.118 Crofters have a limited statutory power of assignation without the consent of the landlord. If the landlord refuses consent to an assignation to a member of the crofter's immediate family, the Crofters Commission may give consent. Where the crofter wishes to assign to someone outwith his immediate family the Commission's consent is required and in deciding whether to consent the Commission take into account any representations made by the crofter and the landlord and the suitability of the proposed assignee.<sup>250</sup> One of the statutory conditions on which crofts are let is that the crofter must not become apparently insolvent.<sup>251</sup> If this condition is breached the landlord may apply to the Land Court for the crofter's removal and if this is granted the landlord can relet the croft.<sup>252</sup> The insolvent crofter may have a claim for compensation for permanent improvements. The expiry of a charge without payment, which we have proposed should be a necessary preliminary to an attachment order, creates apparent insolvency.<sup>253</sup> We think that a crofting tenancy should not be attachable as the landlord has in effect a veto over an assignation by his entitlement to seek removal, but we seek views from those involved in this area of the law.

2.119 We put forward the following proposals and question.

**18. (1) The tenant's interest in an unregistrable lease should be attachable by attachment order unless the lease contains an express exclusion of assignees or assignation is permitted only with the consent of the landlord (or words to the same effect). A provision which permits assignation with the consent of the landlord, which consent is not to be unreasonably withheld, should not bar attachment.**

**(2) Should the interest of a debtor as tenant of a croft be attachable by means of an attachment order?**

**(g) Other unregistrable rights to land**

2.120 Most heritable property is registrable in the property registers and so with the abolition of adjudication for debt, the appropriate diligence for such property will be land attachment. We propose above that tenancies-at-will, short leases and time-shares should be attachable by attachment order. Adjudication is available in relation to all freely transmissible heritable property or rights pertaining to land and such property or rights which cannot be attached by land attachment should be attachable by attachment order. These include heritable rights under trusts,<sup>254</sup> options in relation to land and the right to revoke a conveyance of heritage.<sup>255</sup>

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<sup>249</sup> *Ibid*, p 74.

<sup>250</sup> Crofters (Scotland) Act 1993, s 8.

<sup>251</sup> 1993 Act, s 5 and Sch 2, condition 10.

<sup>252</sup> 1993 Act, s 26.

<sup>253</sup> Bankruptcy (Scotland) Act 1985, s 7(1)(c)(ii).

<sup>254</sup> See para 2.12 below.

<sup>255</sup> Graham Stewart, p 604; *Baird v Morison* (1693) 4 Br Sup 96

2.121 In a sale of heritable property once the contract has been concluded the seller's right to receive the price is a moveable one and can be arrested in the hands of the purchaser.<sup>256</sup> There is doubt as to whether the purchaser's right to the property is heritable or moveable. It has been held heritable in the context of succession,<sup>257</sup> but in a recent Outer House case it was held not to be affected by an inhibition against the purchaser.<sup>258</sup> Professor Gretton regards the question of whether the purchaser's right is adjudgeable as open.<sup>259</sup> The right may be valuable where the property can be sold on at a profit and it would form part of the debtor's sequestrated estate. We think it should be attachable by attachment order as no other diligence seems competent. We would extend this proposal to contractual rights to purchase corporeal moveable property as well. Arrestment of corporeal moveable property requires the property to belong to the debtor<sup>260</sup> but be in the possession of the arrestee. At the contract stage the seller, who would be the arrestee, generally is the owner of the property not the debtor.

2.122 We propose that:

**19. The right under a contract to purchase heritable or moveable property should be attachable by attachment order to the extent that it is not arrestable in the hands of the seller.**

#### **(4) Miscellaneous types of property**

##### **Milk quotas**

2.123 Milk quota was introduced in the then EEC in 1984.<sup>261</sup> It has been described as a right to produce a specified quantity of milk from an agricultural holding without incurring a penalty, and is a valuable asset.<sup>262</sup> In general milk quota attaches to the land and not to the producer and quota normally changes hands only where there is a change in the occupation of the land.<sup>263</sup> Quota may however be sold apart from the land by way of a grazing lease for at least eight months. This has the effect of transferring quota that does not revert to the granter at the end of the period of let. Transfer is also possible without a transfer of the land in order to improve the structure of milk production. In this case certain undertakings are required from both parties and such transfers are uncommon.<sup>264</sup> We do not think that a sheriff should be empowered to authorise a creditor of the producer to attach milk quota separately from the land by either of these methods.

##### **Baronies**

2.124 At present the titles to baronies<sup>265</sup> are registered in the property registers. Unlike peerages and other titles of honour they are freely saleable, and for that reason we think that they should be available to creditors. As a barony or other lordship is transmissible only

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<sup>256</sup> *Lord Advocate v Bank of India* 1991 SCLR 320

<sup>257</sup> *Ramsay v Ramsay* (1887) 15 R 25.

<sup>258</sup> *Leeds Permanent Building Society v Aitken Malone and Mackay* 1986 SLT 338.

<sup>259</sup> Gretton, p 215.

<sup>260</sup> *Stair Memorial Encyclopaedia*, vol 8 "diligence", para 281.

<sup>261</sup> Community Regulations (EEC) 856/84 and 857/84 and Commission Regulation (EEC) 1371/84. See generally Caldwell, *Milk Quotas* (1996).

<sup>262</sup> Gill, *The Law of Agricultural Holdings in Scotland* (3d edn) para 29-01.

<sup>263</sup> *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1991] 1 CMLR 328.

<sup>264</sup> Gill, *The Law of Agricultural Holdings in Scotland* (3d edn) para 4-21.

<sup>265</sup> *ie* lands erected into a barony by a Crown grant of the lands to be held *in liberam baroniam* ("in free barony").

with land which forms part of the barony or other lordship, we consider that land attachment would be the appropriate diligence for attaching both the land and the usually much more valuable title and privileges. In our forthcoming report on the abolition of the feudal system we are to recommend that the titular, heraldic and ceremonial privileges of a barony will become a form of incorporeal property. It would no longer be connected with the land or transmissible only with land and would not be registrable in the property registers. Land attachment would therefore not be competent. We think that the appropriate diligence should be an attachment order.

### **Contractual and statutory options to purchase property**

2.125 Options to acquire or sell property at some future date (such as warrants or traded options in relation to shares) are often valuable and in relation to heritable property may be adjudgeable at present. Some options are not freely transmissible. Thus for example, share options granted to directors or employees of companies may not be realisable by creditors because of restrictive terms in the share option scheme and a right of pre-emption in a feu deed is generally exerciseable only by the superior and is a pertinent of the superiority.<sup>266</sup> Certain tenants, for example a secure public sector tenant,<sup>267</sup> a tenant-at-will<sup>268</sup> or a crofter,<sup>269</sup> have statutory rights to purchase all or part of the subjects let at an advantageous price. These rights to purchase cannot be disassociated from the tenancy itself and therefore should not be separately attachable by diligence. We think that a creditor should be entitled to attach by attachment order only those options or rights to buy or sell which are freely transmissible by themselves.

## **D. EXTENSION OF ARRESTMENT**

### **Introduction**

2.126 Attachment orders are intended to be reserved for those cases where no other diligence is competent. In this Section we consider extending the scope of arrestment to reduce the types of property against which attachment orders would have to be used.

### **Rights under trusts**

2.127 Where the debtor is a beneficiary under a *mortis causa* or *inter vivos* trust the nature of the debtor's interest decides whether arrestment or adjudication is the competent diligence. Adjudication has to be used where the debtor's right is a heritable one. The right is characterised as heritable if the beneficiary has the right to demand from the trustees a conveyance of heritable property. The most likely case is where a testamentary beneficiary is entitled either to a specific bequest of heritable property or the residue (or a share of residue) which includes heritable property. The right may become moveable if the trust deed shows an intention, express or implied, to convert the heritage into moveables before conveyance. The rules as to conversion are complex but, in brief, instructions to the trustees to convert heritage into moveables change a heritable right into a moveable one, whether or not conversion has actually taken place. On the other hand, where a power to convert is

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<sup>266</sup> Conveyancing Amendment (Scotland) Act 1938, s 9.

<sup>267</sup> Housing (Scotland) Act 1987, ss 61-70.

<sup>268</sup> Land Registration (Scotland) Act 1979, ss 20-22.

<sup>269</sup> Crofters (Scotland) Act 1993, ss 12 - 18.

conferred, conversion occurs only when the power is exercised.<sup>270</sup> Another right that has to be adjudged at present is the right of a trustor to a reconveyance of heritable property (to the extent that it does not need to be realised for trust purposes) held by the trustees if the trust fails.<sup>271</sup>

2.128 It would simplify this area of the law if all rights of beneficiaries under trusts and the radical right of trustors were to be made arrestable, whatever the nature of the trust property and whatever the terms of the trust and the grantor's instructions to the trustees. We do not propose this as it would be a substantial alteration in the law of arrestment and not simply ignoring the distinction between heritable and moveable rights. Arrestment is not competent to attach the right to delivery of moveables unless they belong to the debtor and are in the possession of the arrestee. In trust situations the property would belong to the trustees, with the debtor having merely a moveable or heritable right to delivery or conveyance.

2.129 In our previous discussion paper<sup>272</sup> we reviewed the law relating to the general legal nature and effect of trust deeds for creditors and the diligence available to creditors of the grantors of such deeds. We proposed that a creditor whose debt was constituted after the granting of the trust deed should be entitled to attach the grantor's reversionary interest by adjudication directed against the grantor. We understand that the Keeper of the Land Register, when entering the trustee as proprietor indicates that the trustee is registered as a trustee for creditors rather than as an individual. Accordingly, it would seem possible to attach the reversion of heritable property in the trust estate by means of a land attachment.

### **Annuities and liferents**

2.130 Annuities, having a tract of future time, are regarded as being in the nature of heritage.<sup>273</sup> They are therefore attachable by adjudication,<sup>274</sup> although an arrestment will attach the payment due for the period in which it was served and any arrears. We do not think that arrestment in the hands of the payer would be an appropriate diligence for attachment of the capital value of the annuity. Arrestment requires that the arrestee has an obligation to account to the debtor.<sup>275</sup> The payer of an annuity has such an obligation in relation to the instalments but not the capital. The annuity itself, as distinct from the instalments, should in our view be attached by attachment order. It would be competent for the sheriff on granting an application for an attachment order to appoint a factor to ingather future instalments and pay them or a portion of them to the creditor. This would avoid the need for repeated arrestments and perhaps the sale of the annuity itself. Instalments of an annuity payable in respect of past services are attachable by earnings arrestment.<sup>276</sup>

2.131 We think the reasons in the last paragraph apply also to a liferent where the fund is held by trustees-an improper liferent. Thus while arrestment could be used to attach the current instalment plus arrears, the liferent itself should be attached by an attachment order. However, in a proper liferent of heritable property the liferenter has a real right registrable

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<sup>270</sup> Graham Stewart, pp 62-63.

<sup>271</sup> *Connell's JF v MacWatt* 1961 SLT 203

<sup>272</sup> Discussion Paper No 78 on *Adjudication for Debt and Related Matters* (1988).

<sup>273</sup> Erskine, *Institute* II 2 6; *Hill v Hill* (1872) 11 M 247

<sup>274</sup> Graham Stewart, pp 53 and 604.

<sup>275</sup> Graham Stewart, p 71.

<sup>276</sup> Debtors (Scotland) Act 1987, s 73(2). Many such annuities are protected by statute against diligence.

in the property registers<sup>277</sup> and there is no person with an obligation to account to the liferenter on whom an arrestment could be served. The appropriate diligence for a proper liferent of registrable heritable property would be land attachment.

### **Bank of Scotland shares**

2.132 In terms of the Act of 1695 of the Parliament of Scotland setting up the Bank of Scotland stock of the bank was adjudgeable.<sup>278</sup> This still seems to be the position. Stock of the Royal Bank of Scotland was also adjudgeable and not arrestable,<sup>279</sup> but that bank is now incorporated under the Companies Acts so that its shares should be arrestable like those of any other Scottish limited company formed under the Companies Acts.<sup>280</sup> We see no reason why shares in the Bank of Scotland should continue to enjoy the anomalous privilege of being exempt from arrestment.

### **Personal bonds**

2.133 Personal bonds from which executors are excluded and bonds containing an obligation to infest the creditor remained heritable after the Bonds Act 1661 made other personal bonds containing a clause of annualrent (i.e. interest) moveable. However, a later Act of the same year, the Arrestments Act, made sums due under all personal bonds where the creditor was not infest arrestable. Adjudication remains available, but we think an attachment order should not be available and that the creditor's interest in the bond should have to be attached by means of arrestment.

### **Debt secured by floating charge**

2.134 In our Consultative Memorandum No 72 on *Floating Charges and Receivers*,<sup>281</sup> we sought views on whether a debt secured by a floating charge should be characterised as heritable and therefore adjudgeable, or moveable and therefore arrestable. We expressed a preference for making the debt moveable as it seemed unnecessary to draw a distinction between charges where the company's assets were moveable and those where they were heritable. While some consultees doubted the need for a legislative provision as the point was of little practical significance, those who expressed a view were in favour of making the debt moveable. We therefore adhere to our initial preference.

2.135 We propose that:

#### **20. Arrestment should be the only competent diligence for attaching:**

- (a) shares of the Bank of Scotland;**
- (b) debts secured by a floating charge, whatever the nature of the assets charged; and**

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<sup>277</sup> The Land Registration (Scotland) Act 1979, s 2(3) provides that the creation of a liferent over a registered interest in land shall be registered in the Land Register.

<sup>278</sup> Bell, *Commentaries* vol 1, p 102.

<sup>279</sup> *Royal Bank of Scotland v Fairholm* (1770) Mor "Adjudication" Appendix No 3.

<sup>280</sup> *American Mortgage Co of Scotland Ltd v Sidway* 1908 SC 500.

<sup>281</sup> (Published October 1986); paras 2.91 and 2.92.

**(c) sums due under a personal bond where the creditor has no security by way of standard security.**

## PART 3 MONEY ATTACHMENT

### Introduction

3.1 In this Part, we put forward tentative proposals for introducing in Scots law a diligence against cash and negotiable instruments ("money") in the debtor's possession. The question whether such items can be poinded has been raised but never decided. The invariable practice is to exclude such items from a poinding. We have previously observed<sup>1</sup> that poinding and sale is an inappropriate diligence to attach money since it cannot be safely left in the debtor's possession and the later steps in the diligence - advertisement and sale of the poinded goods - being designed to realise property into money, are inappropriate when the attached property is itself money. There is no authority on whether money may be adjudged. We confine our consideration to the enforcement of civil debts. Criminal courts in Scotland have extensive powers to confiscate money which is the proceeds of crime, and to order the forfeiture of money which has been used in the commission of crime.<sup>2</sup>

### Need for a diligence attaching money?

3.2 The main argument in favour of a diligence attaching money is the principle of universal attachability. All the assets of a debtor should be liable to diligence. On sequestration, the whole estate of the debtor, including money in the debtor's possession, vests in the trustee for the benefit of creditors. The law would be incoherent if a different approach were to be adopted for diligence. Debtors, particularly the self-employed, may have substantial amounts of money but no other assets against which diligence could be done. They should not be able to evade the lawful demands of their creditors by holding their wealth as money.

3.3 Several other legal systems allow money to be taken in satisfaction of debt. In England and Wales, the person executing a writ of *fiery facias* may seize "any money or banknotes (whether of the Bank of England, or of any other bank or bankers) and any cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money"<sup>3</sup> and in his possession or control.<sup>4</sup> A bailiff or officer executing a county court warrant of execution has similar powers.<sup>5</sup> In Northern Ireland, the Enforcement of Judgments Office may make an order of seizure which authorises an enforcement officer to seize, among other things, "money, bills of exchange, bonds and promissory notes and any other securities for money belonging to the debtor".<sup>6</sup> We are informed that seizures of money there usually take place in business premises (cash and cheques in a till) but may occur in domestic situations as well.<sup>7</sup> In some Canadian provinces cash and negotiable

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<sup>1</sup> Report on *Diligence and Debtor Protection*, (1985) Scot Law Com No 95, para 5.66.

<sup>2</sup> Criminal Justice (Scotland) Act 1987, Part I; Prevention of Terrorism (Temporary Provisions) Act 1989; Criminal Justice (International Co-operation) Act 1990; Criminal Justice (Scotland) Act 1995, Part II.

<sup>3</sup> Judgments Act 1838, s 12. See also Supreme Courts Act 1981, s 138 as amended by s 15, Courts and Legal Services Act 1990 which applies to any High Court writ of execution against any person.

<sup>4</sup> *Halsbury's Laws of England* (4<sup>th</sup> edn) vol 17, "Execution" para 4.77.

<sup>5</sup> County Courts Act 1984, s 89 as amended by s 15, Courts and Legal Services Act 1990.

<sup>6</sup> Judgments Enforcement (Northern Ireland) Order 1981, arts 31 and 32.

<sup>7</sup> Letter from Mr Napier, Master, Enforcement of Judgments Office, Belfast.

instruments may be seized under a writ of seizure.<sup>8</sup> Cash and cheques may be seized in execution in Australia.<sup>9</sup> In the Australian Capital Territory, for example, a bailiff executing a writ of execution "may seize money, banknotes, cheques, bills of exchange, promissory notes, bonds, specialties or securities for money" belonging to the debtor.<sup>10</sup>

3.4 The arguments against a diligence attaching money are largely practical - protecting debtors from hardship due to deprivation of the means to buy the necessities of life and preventing over-intrusive searches for money. Only a certain portion of a debtor's pay from employment may be taken by means of an earnings arrestment,<sup>11</sup> while social security payments are exempt from ordinary arrestment.<sup>12</sup> These rules are designed to ensure that debtors and their families have money on which to live, albeit at a fairly basic level. They would be defeated if cash representing pay or benefits which debtors had obtained from the bank, social security office or post office could be seized by officers of court.

3.5 We do not think that it would be socially acceptable for an officer of court to be authorised to search the person of a debtor, still less a member of his or her family, in order to find cash belonging to the debtor. Nor should an officer of court be authorised to require debtors to hand over handbags, wallets and purses for examination. The function of officers of court at the sharp end of diligence is difficult enough without adding new powers whose exercise could cause great resentment. Seizure of money, particularly in dwelling-houses if that were to be allowed, would have to be carried out in an extremely sensitive manner and subject to stringent safeguards for debtors.

3.6 If a new diligence for the attachment of money were to be introduced, then it should be expressly provided by statute that poinding of money is incompetent. Money attachment would have special protective features which would be absent from poinding. Furthermore, as we observed above, poinding and warrant sale is not a suitable diligence for money since there is no need of a sale to convert the poinded items into money. We consider that it should be possible to meet some of the objections outlined above and in the rest of this Part we put forward detailed proposals to that effect.

3.7 Meanwhile we propose that:

21. (1) **A new diligence (to be called a "money attachment") should be introduced in Scots law for the attachment of cash and negotiable instruments in the debtor's possession.**
- (2) **The diligence should be authorised by a warrant for money attachment granted by the sheriff on a special application.**
- (3) **It should not be competent to poind, or to attach under an attachment order proposed in Part 2, cash and negotiable instruments in the debtor's possession.**

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<sup>8</sup> Alberta, Civil Enforcement Act RSA Chap C 10.5; Newfoundland, Judgments Enforcement Act 1998. We understand that these statutes are being considered as models for enforcement legislation for the rest of Canada.

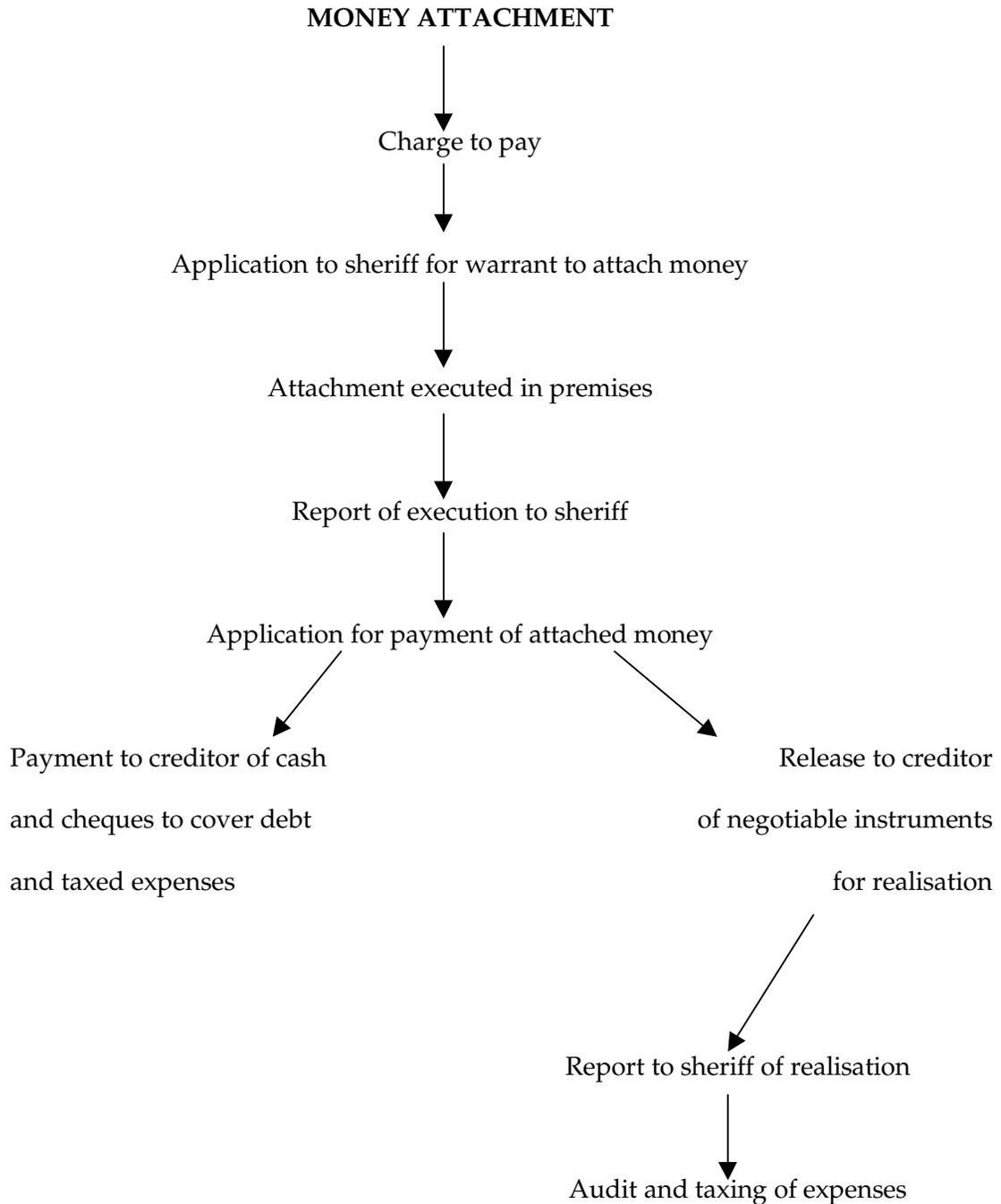
<sup>9</sup> Australian Law Reform Commission, *Report on Debtor Recovery and Insolvency*, No 36 (1987), para 215.

<sup>10</sup> Magistrates Court (Enforcement of Judgments) Act 1994, s 21.

<sup>11</sup> Debtors (Scotland) Act 1987, Part III.

<sup>12</sup> Social Security Administration Act 1992, s 187.

3.8 We set out the main features of money attachment in the following diagram.



### **Application to the sheriff**

3.9 If money attachment were to be introduced, it should be exercisable only in exceptional circumstances. Warrant for money attachment should be available only after the creditor had satisfied the sheriff of the need for it. It should be competent only in execution of court decrees or their equivalents. The creditor must have charged the debtor to pay the debt and the days of charge should have expired without payment

3.10 The diligence of money attachment proper should commence with an application by the creditor to the sheriff for a warrant authorising an officer of court to seize money in the possession of the debtor in specified premises. Under existing legislation, the sheriff court in whose territorial jurisdiction the premises were situated would have exclusive jurisdiction to grant the warrant.<sup>13</sup> The application would not be intimated to the debtor in the first instance, lest intimation defeat the whole purpose of the diligence. The sheriff should however have power of his own accord to order intimation to the debtor and any other interested person.

3.11 As already mentioned, money attachment should be available only in exceptional circumstances. The sheriff should require to be satisfied that there was a real and substantial need for money attachment. The creditor should have to show that the debtor had no substantial assets which could be attached by other diligence. The creditor should also have to show that he had a reasonable belief that sufficient money was present in the specified premises to make the diligence worthwhile. Money attachment should not be used as a "fishing diligence" whereby creditors can have premises searched in the hope of finding money there.

3.12 We propose that:

22. **(1) Money attachment should be competent only if a sheriff, in a special application, grants warrant to officers of court to search for and seize money belonging to the debtor in the debtor's possession. The warrant should specify the premises to be searched.**

**(2) The creditor applying for a warrant should have charged the debtor to pay and the days of charge should have expired without payment. Unless the sheriff otherwise directs, the creditor applying to the sheriff for a warrant of money attachment should not be required to intimate the application to the debtor or others.**

**(3) Before granting a warrant for money attachment the sheriff should be satisfied that:**

**(a) other diligence was either not available or would not provide sufficient to satisfy the debt;**

**(b) there is reasonable cause to believe that there is, or will be, a substantial amount of money in the specified premises; and**

**(c) it would be fair and reasonable to grant the warrant.**

### **Which premises?**

3.13 Should there be any restriction on the type of premises in which money may be searched for and seized? POUNDINGS in dwelling-houses are resented by debtors much more than poundings in business premises. The resentment may be greater in the case of money

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<sup>13</sup> Civil Jurisdiction and Judgments Act 1982, Sch 8, rule 4(1)(d) conferring exclusive jurisdiction in enforcement of judgments on the courts for the place where the judgment has been or is to be enforced.

attachment, where officers of court may have to look into cupboards and drawers rather than simply inventorying the visible furniture and plenishings. On the other hand, prohibiting money attachment in dwelling-houses would provide an incentive for debtors to use their homes as places where money could be kept free from their creditors' diligence.

3.14 We seek views on the following question:

**23. Should it be incompetent for a warrant for money attachment to authorise the seizure of money in a dwelling-house?**

3.15 If money attachment were to be incompetent in dwelling-houses, then the creditor applying for a warrant should have to satisfy the sheriff that the premises specified in the application did not consist of or include a dwelling-house. Furthermore, officers of court executing the warrant would have to refrain from executing the diligence if, on going to the premises, they discovered that it was a dwelling-house. If the premises included a dwelling house, they would have to confine the exercise of their functions to the non-residential section.

**Effect of a warrant for money attachment**

3.16 The sheriff's warrant for money attachment should authorise officers of court to enter the specified premises and to search for and take possession of money found there. Like a warrant for poinding, the warrant for money attachment should authorise the officers to open shut and lockfast places including the entry door. If money attachment is to be competent in dwelling-houses, then we think that, following the rules in poindings<sup>14</sup> officers of court should not normally be entitled to enter a dwelling-house to execute a money attachment if the premises are empty or if only children under the age of 16 are present. Such premises may be entered if the officer has given at least four days prior notice or obtained a special warrant from the sheriff. Another protective provision in poindings which we think should be extended to money attachment restricts the times for executing the diligence. In terms of section 17 of the Debtors (Scotland) Act 1987, no poinding may be executed on a Sunday, Christmas Day, New Year's Day or Good Friday, and poindings may not commence before 8 am or continue after 8 pm except with the prior authority of the sheriff. Diligence involving entry to premises should not be carried out during the night unless the creditor can convince the sheriff of the need for it.

3.17 A warrant for money attachment should authorise a search of the specified premises only. It should not authorise officers to search the persons of debtors or members of their family or any other person present on the premises. Handbags, purses, wallets and similar items should also be exempt from search or seizure. Such searches would be most intrusive and deeply resented.

3.18 We propose that:

**24. (1) A warrant for money attachment should authorise officers of court to enter the specified premises and to search for and take possession of money found there. It should not authorise officers of court to search any person on the**

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<sup>14</sup> Debtors (Scotland) Act 1987, s 17.

premises or to search or take possession of any handbag, purse, wallet or similar item.

(2) A warrant for money attachment should contain a warrant to open shut and lockfast places. Section 18 of the Debtors (Scotland) Act 1987, which restricts powers of entry to dwelling-houses which are empty or in which only children under the age of 16 are present, should apply to money attachments as it applies to poindings.

(3) Section 17 of the Debtors (Scotland) Act 1987, which prohibits poindings on certain days and restricts the hours when they may be executed, should apply to money attachments as it applies to poindings.

### Money attachment schedule

3.19 The officer of court executing a money attachment should be required to complete a schedule of money attachment which would be signed by the officer and the accompanying witness. The schedule, which would be in a prescribed form, would identify the creditor and debtor, refer to the sheriff's warrant and specify the premises in which the warrant is executed. More importantly, it would specify the amount of cash and itemise the negotiable instruments of which the officer had taken possession. The schedule should also inform the debtor that he may make an application to the sheriff for release of all or part of the money on the grounds of hardship. The officer should ask the debtor, or another person present on the premises, to sign a receipt for the cash and negotiable instruments taken. If no such receipt can be obtained, the officer should mention this in his report to the sheriff.

3.20 The officer should either hand the completed schedule of money attachment to the debtor or other person present or, if this is not possible (eg because the debtor refuses to accept the schedule or the premises are empty), leave the schedule on the premises. The money attachment should be treated as executed at the time when the officer of court does either of these acts.

3.21 We propose that:

25. (1) The officer of court executing a money attachment should complete a schedule of money attachment (in the prescribed form) specifying the money taken into possession. The debtor or other person present should be asked to sign a receipt for the money taken.

(2) The officer of court should either hand the completed schedule of money attachment to the debtor or other person present or, where this is not possible, leave it on the premises. The money attachment should be deemed to have been executed at that time.

### Report to the sheriff

3.22 The officer should submit a report of his execution of the warrant of money attachment to the sheriff court of the sheriff who granted the warrant. In practice he would also send a copy to the instructing creditor or his agent. The report would enable the sheriff to supervise the diligence and also provide a formal record of what was attached and the

procedure followed which may be relevant in further proceedings. A report of a pouncing has to be lodged within 14 days<sup>15</sup> and the same period seems apt for money attachment.

3.23 The officer should lodge in court all the cash and negotiable instruments which he has taken into possession and any receipt obtained from the debtor or other person present at the attachment. The sheriff clerk should bank the cash forthwith and retain any negotiable instrument in a safe place, giving the officer a receipt for all the items.

3.24 In summary, we propose that:

26. (1) **The officer of court should lodge with the sheriff clerk of the court which granted the warrant a report of his execution of the money attachment within 14 days of the date of execution.**

(2) **The report should be accompanied by the money seized and the sheriff clerk should forthwith give the officer a receipt for the money so lodged.**

### **Applications by creditor or debtor**

3.25 In due course, the creditor should have to apply to the court for the money to be made available to him in satisfaction of the debt. The application should be intimated by the creditor to the debtor who would be given 14 days in which to object. The sheriff should be empowered to declare the attachment null and order the return of the money if there had been a material irregularity in the diligence. This power should be exercised by the sheriff of his own accord as well as on a motion by the debtor.

3.26 The sheriff should have a wide discretionary power to refuse to order payment to the creditor of all or part of the money attached. This power should, however, be exercisable only on a motion by the debtor or an interested third party. For example, payment should be refused where the debtor satisfies the sheriff that the money is needed for his and his household's necessary living expenses. Another example where payment should be refused would be where a third party, for example the debtor's grown-up son, establishes that the money seized is his. In a business context cash that had been drawn out by the debtor from the bank for the payment of his employees' wages should not be paid to the creditor. Such money is a preferential debt in a sequestration up to a prescribed amount (currently £800<sup>16</sup>) per employee.<sup>17</sup> In exercising his discretion the sheriff should balance the claims of the creditor and the debtor to the money.

3.27 The creditor should be required to apply for payment within a certain short period. There is no reason to delay completion of the diligence where the assets attached are money. We suggest a period of six weeks which should be sufficient for the creditor to be informed of the execution of the diligence and to decide whether or not to apply for payment. If the creditor failed to apply within this period the money attachment should lapse and the sheriff clerk should forthwith return the attached money to the debtor.

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<sup>15</sup> Debtors (Scotland) Act 1987, s 22.

<sup>16</sup> The Bankruptcy (Scotland) Regulations 1985 (SI 1985/1925), reg 14, inserted by The Bankruptcy (Scotland) Amendment Regulations 1986 (SI 1986/1914).

<sup>17</sup> Bankruptcy (Scotland) Act 1985, Sch 3, para 5.

3.28 The debtor or any interested person should be entitled to make an application to the sheriff for release of all or part of the attached money. This application should be capable of being made as soon as the money attachment had been executed. We have already proposed that the schedule of money attachment handed to, or left for, the debtor would inform the debtor of the possibility of making such an application. The application should be intimated to the creditor who should be given an opportunity to oppose it. If the officer had not lodged his report he should be ordered to do so forthwith. In deciding whether to release all or part of the money, the sheriff should exercise his discretion in the same way as he would on opposition by the debtor or a third party to the creditor's application for payment.

3.29 We propose that:

27. (1) **The creditor should be entitled to apply to the sheriff for an order directing the sheriff clerk to payment to him of all or part of the money attached. The debtor should be given an opportunity to oppose.**

(2) **The debtor or any interested third party should be entitled to apply to the sheriff for release of all or part of the money attached. The creditor should be given an opportunity to oppose.**

(3) **The sheriff should have power, of his own accord or on a motion by the debtor or a third party, to declare the attachment null on the ground of a material irregularity whereupon the attached money should be returned.**

(4) **The sheriff should have power, on the debtor's motion, to order all or part of the money attached to be returned. In exercising this discretion the sheriff should be required to balance the respective interests of the debtor and the creditor, but should return to the debtor money which is required for the necessary living expenses of the debtor and his household. Where a third party satisfies the sheriff that money attached belongs to him the sheriff should order it to be paid to the third party.**

(5) **If the creditor's application for payment is not made within six weeks after the date of execution of the money attachment, the diligence should lapse. The application by the debtor or a third party for release should be competent as soon as the money attachment is executed.**

### **Payment to the creditor**

3.30 We turn now to consider how the sheriff's order that all or part of the attached money be paid to the creditor should be implemented. In the case of attached cash which would have been banked under our earlier proposals the sheriff clerk should be directed to pay the creditor by means of a cheque drawn on that bank account. Attached cheques payable to the debtor would have been kept in safe custody by the sheriff clerk. The sheriff should make an order assigning the debtor's rights in them to the sheriff clerk. The sheriff clerk could then pay the cheques into the court bank account on exhibiting the sheriff's order. Once the cheques had cleared the sheriff clerk would be in a position to pay the creditor. We prefer this solution to the sheriff clerk simply handing the cheques to the creditor with an order of the sheriff assigning the debtor's interest to the creditor. Our

proposals enable the court to have a greater degree of supervision of the payment process and avoid further procedure if a cheque is not honoured.

3.31 Other negotiable instruments such as promissory notes or bills of lading may be more difficult than cheques to convert into money. We do not think realising such negotiable instruments is an appropriate task for sheriff clerks. The instruments should be made over to the creditor together with an order from the sheriff transferring the debtor's interest to the creditor. The creditor would then be in a position to realise them and should be under a duty to obtain the best price that could reasonably be obtained. The creditor should be required to submit a report of the realisation showing the amount each instrument was realised for and the expenses of realisation.

3.32 We propose that:

**28. (1) Where the sheriff orders payment of all or part of the attached money to the creditor this should be implemented by:**

**(a) the sheriff clerk sending the creditor a cheque for the attached cash which had been banked and for attached cheques payable to the debtor which had been paid into the court bank account by virtue of an order of the sheriff;**

**(b) the sheriff clerk sending the creditor negotiable instruments other than cheques together with an order of the sheriff transferring the debtor's interest in them to the creditor.**

**(2) The creditor should be under a duty to obtain the best price for the instruments sent to him in terms of paragraph 1(b) above that could reasonably be obtained, and to report to the sheriff clerk with details of the amount realised and the expenses of realisation.**

## **Expenses**

3.33 The general rule in diligence expenses is that the creditor's necessary expenses in executing the diligence are chargeable against the debtor. We see no reason for not applying this rule to money attachment. The creditor's expenses should include the expenses of the applications to the sheriff for a warrant of money attachment and for payment as these are essential steps in the diligence. The expenses of these applications should generally be limited to what would have been incurred if the application were unopposed. The creditor should have to bear his own expenses of further procedure caused by the debtor's opposition and the debtor should bear his own expenses in this regard. As regards other applications each side should bear their own expenses. The sheriff however should have power to vary the rules about expenses of proceedings before him where he considers that a party has acted frivolously.

3.34 The Debtors (Scotland) Act 1987 introduced a rule for poindings and arrestments that the expenses of these diligences would generally be recoverable only by means of that diligence or an insolvency or ranking process.<sup>18</sup> They were not to be recoverable by means of

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<sup>18</sup> S 93.

a separate legal action or other diligence. We suggest that this rule should apply to money attachment. Another brake on speculative money attachments which we propose is that the expenses of obtaining and executing a warrant for money attachment should not be chargeable against the debtor at all if less than the amount of those expenses was attached.

3.35 Where a money attachment consisted only of cash and cheques the creditor could submit an account of the diligence expenses when applying to the sheriff for payment. These expenses should be audited by the auditor of court who would report back to the sheriff. The sheriff would then take the expenses into account in deciding how much of the attached money should be paid to the creditor in order to satisfy the debt, interest accrued and expenses. Where negotiable instruments other than cheques were concerned the final accounting between debtor and creditor would have to be postponed until the creditor's report of realisation was submitted and audited.

3.36 We propose that:

29. (1) **The expenses properly incurred by a creditor in executing the diligence of money attachment should be chargeable against the debtor. The expenses should, unless paid by the debtor, be recoverable from the proceeds of the attachment concerned but (apart from the expenses of the charge) not by any other legal process except supervening insolvency processes or processes for ranking creditors' claims on the attached property.**

(2) **Where the expenses of obtaining a warrant of money attachment and executing it exceed the amount of money attached, the expenses of these steps should not be chargeable against the debtor.**

(3) **Any expenses not recovered by the time the diligence is completed or ceases to have effect should cease to be chargeable against the debtor, except as aforesaid.**

(4) **Each party should bear their own expenses in relation to incidental court applications, but the debtor should be liable for the expenses of the creditor's applications for warrant for money attachment and for payment on the basis that they were unopposed and the court should be empowered to award expenses not exceeding a prescribed sum if an application or an objection was frivolous.**

### **Competition with sequestration and floating charges**

3.37 We turn now to deal with competition between a creditor using money attachment and the trustee in a debtor's subsequent sequestration or the holder of a floating charge. Except in the most unusual circumstances, it is difficult to envisage a competition arising between a money attachment and any other mode of diligence since money would only be attachable by money attachment. Competitions with other rights, e.g. as between the different parties claiming right to a negotiable instrument, could occur but these should be left to be worked out by the courts in accordance with the principles of ranking.

3.38 As regards a competition between a money attachment and a sequestration, we suggest that the rules in relation to poindings and arrestments set out in section 37 of the Bankruptcy (Scotland) Act 1985 should apply to money attachments. The result would be that a money attachment executed within 60 days prior to sequestration should confer no

preference on the creditor except for expenses. If the creditor had been paid in accordance with the sheriff's order he should be bound to pay back the money less expenses to the trustee. A money attachment executed more than 60 days prior to sequestration would however confer a preference on the creditor in a question with the trustee for the amount of the debt, interest accruing and the expenses of the money attachment. These rules should also apply to liquidations.

3.39 Under the current interpretation of the phrase "effectually executed diligence" in section 60(1) of the Insolvency Act 1986 a money attachment executed before the creation of a floating charge would have preference over the charge<sup>19</sup>. Where the money attachment was executed after the creation of the floating charge, the attaching creditor would only obtain a preference over the floating charge if the diligence was completed by the sheriff's order transferring title to the money to the creditor before the floating charge crystallised.

3.40 We propose that:

**30. A money attachment coming into effect within 60 days before the debtor's sequestration or liquidation should be ineffectual in a question with the trustee or liquidator, except as to the expenses of attachment.**

#### **Time to pay**

3.41 While time to pay directions contained in a decree are in effect it would be incompetent to apply for a warrant for money attachment order. No additional provisions are needed to achieve this because a charge, which we propose should be an essential precursor of the application, could not be served unless the debtor defaults.

3.42 The debtor should be entitled to apply for a time to pay order under the Debtors (Scotland) Act 1987 at any time after service of the charge and up until the granting by the sheriff of a warrant for money attachment. An interim order sisting diligence under section 6(3) should prevent the creditor taking any further steps in the diligence and the sheriff should not be entitled to grant a pending application for a warrant which should therefore fall. The time to pay order itself should prohibit the creditor from applying for a warrant for money attachment in respect of that debt.

3.43 Time orders, allowing debtors time to pay, may be granted under section 129 of the Consumer Credit Act 1974. The Act is silent as to the effects of diligence and time orders on each other. We think that the position for a time order should be the same as for a time to pay order.

3.44 We propose that:

**31. (1) An application for a time to pay order under the Debtors (Scotland) Act 1987 should be competent at any time after the service of a charge until the creditor's application for a warrant of money attachment is granted. An interim order under section 6(3) of that Act sisting diligence should prevent the creditor from applying for a warrant and any pending application should fall.**

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<sup>19</sup> *Lord Advocate v Royal Bank of Scotland* 1977 SC 155; *Iona Hotels Ltd v Craig* 1990 SC 330.

(2) The making of a time to pay order should prevent the creditor from applying for a warrant of money attachment.

(3) While a time order under section 129 of the Consumer Credit Act 1974 is in effect, it should be incompetent to apply for or grant a warrant of money attachment.

## **PART 4 LIST OF PROPOSALS AND QUESTIONS**

### **REPLACEMENT OF ADJUDICATION BY NEW DILIGENCES**

1. (1) The diligence of adjudication for debt should be abolished.
- (2) Money and negotiable instruments should be attachable by a new diligence (to be called a money attachment) as set out in Part 3 below.
- (3) Property attachable for debt which is not attachable by any other mode of diligence should be attachable by a new diligence (to be called an attachment order) as set out in Part 2 below.

(Paragraph 1.12)

### **ATTACHMENT ORDERS**

#### **Scope for attachment orders**

2. (1) It should be competent to attach by attachment order any property of the debtor which is:
  - (a) attachable for debt by diligence at common law; but
  - (b) not attachable by any other diligence.
- (2) Any property of the debtor which is exempt from diligence by or under any enactment or rule of law designed to protect him or a third party (such as a member of his family) from undue hardship should not be attachable by an attachment order.

(Paragraph 2.10)

#### **Application for attachment order**

3. An application for an attachment order should be competent only if a charge has been served on the debtor to pay the debt concerned and the days of charge have expired without payment.

(Paragraph 2.15)

4. (1) The sheriff court should have exclusive jurisdiction in applications for attachment orders.

(2) Except where the subjects to be attached are intellectual property (for which a special jurisdictional rule is proposed in proposal 17), the sheriff court for the place where the property sought to be attached is situated (being the place where the judgment is to be enforced) should have exclusive jurisdiction to make an attachment order in accordance with the Civil Jurisdiction and Judgments Act 1982, Schedule 8, rule 4(1)(d).

(Paragraph 2.17)

5. (1) An application for an attachment order should be made by way of summary application.

(2) The sheriff should have power on making an attachment order to make such ancillary orders as he thinks fit for the purpose of facilitating the fair and reasonable operation of the attachment.

(Paragraph 2.23)

### **Effect of attachment**

6. (1) An attachment under an attachment order should confer on the creditor a right over the attached property in security of payment of the debt, interest and expenses chargeable against the debtor.

(2) As from the date of service on the debtor of the schedule of attachment, the attachment should have the effect of a personal prohibition of the debtor from:

(a) assigning or otherwise transferring ownership of the attached property to a third party whether for onerous causes or not; or

(b) creating any subordinate real right (such as a right in security or lease) over the property in favour of a third party.

(3) Infringement of the attachment's prohibition by the debtor, or by a third party who knows that the property is attached, should be treated as a breach of attachment and punishable as a contempt of court.

(4) Any transfer made, or subordinate real right created, by a debtor in breach of the attachment should be voidable at the instance of the creditor unless the debtor's singular successor or grantee acquired right in good faith without notice of the attachment and for value.

(5) An attachment should:

(a) where the attached property is not registrable in a public register of title, operate as a real right or preference in a competition with third parties as from the date of service of the schedule of attachment on the debtor; and

(b) where the attached property is so registrable, operate as such a real right or preference from the date fixed by any enactment or rule of law on the ranking of diligences or other rights transmitting by operation of law registered in that register.

(6) An attachment coming into effect within 60 days before the debtor's sequestration or liquidation should be ineffectual in a question with the trustee or liquidator, except as to the expenses of attachment.

(7) If the attachment order is registered but the schedule of attachment is not served on the debtor, then the expenses of the diligence should not be chargeable against the debtor.

(Paragraph 2.32)

### **Duration of attachment**

7. An attachment should remain in effect for a period of three years following its coming into effect by service of the schedule of attachment.

(Paragraph 2.34)

### **Warrant of sale**

8. (1) A creditor should be entitled to sell the attached property provided that the sheriff grants a warrant of sale. The sheriff clerk should fix a date for the hearing of the creditor's application at which the debtor, the creditor and other interested parties should be entitled to be heard.

(2) The sheriff should have power to refuse to grant a warrant of sale of his own accord or on an objection by any interested person on the ground that:

(a) the attachment is invalid or has ceased to have effect;

(b) the debt is disproportionately small in relation to the value of the attached property; or

(c) the net free proceeds of sale receivable by the attaching creditor are unlikely to exceed the expenses of sale.

(3) The sheriff should have power, on an objection by any interested person, to refuse to grant a warrant of sale or to postpone the grant for a specified period not exceeding 12 months on the ground that a sale of the attached property would be unduly harsh in the circumstances.

(4) The sheriff should have power, on an objection by any interested person, to postpone the grant of a warrant of sale:

(a) for up to 12 months, where the property attached comprises or includes the principal or only residence of the debtor and one or more close relatives of the debtor; or, as the case may be,

(b) for up to six months, where the property attached comprises or includes the principal or only residence of one or more individuals (except where they occupy under a lease from the debtor binding on the creditor).

In sub-paragraph (a), the expression "close relative" has reference to a spouse, a child of the debtor or his spouse, or a child treated by the debtor as such a child.

(5) The sheriff should have power to refuse or to sist the application where another creditor has already obtained a warrant of sale, or intends to exercise a power of sale, of the attached property.

(Paragraph 2.38)

### **Sale of attached property**

9. (1) A creditor should be under a duty to advertise and generally take all reasonable steps to ensure that the attached property is sold for the best price that can reasonably be obtained. The sheriff should be empowered to make orders relating to the manner in which the attached property is to be sold.

(2) A conveyance of the attached property granted in implement of the warrant of sale by the creditor to a purchaser should have the same effect as if it had been granted by the debtor.

(Paragraph 2.41)

### **Expenses of attachment and sale**

10. (1) The expenses properly incurred by a creditor in executing the diligence of attachment and sale under an attachment order should be chargeable against the debtor. The expenses should, unless paid by the debtor, be recoverable from the proceeds of the attachment concerned but (apart from the expenses of the charge) not by any other legal process except supervening insolvency processes or processes for ranking creditors' claims on the attached property.

(2) Any expenses not recovered by the time the diligence is completed or ceases to have effect should cease to be chargeable against the debtor, except as aforesaid.

(3) Each party should bear his own expenses in relation to incidental court applications, but the debtor should be liable for the expenses of an application for an attachment order and an application for warrant to sell on the basis that it was

unopposed and the court should be empowered to award expenses not exceeding a prescribed sum if an application or an objection was frivolous.

(Paragraph 2.45)

### **Report of sale**

11. (1) The creditor executing a warrant of sale should be required to submit to the sheriff a report on sale and diligence expenses in prescribed form within 28 days of the date of settlement of the sale.

(2) The sheriff should have power to make an order imposing on a creditor who makes a report late without reasonable excuse or refuses to make a report, liability in whole or in part for the expenses of attachment otherwise chargeable against the debtor.

(3) The report of sale should be remitted by the sheriff to the auditor of court who should:

- (a) tax the expenses chargeable against the debtor;
- (b) certify the balance due to or by the debtor; and
- (c) report to the sheriff,

after giving interested persons an opportunity to make representations on any alteration of the expenses or balance.

(4) On receiving the auditor's report, the sheriff, after giving interested persons an opportunity to be heard, should have power;

- (a) to declare the above-mentioned balance to be due to or by the debtor, with or without modifications; or
- (b) if the sheriff is satisfied that there has been a substantial irregularity in the diligence, declare it to be void and make consequential orders.

(Paragraph 2.48)

### **Foreclosure**

12. (1) A creditor who fails to sell the attached property should be entitled to apply to the sheriff for an order of foreclosure vesting the property in him at a price to be fixed by the sheriff.

(2) The sheriff should have power to sist the application to allow more time for a purchaser to be found and generally to make any appropriate ancillary order facilitating the foreclosure.

(Paragraph 2.50)

### **Common property and attachment orders**

13. As regards the method of adapting attachment orders for use against the debtor's undivided (*pro indiviso*) share of common property, views are invited on which of the following two options is preferable.

(a) The creditor should have a title to raise an action of division and sale which should be combined with proceedings in the diligence in a manner to be prescribed by rules of court. The provisions on applications for warrant of sale proposed above should apply subject to those rules.

(b) Alternatively, on the analogy of poinding and sale of corporeal moveables, the whole property would be attachable under an attachment order for the debts of one co-owner and the other co-owners would be entitled to obtain release of the property from the attachment on paying the value of the debtor's share, all in the manner described at paragraph 2.52 above.

(Paragraph 2.54)

### **Time to pay and attachment orders**

14. (1) An application for a time to pay order under the Debtors (Scotland) Act 1987 should be competent at any time after the service of a charge until the creditor's application to sell the attached property is granted. An interim order sisting diligence (under section 6(3)) should prevent the creditor taking further steps in the diligence, other than serving a schedule of attachment in pursuance of an existing attachment order. It should be incompetent for the sheriff to grant an attachment order or a warrant of sale and any pending application should fall.

(2) The making of a time to pay order should preclude the creditor from serving a schedule of attachment, and where a schedule has been served the sheriff should prohibit the creditor from taking any further steps in the diligence.

(3) While a time order under section 129 of the Consumer Credit Act 1974 is in effect, it should be incompetent to commence or continue the diligence (other than serving a schedule of attachment in pursuance of an existing attachment order) against the debtor.

(Paragraph 2.58)

## Attachment of intellectual property

15. (1) It should be competent to use an attachment order against any type of intellectual property which, though not attachable by arrestment, is freely assignable or declared by statute as being transmissible by operation of law.
- (2) Without prejudice to that generality, the types of intellectual property attachable by attachment order should include:
- (i) patents, applications for patents, and associated licences, and sub-licences;
  - (ii) plant variety rights;
  - (iii) copyright and associated licences;
  - (iv) industrial designs, design rights and associated licences;
  - (v) author's and performer's rights to equitable remuneration after transfer of rental right;
  - (vi) performers' property rights; and
  - (vii) trade marks and associated applications.

For avoidance of doubt, however, the statutory right to compensation under the Plant Varieties Act 1997, section 5, should not be attachable by attachment order since its correlative obligation is arrestable.

(Paragraph 2.93)

16. (1) Views are sought on what procedure should apply to the attachment of intellectual property where the debtor is a co-owner, along with a third party, of the property?
- (2) Our tentative preference is for the second option in Proposal 13 (paragraph 2.54) above, namely attachment of all shares for the debts of one co-owner coupled with a right on the part of third party co-owners to obtain release of the property on paying the value of the debtor's share.

(Paragraph 2.100)

17. (1) The provisions of the Civil Jurisdiction and Judgments Act 1982, Schedule 8, rule 4(1)(d) (which provides that, in proceedings concerned with the enforcement of judgments, the courts for the place where the judgment has been or is to be enforced has exclusive jurisdiction) should not apply to an application for an attachment order

for the attachment of a form of intellectual property. Instead, jurisdiction in such an application should be conferred on the court for the place where:

(a) the proprietor of the intellectual property has his seat or domicile on the date of the commencement of the proceedings in the application; or

(b) where subparagraph (a) does not apply, the proprietor has an establishment on that date,

(2) The competent authorities should consider whether a similar amendment should be made to the Civil Jurisdiction and Judgments Act 1982, Schedule 4, so that article 16(5) (which provides that, in proceedings concerned with the enforcement of judgments, the courts of the part of the United Kingdom in which the judgment has been or is to be enforced has exclusive jurisdiction) would not apply to an application for an attachment order attaching a form of intellectual property. Instead, jurisdiction in such an application should be conferred on the courts of the part of the United Kingdom where:

(a) the proprietor of the intellectual property has his seat or domicile on the date of the commencement of the proceedings ; or

(b) where subparagraph (a) does not apply, the proprietor has an establishment on that date.

(Paragraph 2.106)

### **Attachment of leases**

18. (1) The tenant's interest in an unregistrable lease should be attachable by attachment order unless the lease contains an express exclusion of assignees or assignation is permitted only with the consent of the landlord (or words to the same effect). A provision which permits assignation with the consent of the landlord, which consent is not to be unreasonably withheld, should not bar attachment.

(2) Should the interest of a debtor as tenant of a croft be attachable by means of an attachment order?

(Paragraph 2.119)

### **Attachment of right to purchase property**

19. The right under a contract to purchase heritable or moveable property should be attachable by attachment order to the extent that it is not arrestable in the hands of the seller.

(Paragraph 2.122)

## **EXTENSION OF ARRESTMENT**

20. Arrestment should be the only competent diligence for attaching:

- (a) shares of the Bank of Scotland;
- (b) debts secured by a floating charge, whatever the nature of the assets charged; and
- (c) sums due under a personal bond where the creditor has no security by way of standard security.

(Paragraph 2.135)

## **MONEY ATTACHMENT**

### **Scope of money attachment**

21. (1) A new diligence (to be called a "money attachment") should be introduced in Scots law for the attachment of cash and negotiable instruments in the debtor's possession.
- (2) The diligence should be authorised by a warrant for money attachment granted by the sheriff on a special application.
- (3) It should not be competent to poind, or to attach under an attachment order proposed in Part 2, cash and negotiable instruments in the debtor's possession.

(Paragraph 3.7)

### **Warrant for money attachment**

22. (1) Money attachment should be competent only if a sheriff, in a special application, grants warrant to officers of court to search for and seize money belonging to the debtor in the debtor's possession. The warrant should specify the premises to be searched.
- (2) The creditor applying for a warrant should have charged the debtor to pay and the days of charge should have expired without payment. Unless the sheriff otherwise directs, the creditor applying to the sheriff for a warrant of money attachment should not be required to intimate the application to the debtor or others.
- (3) Before granting a warrant for money attachment the sheriff should be satisfied that:

- (a) other diligence was either not available or would not provide sufficient to satisfy the debt;
- (b) there is reasonable cause to believe that there is, or will be, a substantial amount of money in the specified premises; and
- (c) it would be fair and reasonable to grant the warrant.

(Paragraph 3.12)

23. Should it be incompetent for a warrant for money attachment to authorise the seizure of money in a dwelling-house?

(Paragraph 3.14)

### **Execution of money attachment**

24. (1) A warrant for money attachment should authorise officers of court to enter the specified premises and to search for and take possession of money found there. It should not authorise officers of court to search any person on the premises or to search or take possession of any handbag, purse, wallet or similar item.

(2) A warrant for money attachment should contain a warrant to open shut and lockfast places. Section 18 of the Debtors (Scotland) Act 1987, which restricts powers of entry to dwelling-houses which are empty or in which only children under the age of 16 are present, should apply to money attachments as it applies to poindings.

(3) Section 17 of the Debtors (Scotland) Act 1987, which prohibits poindings on certain days and restricts the hours when they may be executed, should apply to money attachments as it applies to poindings.

(Paragraph 3.18)

25. (1) The officer of court executing a money attachment should complete a schedule of money attachment (in the prescribed form) specifying the money taken into possession. The debtor or other person present should be asked to sign a receipt for the money taken.

(2) The officer of court should either hand the completed schedule of money attachment to the debtor or other person present or, where this is not possible, leave it on the premises. The money attachment should be deemed to have been executed at that time.

(Paragraph 3.21)

26. (1) The officer of court should lodge with the sheriff clerk of the court which granted the warrant a report of his execution of the money attachment within 14 days of the date of execution.
- (2) The report should be accompanied by the money seized and the sheriff clerk should forthwith give the officer a receipt for the money so lodged.

(Paragraph 3.24)

### **Applications by creditor or debtor**

27. (1) The creditor should be entitled to apply to the sheriff for an order directing the sheriff clerk to payment to him of all or part of the money attached. The debtor should be given an opportunity to oppose.
- (2) The debtor or any interested third party should be entitled to apply to the sheriff for release of all or part of the money attached. The creditor should be given an opportunity to oppose.
- (3) The sheriff should have power, on his own accord or on a motion by the debtor or a third party, to declare the attachment null on the ground of a material irregularity whereupon the attached money should be returned.
- (4) The sheriff should have power, on the debtor's motion, to order all or part of the money attached to be returned. In exercising this discretion the sheriff should be required to balance the respective interests of the debtor and the creditor, but should return to the debtor money which is required for the necessary living expenses of the debtor and his household. Where a third party satisfies the sheriff that money attached belongs to him the sheriff should order it to be paid to the third party.
- (5) If the creditor's application for payment is not made within six weeks after the date of execution of the money attachment, the diligence should lapse. The application by the debtor or a third party for release should be competent as soon as the money attachment is executed.

(Paragraph 3.29)

28. (1) Where the sheriff orders payment of all or part of the attached money to the creditor this should be implemented by:
- (a) the sheriff clerk sending the creditor a cheque for the attached cash which had been banked and for attached cheques payable to the debtor which had been paid into the court bank account by virtue of an order of the sheriff;
- (b) the sheriff clerk sending the creditor negotiable instruments other than cheques together with an order of the sheriff transferring the debtor's interest in them to the creditor.

(2) The creditor should be under a duty to obtain the best price for the instruments sent to him in terms of paragraph 1(b) above that could reasonably be obtained, and to report to the sheriff clerk with details of the amount realised and the expenses of realisation.

(Paragraph 3.32)

### **Expenses of money attachment**

29. (1) The expenses properly incurred by a creditor in executing the diligence of money attachment should be chargeable against the debtor. The expenses should, unless paid by the debtor, be recoverable from the proceeds of the attachment concerned but (apart from the expenses of the charge) not by any other legal process except supervening insolvency processes or processes for ranking creditors' claims on the attached property.

(2) Where the expenses of obtaining a warrant of money attachment and executing it exceed the amount of money attached, the expenses of these steps should not be chargeable against the debtor.

(3) Any expenses not recovered by the time the diligence is completed or ceases to have effect should cease to be chargeable against the debtor, except as aforesaid.

(4) Each party should bear their own expenses in relation to incidental court applications, but the debtor should be liable for the expenses of the creditor's applications for warrant for money attachment and for payment on the basis that they were unopposed and the court should be empowered to award expenses not exceeding a prescribed sum if an application or an objection was frivolous.

(Paragraph 3.36)

### **Sequestration or liquidation**

30. A money attachment coming into effect within 60 days before the debtor's sequestration or liquidation should be ineffectual in a question with the trustee or liquidator, except as to the expenses of attachment.

(Paragraph 3.40)

### **Time to pay**

31. (1) An application for a time to pay order under the Debtors (Scotland) Act 1987 should be competent at any time after the service of a charge until the creditor's application for a warrant of money attachment is granted. An interim order under

section 6(3) of that Act sisting diligence should prevent the creditor from applying for a warrant and any pending application should fall.

(2) The making of a time to pay order should prevent the creditor from applying for a warrant of money attachment.

(3) While a time order under section 129 of the Consumer Credit Act 1974 is in effect, it should be incompetent to apply for or grant a warrant of money attachment.

(Paragraph 3.44)