

Scottish Law Commission

(SCOT. LAW COM. No. 95)

REPORT ON DILIGENCE AND DEBTOR PROTECTION

Volume Two

Appendices

(2 volumes not sold separately)

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EDINBURGH
HER MAJESTY'S STATIONERY OFFICE

PART V

RECOVERY OF RATES AND TAXES ETC.

Recovery of
rates and taxes
etc.

100.—(1) The enactments mentioned in Schedule 5 to this Act shall have effect subject to the amendments specified therein.

(2) A poinding and sale in pursuance of a summary warrant granted under or by virtue of any of the following enactments—

- 1947 c. 43 (a) section 247 of the Local Government (Scotland) Act 1947;
- 1970 c. 9 (b) section 63 of the Taxes Management Act 1970;
- 1983 c. 53 (c) paragraph 3 of Schedule 1 to the Car Tax Act 1983;
- 1983 c. 55 (d) paragraph 6 of Schedule 7 to the Value Added Tax Act 1983;

shall be proceeded with in accordance with Schedule 6 to this Act.

(3) No person shall be imprisoned for failure to pay rates or any tax.

(4) Section 248 of the Local Government (Scotland) Act 1947 and section 64 of the Taxes Management Act 1970 (priority of claims for rates and taxes over other claims) are hereby repealed.

1856 c. 56 (5) The following provisions of the Exchequer Court (Scotland) Act 1856 are hereby repealed—

- (a) in section 28 (extracts of exchequer decrees), the words from “except that” to the end;
- (b) sections 29 to 34 (special modes of diligence for the enforcement of Crown debts);
- (c) section 36 (effects of deceased Crown debtor may be attached by arrestment or poinding);
- (d) section 42 (preference of Crown over other creditors).

EXPLANATORY NOTES

Clause 100

This clause deals with diligence on summary warrants granted for the recovery of rates and taxes and abolishes Exchequer diligence and imprisonment for non-payment of rates and taxes.

Subsection (2)

This subsection implements Recommendations 7.4 (para. 7.20) and 7.5 (para. 7.22).

Subsection (3)

This subsection implements Recommendation 7.17(1) (para. 7.80).

Subsection (4)

This subsection implements Recommendation 7.19 (para. 7.106).

Subsection (5)

This subsection implements Recommendation 7.18 (para. 7.92).

EXPLANATORY NOTES

PART VI MESSENGERS-AT-ARMS AND SHERIFF OFFICERS

Regulation of
organisation,
training, conduct
and procedure.

101.—(1) The Court of Session may by act of sederunt in respect of officers of court—

- (a) regulate their organisation;
- (b) regulate their training and the qualifications required to obtain a commission as messenger-at-arms or sheriff officer;
- (c) regulate their conduct in exercising their functions;
- (d) regulate the scope of their official functions;
- (e) make provision prohibiting the undertaking by them of extra-official activities which appear to the Court to be incompatible with their official functions;
- (f) make provision permitting the undertaking by them of other extra-official activities, not appearing to the Court to be incompatible as aforesaid, which are undertaken by them for remuneration, and the act of sederunt may attach conditions to any such permission;
- (g) prescribe the procedure in respect of applications for a commission as messenger-at-arms under section 103 of this Act or as sheriff officer;
- (h) prescribe the procedure in disciplinary proceedings against them under section 105 of this Act, and provide for the remit of any such proceedings from the Court of Session to a sheriff principal, from one sheriff principal to another sheriff principal and from a sheriff principal to the Court of Session;
- (i) make provision for the keeping of accounts by them and the auditing of those accounts;
- (j) make provision for the keeping of records by them and the inspection of those records;
- (k) make provision in respect of the finding of caution by them;
- (l) make such other provision as may appear to the Court to be necessary or proper.

(2) No extra-official activity (not being an activity prohibited or regulated by an act of sederunt made under subsection (1)(e) or (f) above) may be undertaken by an officer of court for remuneration unless the officer of court obtains the permission of the sheriff principal from whom he holds a commission to his undertaking the activity, but the sheriff principal shall not withhold such permission unless it appears to him that the undertaking by the officer of court of the activity would be incompatible with the officer of court's official functions.

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Clause 101

This clause considerably extends the Court of Session's powers to make regulations concerning officers of court, thus implementing Recommendation 8.5 (para. 8.34).

Subsection (1)

Paragraph (a) implements Recommendation 8.9 (para. 8.61).

Paragraph (b) implements Recommendation 8.8(1) (para. 8.56).

Paragraph (c) implements Recommendations 8.23 (para. 8.130), 8.24 (para. 8.135) and 8.25 (para. 8.137).

Paragraph (d) implements Recommendation 8.22(a) (para. 8.125).

Paragraph (e) implements Recommendations 8.19 (para. 8.110) and 8.20 (para. 8.113).

Paragraph (f) implements Recommendations 8.19 (para. 8.110), 8.20 (para. 8.113) and 8.21 (para. 8.121).

Paragraph (g) implements Recommendation 8.8(3) (para. 8.56).

Paragraph (h) implements Recommendations 8.12(6) (para. 8.84) and 8.13 (para. 8.87).

Paragraphs (i), (j) and (k) implement Recommendation 8.22 (para. 8.125).

Subsections (2) and (3)

These subsections implement Recommendations 8.19 (para. 8.110) and 8.21 (para. 8.121).

(3) The sheriff principal may attach conditions to any permission granted by him under subsection (2) above.

Advisory
Council.

102.—(1) There shall be a body, (to be known as “the Advisory Council on Messengers-at-Arms and Sheriff Officers” and in this section called “the Advisory Council”) whose duties shall be to advise the Court of Session on the making of any act of sederunt under section 101 of this Act and generally to keep under review all matters relating to officers of court.

(2) The Advisory Council shall consist of—

(a) the following persons appointed by the Lord President of the Court of Session—

- (i) a judge of the Court of Session who shall act as chairman;
- (ii) 2 sheriffs principal;
- (iii) 2 officers of court; and
- (iv) a solicitor; and

(b) one person appointed by the Secretary of State.

(3) The secretary of the Advisory Council shall be a full-time clerk of court or sheriff clerk appointed by the Secretary of State.

(4) The members of the Advisory Council shall, so long as they retain the respective qualifications specified in subsection (2) above, hold office for 3 years and be eligible for reappointment.

(5) Any vacancy in the membership of the Advisory Council occurring by death, resignation or other cause prior to the expiry of 3 years after the date of appointment of the member whose office is so vacated shall be filled by the appointment by the person by whom that member was appointed of another person possessing the same qualification:

Provided that any person appointed in pursuance of this subsection to fill a vacancy shall remain a member of the Council only until the expiry of 3 years after the date of the appointment of the member whose office is so vacated, but shall be eligible for reappointment.

(6) The Advisory Council shall have power to regulate the summoning of meetings of the Council and the procedure at such meetings; and at any such meeting 3 members shall be a quorum.

Appointment of
messenger-at-
arms.

103.—(1) The Court of Session, on an application made to it, may find the applicant suitable to be appointed as a messenger-at-arms and recommend such appointment to the Lyon King of Arms; and, on receipt of such a recommendation, the Lyon King of Arms may grant the applicant a commission as a messenger-at-arms.

EXPLANATORY NOTES

Clause 102

This clause establishes the Advisory Council on Messengers-at-Arms and Sheriff Officers with the functions of advising the Court of Session on making acts of sederunt affecting officers of court and of keeping matters relating to officers under review. Subsections (1) and (2) implement Recommendation 8.5(2) and (3) (para. 8.34).

Clause 103

This clause introduces a new procedure for appointment of messengers-at-arms and regulates their functions. By retaining the separate office of messenger-at-arms it implements Recommendation 8.2 (para. 8.16).

Subsections (1) and (5)

These subsections implement Recommendation 8.4 (para. 8.28).

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(2) An application under this section shall be incompetent unless the applicant holds a commission as a sheriff officer.

(3) A messenger-at-arms shall not be authorised by his commission as messenger-at-arms to execute a warrant granted by a sheriff or sheriff clerk.

(4) A messenger-at-arms shall cease to be entitled to hold a commission as messenger-at-arms if he no longer holds a commission as a sheriff officer.

(5) Any rule of law and any other enactment regulating the appointment of messengers-at-arms shall cease to have effect.

Inspection of
work.

104.—(1) The sheriff principal—

(a) may from time to time in relation to any sheriff officer who holds a commission from him, and

(b) shall, if directed to do so by the Court of Session in relation to any sheriff officer who also holds a commission as messenger-at-arms,

appoint such a person as he thinks fit to inspect the work or particular aspects of the work of that officer in his capacity as sheriff officer and if he also holds a commission as a messenger-at-arms, in his capacity as a messenger-at-arms.

(2) A person appointed under subsection (1) above may, and, if the Court of Session directs the sheriff principal so to require shall be required by the sheriff principal to make enquiry as to extra-official activities undertaken for remuneration by any officer of court concerned.

(3) A person appointed as aforesaid shall make a report of his inspection and of any enquiry under subsection (2) above to the sheriff principal and, if the report is concerned with the work or extra-official activities of any messenger-at-arms, shall send a copy thereof to the Court of Session.

(4) A person appointed as aforesaid shall be entitled—

(a) to a fee, unless he is employed full-time in the civil service of the Crown; and

(b) to payment of his outlays incurred,

in connection with an inspection and report under this section, such fee and outlays being payable out of money provided by Parliament.

Investigation of
alleged
misconduct.

105.—(1) This section applies where—

(a) a report under section 104(3) of this Act discloses that an officer of court may have been guilty of misconduct;

EXPLANATORY NOTES

Subsections (2) and (4)

These subsections implement Recommendation 8.8(5) (para. 8.56).

Subsection (3)

This subsection implements Recommendations 7.2 (para. 7.11) and 8.6(1) (para. 8.40).

Clause 104

This clause empowers the Court of Session or a sheriff principal to appoint a person to inspect the work of an officer of court or a firm of officers. It implements Recommendations 8.10 (para. 8.66) and 8.11(1) (para. 8.73).

Clause 105

This clause deals with proceedings against officers of court in respect of alleged misconduct. It implements Recommendation 8.12(1) to (3) and (7) (para. 8.84).

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- (b) a report by a sheriff or a complaint by any other person is made—
 - (i) to the Court of Session alleging misconduct by a messenger-at-arms;
 - (ii) to the sheriff principal from whom a sheriff officer holds a commission alleging misconduct by the officer; or
- (c) any judge of the Court of Session, or a sheriff principal, has reason to believe that an officer of court may have been guilty of misconduct.

(2) Where this section applies, a judge nominated by the Lord President of the Court of Session, or the sheriff principal, after giving the officer of court an opportunity to admit or deny the misconduct or to give an explanation of the matter, may appoint a solicitor to investigate the matter unless the officer of court—

- (a) admits the misconduct in writing, or
- (b) gives a satisfactory explanation of the matter.

(3) Where the solicitor after carrying out an investigation in pursuance of subsection (2) above is of the opinion—

- (a) that there is a probable case of misconduct and that there is sufficient evidence to support such a case, disciplinary proceedings shall be brought at his instance against the officer of court before the relevant court; or
- (b) that there is not a probable case of misconduct or that there is insufficient evidence to support such a case, he shall report that fact to the relevant court.

(4) The solicitor shall be entitled to a fee, and to payment of his outlays incurred, in connection with an investigation and disciplinary proceedings brought by him under this section, such fee and outlays being payable out of money provided by Parliament.

(5) The relevant court may award expenses in any disciplinary proceedings brought under this section in favour of or against either party to the proceedings; and for the purposes of this subsection the party bringing the proceedings shall be deemed to be the Secretary of State.

(6) Where expenses are awarded under subsection (5) above in favour of—

- (a) the officer of court, the expenses shall be recoverable by him from the Secretary of State;
- (b) the Secretary of State, the expenses shall be recoverable from the officer of court by the Secretary of State, who shall pay any expenses so recovered into the Consolidated Fund:

Provided that it shall be incompetent to enforce payment of expenses recoverable under paragraph (a) above by any diligence.

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(7) If the person appointed under section 104(1) of this Act is a solicitor, that person may be appointed as solicitor under subsection (2) above.

(8) In this section "the relevant court" means whichever of the Court of Session or the sheriff principal made the appointment under subsection (2) above.

(9) In this section and section 106 of this Act "misconduct" includes conduct tending to bring the office of messenger-at-arms or sheriff officer into disrepute.

Courts' powers
in relation to
offences or
misconduct.

106.—(1) Where the Court of Session becomes aware that a messenger-at-arms has been convicted by a court of any crime or offence, it may make an order finding that the messenger-at-arms should be suspended from practice or deprived of office.

(2) Where the sheriff principal from whom a sheriff officer holds a commission becomes aware that the sheriff officer has been convicted by a court of any crime or offence, the sheriff principal may make an order suspending the sheriff officer from practice, or depriving him of office, in that sheriffdom.

1974 c. 53

(3) Subsections (1) and (2) above are without prejudice to section 4(3)(b) of the Rehabilitation of Offenders Act 1974; and in those subsections "crime or offence" means any crime or offence of which the officer of court has been convicted before or after he was granted a commission as an officer of court, other than any crime or offence disclosed in his application for such a commission.

(4) Where—

(a) a messenger-at-arms at any time admits in writing that he is guilty of misconduct; or

(b) the Court of Session at the end of disciplinary proceedings under section 105(3)(a) of this Act is satisfied that a messenger-at-arms is guilty of misconduct,

the Court of Session may make one or more of the following orders—

(i) an order finding that the messenger-at-arms should be suspended from practice or deprived of office;

(ii) an order imposing a fine on the officer of court not exceeding £2,500 or such sum as may be prescribed;

(iii) an order censuring him;

(iv) if the misconduct consists of, or includes, the charging of excessive fees or outlays, an order decerning for repayment by the officer of court of the fees or outlays, to the extent that they were excessive, to the person who paid them.

(5) Where—

(a) a sheriff officer at any time admits in writing that he is guilty of misconduct; or

EXPLANATORY NOTES

Clause 106

This clause confers certain powers on the Court of Session and the sheriffs principal as disciplinary authorities in dealing with offences or misconduct committed by officers of court.

Subsections (1) to (3)

These subsections implement Recommendation 8.14 (para. 8.89).

Subsections (4) to (8)

These subsections implement Recommendation 8.12(4), (5) and (8) (para. 8.84).

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- (b) the sheriff principal at the end of disciplinary proceedings under section 105(3)(a) of this Act is satisfied that a sheriff officer is guilty of misconduct,

the sheriff principal may make one or more of the following orders—

- (i) an order suspending the sheriff officer from practice, or depriving him of office, in that sheriffdom;
- (ii) an order mentioned in subsection (4)(ii), (iii) or (iv) above.

(6) Where an officer of court fails to comply with an order under this section imposing a fine on him, the Court of Session or, as the case may be, the sheriff principal may make an order—

- (a) decerning for payment of the fine an extract of which shall contain a warrant in the prescribed form which shall have the same effect as an extract of a decree mentioned in section 112 of this Act; or

- (b) under subsection (4)(i) or (5)(i) above.

(7) In subsection (4)(ii) above “prescribed” means prescribed in regulations made by the Secretary of State by statutory instrument, and any such regulations shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(8) Any fine imposed under this section shall be recoverable by the Secretary of State and shall be paid by him into the Consolidated Fund.

Provisions
supplementary
to s.106.

107.—(1) The Court of Session shall cause intimation to be made of any order under subsection (1) or (4) of section 105 of this Act to—

- (a) every sheriff principal from whom the messenger-at-arms holds a commission as a sheriff officer;
- (b) the Lyon King of Arms.

(2) The sheriff principal shall cause intimation to be made of any order under subsection (2) or (5) of that section—

- (a) to every other sheriff principal from whom the sheriff officer holds a commission as a sheriff officer; and
- (b) if the sheriff officer holds a commission as a messenger-at-arms, to the Court of Session and the Lyon King of Arms.

(3) On intimation under this section of an order under subsection (1), (2), (4)(i) or (5)(i) of the said section 106—

- (a) to a sheriff principal, the sheriff principal shall make an order suspending the sheriff officer concerned from practice, or (as the case may be) depriving him of office, in the sheriffdom;
- (b) to the Lyon King of Arms, the Lyon King of Arms shall suspend the messenger-at-arms concerned from practice or (as the case may be) deprive him of office.

EXPLANATORY NOTES

Clause 107

This clause details the effect which a penalty imposed by one disciplinary authority has on other commissions held by the officer. It implements Recommendation 8.15 (para. 8.91).

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(4) Subject to subsection (3)(b) above, it shall be incompetent for the Lyon King of Arms to discipline a messenger-at-arms or suspend him from practice or deprive him of office.

Appeals from
decisions under
ss.105(5) and
106.

108. Any decision of a Lord Ordinary or a sheriff principal under section 105(5) or section 106(1), (2), (4) or (5) of this Act shall be appealable to the Inner House of the Court of Session, but the decision of the Inner House on any such appeal shall be final.

Execution of
diligence or
warrant null
where officer of
court has
interest.

109.—(1) The execution by an officer of court of diligence, or of a warrant in any proceedings, shall be null if the subject matter of the diligence or proceedings—

- (a) is one in which the officer of court has an interest as an individual; or
- (b) consists of or includes a debt to which any of the circumstances mentioned in subsection (2) below apply.

(2) This subsection applies to the circumstances where the debt is due to—

- (a) a company or firm, and the officer of court—
 - (i) is a director or partner of that company or firm or holds by himself, or along with a business associate or with a member of his family, a controlling interest therein; or
 - (ii) has a pecuniary interest in that company or firm and the principal business of the company or firm is the purchase of debts for enforcement;
- (b) a business associate of the officer of court, or to a member of the officer of court's family;
- (c) a company or firm, and a business associate of the officer of court or a member of the officer of court's family—
 - (i) is a director or partner of that company or firm or holds a controlling interest therein; or
 - (ii) has a pecuniary interest in that company or firm and the principal business of the company or firm is the purchase of debts for enforcement.

(3) Any reference in subsection (2) above to—

- (a) a business associate of an officer of court shall be construed as a reference to a co-director, partner, employer, employee, agent or principal of the officer of court;
- (b) a member of an officer of court's family shall be construed as a reference to the wife or husband, a parent or child, a grandparent or grandchild, or a brother or sister of the officer of court (whether of the full blood or the half-blood or by affinity) and in this paragraph shall include any relative

EXPLANATORY NOTES

Clause 108

This clause regulates appeals arising out of disciplinary proceedings.

Clause 109

This clause makes the execution of a court warrant (connected with diligence, citation or otherwise) null if the officer or a closely connected person, company or firm has an interest in the subject matter of the warrant. It implements Recommendations 8.16 (para. 8.96), 8.17 (para. 8.100) and 8.18 (para. 8.104).

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of the officer of court mentioned therein whether or not the relative's parents are or were married to each other;

- (c) a controlling interest in a company shall be construed in accordance with paragraph 13(7) of Schedule 4 to the Finance Act 1975.

1975 c. 7.

(4) In subsection (3)(a) above "principal" does not include a principal in a contract for the execution of diligence or of a warrant in relation to the debt concerned.

Measure of
damages payable
by officer of
court for
negligence or
other fault.

110. There shall cease to have effect any rule of law whereby, if an officer of court has been found liable to a creditor for negligent delay or failure to execute diligence, or for other fault in the execution of diligence, the damages payable by the officer of court are determined solely by reference to the amount of the debt.

Official identity
card.

111.—(1) An official identity card shall be issued to—

- (a) every messenger-at-arms;
- (b) every sheriff officer,

by or on behalf of the person from whom he holds his commission.

(2) On being requested to show his credentials while performing his official functions, a messenger-at-arms or a sheriff officer shall exhibit his identity card.

EXPLANATORY NOTES

Clause 110

This clause amends the law relating to the quantification of damages claimable by a creditor against an officer for negligent failure or delay to execute diligence. It implements Recommendation 8.26 (para. 8.141).

Clause 111

This clause makes provision for identity cards for officers of court. It implements Recommendation 8.27 (para. 8.145).

PART VII

**WARRANTS FOR DILIGENCE AND CHARGES FOR
PAYMENT**

Warrants for
diligence in
extract decrees
of certain
courts.

112.—(1) Every extract of a decree for the payment of money, or amongst other things for the payment of money, which is pronounced by—

- (a) the Court of Session;
- (b) the High Court of Justiciary; or
- (c) the Court of Teinds,

shall contain a warrant in a form prescribed by act of sederunt or, as the case may be, by act of adjournal which shall have the effect of authorising—

- (i) the charging of the debtor to pay to the creditor within a period specified in the charge the sum or sums specified in the extract and any interest accrued on the sum or sums and, in the event of failure to make such payment within that period, the execution of an earnings arrestment against the debtor's earnings and the poinding of articles belonging to the debtor and, if necessary for the purpose of executing the poinding, the opening of shut and lockfast places;
- (ii) an arrestment other than an arrestment of the debtor's earnings in the hands of his employer; and
- (iii) subject to section 82 of this Act, if the decree consists of or includes a maintenance order, a current maintenance arrestment against the debtor's earnings.

(2) An extract of a decree in an action of poinding of the ground shall contain a warrant in the prescribed form which shall have the effect of authorising a poinding of the ground.

Warrants for
diligence: special
cases.

113.—(1) This section applies where a creditor has acquired by assignation intimated to the debtor, confirmation as executor, or otherwise a right to—

- (a) a decree after it has been extracted; or
- (b) an obligation contained in a document (an extract of which, after the document has been registered in the Books of Council and Session or in sheriff court books, may be obtained containing warrant for execution) after the document has been so extracted; or
- (c) a decree, or such document as is mentioned in paragraph (b) above, before it has been extracted if the creditor has subsequently obtained such an extract; or
- (d) an order or determination which by virtue of any enactment is enforceable as if it were an extract registered decree arbitral bearing a warrant for execution issued by a sheriff;

EXPLANATORY NOTES

Clause 112

This clause regulates the form and effect of warrants for diligence which are appended to extract decrees of various courts (see also Schedule 7, paras. 8, 10 and 23).

Subsection (1)

This subsection implements Recommendation 9.1 (para. 9.7), and in so far as it makes the expiry of a charge for payment of money a precondition of an earnings arrestment implements Recommendation 6.7(1) and (2) (para. 6.59).

Subsection (2)

This subsection implements Recommendation 9.2(3) (para. 9.12).

Clause 113

This clause provides a procedure whereby creditors who acquire rights to a decree or other document containing a warrant for diligence can be authorised to do diligence in their own names. It implements Recommendation 9.2(2) (para. 9.12).

(either directly or through a third party) from a person in whose favour the decree, order or determination was granted or who was the creditor in the obligation contained in the document.

(2) Where this section applies, the creditor who has acquired a right as aforesaid may apply to the appropriate clerk for a warrant having the effect of authorising the execution at the instance of that creditor of any diligence authorised by the extract of the decree or document or by the order or determination, as the case may be.

(3) The applicant under subsection (2) above shall submit to the appropriate clerk—

- (a) an extract of the decree or of the document registered as aforesaid or a certified copy of the order or determination;
- (b) the assignation (along with evidence of intimation to the debtor of the assignation), confirmation as executor or other document establishing the applicant's right.

(4) Where a charge has already been served in pursuance of the decree, order, determination or registered document, then the applicant may, if—

- (a) with his application, he submits the certificate of execution of the charge in addition to the documents mentioned in subsection (3); and
- (b) his application is granted,

execute diligence in pursuance of that charge.

(5) The appropriate clerk shall grant the warrant applied for under subsection (2) above if he is satisfied that the applicant's right is established.

(6) For the purposes of this section, "the appropriate clerk" shall be, where the applicant has acquired a right to—

- (a) a decree granted by the Court of Session or to a document registered (whether before or after such acquisition) in the Books of Council and Session, a clerk of court of the Court of Session;
- (b) a decree granted by the High Court of Justiciary, a clerk of Justiciary;
- (c) a decree granted by a sheriff or to a document registered (whether before or after such acquisition) in the books of a sheriff court, the sheriff clerk of that sheriff court;
- (d) such an order or determination as is mentioned in subsection (1)(d) above, any sheriff clerk.

Abolition of
letters of
horning, horning
and poinding,
poinding, and
caption.

114. The granting of letters of horning, letters of horning and poinding, letters of poinding and letters of caption shall cease to be competent.

EXPLANATORY NOTES

Clause 114

This clause implements Recommendation 9.2(1) (para. 9.12).

Provisions
relating to
charges for
payment.

115.—(1) The execution of a poinding or an earnings arrestment shall be incompetent unless a charge for payment has been served on the debtor and the period for payment specified in the charge has expired without payment being made:

Provided that this subsection shall not apply to a poinding or an earnings arrestment executed in pursuance of a summary warrant

(2) The period for payment specified in any charge for payment served in pursuance of a warrant for execution shall be 14 days if the person on whom it is served is within the United Kingdom and 21 days if he is outside the United Kingdom or his whereabouts are unknown.

(3) Any such charge shall be in a form prescribed by act of sederunt or act of adjournal.

(4) Where any such charge has been served, it shall be incompetent to execute a poinding or an earnings arrestment by virtue of that charge more than 2 years after the date of such service:

Provided that a creditor may reconstitute his right to execute a poinding or an earnings arrestment by the service of a further charge for payment.

(5) No expenses incurred in the service of a further charge for payment shall be chargeable against the debtor.

(6) Registration of certificates of execution of charges for payment in a register of hornings shall cease to be competent.

Enforcement of
certain warrants
and precepts of
sheriff anywhere
in Scotland.

116. The following may be executed anywhere in Scotland—

- (a) a warrant for execution contained in an extract of a decree granted by a sheriff;
- (b) a warrant for execution inserted in an extract of a document registered in sheriff court books;
- (c) a summary warrant;
- (d) a warrant of a sheriff for arrestment on the dependence of an action or in security;
- (e) a precept (issued by a sheriff clerk) of arrestment in security of a liquid debt the term of payment of which has not arrived;

and the warrant or precept may be executed by a sheriff officer of—

- (i) the court which granted it; or
- (ii) the sheriff court district in which it is to be executed.

EXPLANATORY NOTES

Clause 115

This clause regulates the form and effect of charges for payment of money.

Subsection (1)

This subsection implements Recommendations 5.1 (para. 5.9) and 6.7(2) (para. 6.59).

Subsection (2)

This subsection implements Recommendation 5.2 (para. 5.12).

Subsection (3)

The subsection implements Recommendation 5.7(1) (para. 5.32).

Subsections (4) and (5)

These subsections implement Recommendation 5.6 (para. 5.29).

Subsection (6)

This subsection implements Recommendation 9.3 (para. 9.15).

Clause 116

This clause removes the need for warrants of concurrence where the warrant is to be executed in a different sheriffdom from that in which it was granted. It implements Recommendations 7.15 (para. 7.65) and 9.5 (para. 9.26).

PART VIII

MISCELLANEOUS AND GENERAL

General provision relating to liability for expenses in court proceedings.

117.—(1) Subject to subsection (2) below, a debtor shall not be liable to a creditor, nor a creditor to a debtor, for any expenses incurred by the other party in connection with an application, any objections to an application, or a hearing held, under any provision of this Act:

Provided that if—

- (a) any such application is frivolous;
 - (b) the application is opposed on frivolous grounds; or
 - (c) a party requires a hearing to be held on frivolous grounds,
- the sheriff may award a sum of expenses, not exceeding £25 or such amount as may be prescribed, against the party acting frivolously in favour of the other party.

(2) This section is without prejudice to Schedule 1 and paragraphs 25 to 33 of Schedule 6 to this Act (expenses of poinding and sale), and does not apply to any question as to liability for expenses incurred—

- (a) under section 1 of this Act;
- (b) in connection with an appeal under any provision of this Act; or
- (c) by or against a person other than the debtor or a creditor in connection with an application under any provision of this Act.

(3) In subsection (1) above “prescribed” means prescribed in regulations made by the Secretary of State by statutory instrument; and any such regulations shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Recovery from debtor of expenses of certain diligences.

118.—(1) Subject to subsections (3) to (5) below, any expenses chargeable against the debtor which are incurred in—

- (a) a poinding and sale;
- (b) the service of an earnings arrestment schedule;
- (c) an application for, or for inclusion in, a conjoined arrestment order under section 87(1) or 88(5) of this Act;

shall be recoverable from the debtor by the diligence concerned but not by any other legal process; and any such expenses which have not been recovered by the time the diligence is completed or otherwise ceases to have effect shall cease to be chargeable against the debtor.

(2) Subject to subsections (4) and (5) below, any expenses chargeable against the debtor which are incurred in the service of a schedule of arrestment and in an action of furthcoming or sale shall be recoverable

EXPLANATORY NOTES

Clause 117

This clause regulates the liability of debtors and creditors for the expenses of any court proceedings under the Bill. It implements Recommendation 9.8(1) to (3) (para. 9.44).

Clause 118

This clause makes provision for the recovery from the debtor of diligence expenses which are chargeable against the debtor.

Subsection (1)

This subsection implements Recommendation 9.9(1) (para. 9.58).

Subsection (2)

This subsection implements Recommendation 9.9(2) (para. 9.58).

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from the debtor out of the arrested property; and the court shall grant a decree in the action of furthcoming for the balance of any expenses not so recovered.

(3) The sheriff shall, in relation to—

- (a) any expenses awarded by him under paragraph 7 of Schedule 1 or paragraph 29 of Schedule 6 to this Act; or
- (b) any additional sum of expenses awarded by him under paragraph 8 of Schedule 1 or paragraph 30 of Schedule 6 to this Act,

against the debtor in favour of the creditor, grant a decree for those expenses.

(4) Where any diligence mentioned in subsection (1) or (2) above is—

- (a) recalled under section 8(2)(a), (d) or (e) of this Act in relation to a time to pay order;
- (b) rendered ineffectual by a sequestration of the debtor's estate or a debt arrangement scheme;
- (c) rendered unenforceable by virtue of the creditor entering into a composition contract or acceding to a trust deed for creditors or by virtue of the subsistence of a protected trust deed within the meaning of Schedule 5 to the Bankruptcy (Scotland) Act 1985; or
- (d) recalled by a conjoined arrestment order;

then—

- (i) the expenses thereof which were chargeable against the debtor shall remain so chargeable; and
- (ii) if the debtor's obligation to pay the expenses is not discharged under or by virtue of the time to pay order, sequestration, debt arrangement scheme, composition contract, trust deed for creditors or conjoined arrestment order, those expenses shall be recoverable by further diligence in pursuance of the warrant which authorised the original diligence.

(5) Any expenses incurred in the execution of diligence and chargeable against the debtor by virtue of section 18(3) of this Act—

- (a) which are not included in the scheme in pursuance of section 18(4) of this Act; or
- (b) which are so included in a case where—
 - (i) the scheme comes into force but ceases to have effect without a discharge of any of the debts included in the scheme being granted under section 31(1) of this Act, or
 - (ii) the decision confirming the scheme is reversed on appeal on the final determination of the case,

1985 c.

EXPLANATORY NOTES

Subsection (3)

This subsection implements Recommendation 9.9(6) (para. 9.58).

Subsections (4) and (5)

These subsections implement Recommendation 9.9(5) (para. 9.58).

The Debtors (Scotland) Bill

shall be recoverable by further diligence in pursuance of the warrant which authorised the original diligence.

(6) The expenses incurred in the execution of a current maintenance arrestment shall be recoverable by any diligence other than a current maintenance arrestment, and shall be so recoverable in pursuance of the warrant which authorised the current maintenance arrestment.

Ascription of
sums recovered
by diligence or
while diligence
is in effect.

119. Any sums recovered by any of the following diligences—

- (a) a poinding and sale;
- (b) an earnings arrestment;
- (c) an arrestment and action of furthcoming or sale; or
- (d) a conjoined arrestment order in so far as it enforces an ordinary debt;

or paid to account of the sums recoverable by the diligence while the diligence is in effect, shall be ascribed to the following in the order in which they are mentioned—

- (i) the expenses of the diligence already incurred;
- (ii) any interest, due under the decree or other document of debt on which the diligence proceeds, which has accrued at the date of execution of the poinding, earnings arrestment or arrestment, or in the case of an ordinary debt included in a conjoined arrestment order which has accrued at the date of application under section 87(1) or 88(5) of this Act;
- (iii) any sum (including any expenses) due under the decree or such document, other than any expenses or interest mentioned in paragraphs (i) and (ii) above.

Certain
diligences
terminated by
payment or
tender of full
amount owing.

120. Any of the following diligences—

- (a) a poinding and sale;
- (b) an arrestment and action of furthcoming or sale;

shall cease to have effect if the full amount recoverable thereby—

- (i) is paid to the creditor, an officer of court, or any other person who has authority to receive payment on behalf of the creditor; or
- (ii) is tendered to anyone mentioned in paragraph (a) above and the tender is not accepted within a reasonable time;

and any rule of law whereby the diligence mentioned in paragraph (a) or (b) above ceases to have effect on payment or tender of the principal sum of the debt is hereby abolished.

EXPLANATORY NOTES

Subsection (6)

The subsection implements Recommendation 9.9(3) (para. 9.58).

Clause 119

This clause regulates how sums recovered by diligence or paid while the diligence is in effect are to be ascribed. It implements Recommendation 9.9(7) (para. 9.58).

Clause 120

This clause abolishes the present rule that payment of the amount due under the decree prevents further steps in the diligence from being taken to recover the expenses of diligence. It implements Recommendation 9.9(4) (para. 9.58).

The Debtors (Scotland) Bill

Provisions to
assist debtor in
proceedings
under Act.

121.—(1) No fees shall be payable by a debtor, in connection with—

- (a) any application by him;
- (b) objections by him to an application by any other person;
or
- (c) a hearing held,

under any provision of this Act, to any officer of any office or department connected with the sheriff court the expenses of which are paid wholly or partly out of the Consolidated Fund or out of money provided by Parliament.

(2) The sheriff clerk shall, if requested by the debtor—

- (a) provide him with information as to the procedures available to him under this Act;
- (b) assist him in the completion of any form required in connection with any proceedings under this Act:

Provided that the sheriff clerk shall not be liable to the debtor for any failure by him in performing the duties imposed on him by this subsection.

(3) Subsection (2) above is without prejudice to section 5(2) of this Act.

Lay
representation.
1971 c. 58.

122. In relation to any proceedings before the sheriff under any provision of this Act, the power conferred on the Court of Session by section 32 of the Sheriff Courts (Scotland) Act 1971 (power of Court of Session to regulate civil procedure in sheriff court) shall extend to the making of rules permitting a party to such proceedings, in such circumstances as may be specified in the rules, to be represented by a person who is neither an advocate nor a solicitor.

Legal aid.
1967 c. 43.

123. At the end of Part II of Schedule 1 to the Legal Aid (Scotland) Act 1967 (proceedings for which legal aid shall not be given) there shall be added the following paragraph—

“5. Proceedings at first instance under the Debtors (Scotland) Act 1985, other than proceedings in connection with an application under section 1 or 3 of that Act to a Lord Ordinary or to the sheriff in an ordinary cause:

Provided that nothing in this paragraph shall preclude any third party to proceedings under that Act from obtaining legal aid in connection with those proceedings.”.

Sequestration
for rent or
feuduty and
arrestments
other than
earnings
arrestments.

124.—(1) Sections 43 to 45, 48 and 51 of this Act shall apply to a landlord's or superior's right of hypothec and its enforcement by a sequestration for rent or feuduty as they apply to a poinding.

(2) Section 43 of this Act shall apply to an arrestment other than an arrestment of a debtor's earnings in the hands of his employer as it applies to a poinding.

EXPLANATORY NOTES

Clause 121

This clause contains provisions designed to encourage debtors to make use of the courts in connection with applications under this Bill.

Subsection (1)

This subsection implements Recommendation 9.6(5) (para. 9.31).

Subsection (2)

This subsection implements Recommendation 9.6(1) (para. 9.31).

Clause 122

This clause makes provision for lay representation in connection with applications under this Bill. It implements Recommendation 9.6(2) (para. 9.31).

Clause 123

This clause makes provision for legal aid in connection with applications under this Bill and appeals against the granting or refusal of such applications. It implements Recommendation 9.10(1) (para. 9.64).

Clause 124

This clause extends certain new restrictions on poindings to sequestrations for rent or feuduty and arrestments. It implements Recommendation 5.51 (para. 5.244).

Obligations *ad factum praestandum*.

125.—(1) An obligation *ad factum praestandum* which is contained in a document registered in the Books of Council and Session or in sheriff court books shall not by virtue of that registration be enforceable by imprisonment.

(2) A charge of the purpose of enforcing an obligation *ad factum praestandum* which is contained in an extract of a decree or of a document registered as aforesaid shall be incompetent.

Adjudication for debt.

126. It shall be incompetent for a creditor to raise an action of adjudication for debt to enforce a debt payable under a liquid document of debt unless—

- (a) the debt has been constituted by decree; or
- (b) the document of debt or, if the document is a bill of exchange or a promissory note, a protest of the bill or note, has been registered for execution in the Books of Council and Session or in sheriff court books.

Procedure in diligence proceeding on extract of registered document etc.

127. The Court of Session may by act of sederunt—

- (a) regulate and prescribe the procedure and practice in; and
- (b) prescribe the form of any document to be used in, or for the purposes of—

diligence proceeding—

- (i) on an extract of a document which has been registered for execution in the Books of Council and Session or in sheriff court books; or
- (ii) on an order or a determination which by virtue of any enactment is to be treated as if it were so registered.

Appeals.

128.—(1) Subject to subsection (7) below and sections 27(5), 34(9), 40(3), 46(2), 62(6), 69(5), 78(5), 87(12), 88(9) and 92(7) of this Act and paragraphs 5(2), 10(4) and 17(3) of Schedule 6 thereto, an appeal may be taken against any decision of the sheriff under this Act but only on a question of law and with the leave of the sheriff; and section 38 of the Sheriff Courts (Scotland) Act 1971 (appeal in summary causes) shall not apply to any appeal or any further appeal taken under this Act.

1971 c. 58.

(2) Any appeal against a decision of the sheriff under subsection (1) above must be taken within a period of 14 days after the date when the decision which is appealed against was made.

(3) Any decision of the Lord Ordinary on an application under section 1 or 3(4) of this Act shall be appealable but only on a question of law and with the leave of the Lord Ordinary.

(4) Except in so far as any provision of this Act otherwise provides, any decision of the sheriff under this Act or of the Lord Ordinary

EXPLANATORY NOTES

Clause 125

This clause modifies the law relating to the enforcement of obligations *ad factum praestandum* contained in decrees and documents registrable for execution. It implements Recommendation 9.4 (para. 9.22).

Clause 126

This clause amends the law relating to actions of adjudication. It implements Recommendation 3.8 (para. 3.37).

Clause 127

This clause empowers the Court of Session to regulate diligence and diligence forms proceeding on extracts from books of court. It implements Recommendation 9.14 (para. 9.79).

Clause 128

This clause deals with appeals taken against any decision on an application made under this Bill.

Subsections (1) to (3)

These subsections implement Recommendation 9.11 (para. 9.70).

Subsections (4) to (7)

These subsections implement Recommendation 9.12 (para. 9.74).

The Debtors (Scotland) Bill

shall take effect as soon as it is made and shall remain in effect unless and until—

- (a) it is reversed on appeal; and either
- (b) the period allowed for further appeal has expired without an appeal being taken; or
- (c) if such a further appeal has been taken, the matter has been finally determined in favour of the reversal of the sheriff's or Lord Ordinary's decision.

(5) No decision reversing a decision of the sheriff or Lord Ordinary under this Act shall have retrospective effect.

(6) A court to which an appeal under this Act or a further appeal is taken may—

(a) before it disposes of the appeal, make such interim order; and

(b) on determining the appeal, make such supplementary order, as it thinks necessary or reasonable in the circumstances.

(7) Nothing in this section shall apply in relation to any decision of a court under Part VI of this Act.

Application to
Crown.
1947 c. 44

129. Without prejudice to the Crown Proceedings Act 1947, this Act shall bind the Crown acting in its capacity as a creditor or employer.

General
Interpretation.

130. In this Act, unless the context otherwise requires—

“earnings” has the meaning assigned by section 73 of this Act;

“employer” has the meaning assigned by section 73(4) of this Act;

“maintenance” has the meaning assigned by section 74 of this Act;

“maintenance order” has the meaning assigned by section 74 of this Act;

“net earnings” has the meaning assigned by section 73(3) of this Act;

“officer of court” means a messenger-at-arms or a sheriff officer;

“ordinary debt” has the meaning assigned by section 99 of this Act;

“pay day” has the meaning assigned by section 75 of this Act;

“prescribed” means prescribed by act of sederunt;

“summary warrant” means a summary warrant granted under any of the enactments mentioned in Schedule 5 to this Act.

EXPLANATORY NOTES

Clause 129

This clause implements Recommendation 9.13 (para. 9.77).

The Debtors (Scotland) Bill

Minor and consequential amendments, transitional provisions and repeals.

131.—(1) The enactments mentioned in Schedule 7 to this Act shall have effect subject to the amendments respectively specified in that Schedule, being minor amendments or amendments consequential on the provisions of this Act.

(2) The transitional provisions contained in Schedule 8 to this Act shall have effect.

(3) The enactments set out in Schedule 9 to this Act are hereby repealed to the extent specified in the third column of that Schedule.

Short title, commencement and extent.

132.—(1) This Act may be cited as the Debtors (Scotland) Act 1985.

(2) This Act (except section 102 and this section) shall come into force on such day as the Secretary of State may by order made by statutory instrument appoint.

(3) This Act extends to Scotland only.

EXPLANATORY NOTES

SCHEDULES

Section 70.

SCHEDULE 1

EXPENSES OF POINDING AND SALE

Expenses chargeable against the debtor

1.—(1) Subject to paragraphs 2, 3, 5 and 6 of this Schedule, there shall be chargeable against the debtor any expenses incurred in taking any of the following steps—

- (a) in serving one charge;
- (b) in serving a notice and a copy thereof under section 45 of this Act before entering a dwellinghouse for the purpose of executing a poinding;
- (c) in executing a poinding under section 46(1) of this Act;
- (d) in making a report under section 46(5) of this Act of the redemption by the debtor of any poinded article;
- (e) in granting a receipt under subsection (6) of section 46 of this Act for payment for redemption under subsection (5) of that section;
- (f) in making a report under section 47 of this Act of the execution of a poinding, but not in applying for an extension of time for the making of such a report;
- (g) in applying for a warrant of sale under section 52(1) of this Act;
- (h) in making intimation, serving a copy of the warrant of sale and giving public notice under section 56 of this Act;
- (i) in removing any articles for sale in pursuance of a warrant of sale;
- (j) in making arrangements for, conducting and supervising the sale;
- (k) in granting a receipt under section 53(3) of this Act for payment for the release or redemption of poinded articles;
- (l) in making a report under section 53(5)(b) of this Act of the release or redemption of poinded articles;
- (m) in making a report of an agreement under section 58(3) of this Act;
- (n) subject to subsection (2) of section 61 of this Act, in making a report of sale under that section;
- (o) in granting a receipt under section 67(4) of this Act for payment for the release from a poinding of any article which is owned in common;
- (p) in making a report under section 67(6)(b) of this Act of the release of any such article;
- (q) in opening shut and lockfast places in the execution of the diligence.

EXPLANATORY NOTES

Schedule 1

This schedule regulates liability for expenses in connection with the diligence of poinding and sale.

Paragraph 1

This paragraph implements Recommendations 9.7(2) (para. 9.36) and 9.8(4) (para. 9.44).

(2) The Secretary of State may by regulations made by statutory instrument amend any of paragraphs (a) to (q) of sub-paragraph (1) above or may delete any of, or add to, the steps specified therein.

(3) No regulations shall be made under sub-paragraph (2) above unless a draft of the regulations has been laid before Parliament and approved by resolution of each House of Parliament.

2. Where a warrant of sale is varied under section 57 of this Act, there shall be chargeable against the debtor the expenses incurred in the application for the variation and the execution of the warrant of sale as varied but, subject to paragraph 4 of this Schedule, not in the application for, and the execution of, the original warrant of sale.

3. Where arrangements for a sale are cancelled under subsection (1) of section 58 of this Act, then; if new arrangements are made for the sale in the circumstances mentioned in subsection (4)(a) of that section, there shall be chargeable against the debtor the expenses incurred in the making of the new arrangements but not in the making of the arrangements which have been cancelled.

4. Where a warrant of sale is varied under section 57 of this Act and the sheriff has awarded an additional sum of expenses under paragraph 8 of this Schedule in the application for the original warrant of sale, that sum shall be chargeable against the debtor.

5. Where any such further poinding as is mentioned in section 63(3) of this Act has been executed, there shall be chargeable against the debtor the expenses incurred in that poinding process but not the expenses incurred in the original poinding process.

6. Where a new date is arranged under section 57(9) of this Act for the holding of the sale or for the removal of the articles for sale, there shall be chargeable against the debtor the expenses incurred in connection with arranging the new date but not those incurred in connection with arranging the original date.

Circumstances where liability for expenses is at the discretion of the sheriff

7. The liability for any expenses incurred by the creditor or the debtor—

(a) in an application by the creditor or an officer of court to the sheriff under any provision of Part III of this Act, other than an application for a warrant of sale under section 52(1) of this Act or an application for variation of a warrant of sale under section 57(1) of this Act; or

(b) in implementing an order under—

(i) section 46(2) of this Act (order for security or immediate disposal of poinded articles); or

(ii) section 64 or 65 of this Act (orders dealing with breach of poinding),

shall be as determined by the sheriff.

EXPLANATORY NOTES

Paragraphs 2 and 4

These paragraphs implement Recommendation 9.8(4) (para. 9.44).

Paragraphs 3 and 6

These paragraphs implement Recommendation 9.7(4) (para. 9.36).

Paragraph 5

This paragraph implements Recommendation 5.25(3) (para. 5.120).

Paragraph 7

Sub-paragraph (a) implements Recommendation 9.8(3) (para. 9.44) and ***sub-paragraph (b)*** implements Recommendation 9.7(3) (para. 9.36).

The Debtors (Scotland) Bill

Calculation of amount chargeable against debtor under the foregoing provisions

8. Expenses—

- (a) chargeable against the debtor by virtue of any of paragraphs 1 to 5 of this Schedule in respect of an application under Part III of this Act; or
- (b) awarded by the sheriff against the debtor in favour of the creditor in a determination under paragraph 7 of this Schedule in respect of an application other than an application under section 64 or 65 of this Act,

shall be calculated, whether or not the application is opposed by the debtor, as if it were unopposed, except that, if the debtor opposes the application on grounds which appear to the sheriff to be frivolous, the sheriff may award an additional sum of expenses, not exceeding £25 or such amount as may be prescribed, against the debtor.

Circumstances where no expenses are due to or by either party

9. The debtor shall not be liable to the creditor nor the creditor to the debtor for any expenses incurred by the other party—

- (a) in an application by the debtor to the sheriff under any provision of Part III of this Act;
- (b) in connection with a hearing held by virtue of section 49(4)(b), 52(4), 57(5) or 61(6) of this Act:

Provided that if—

- (i) the application or the opposition to the application appears to the sheriff to be frivolous; or
- (ii) a party requires a hearing to be held on grounds which appear to the sheriff to be frivolous,

the sheriff may award a sum of expenses, not exceeding £25 or such amount as may be prescribed, against the party acting frivolously in favour of the other party.

Supplementary

10.—(1) Any expenses chargeable against the debtor by virtue of any provision of this Schedule shall be recoverable out of the proceeds of sale.

(2) In paragraph 8, and in the proviso to paragraph 9, of this Schedule, “prescribed” means prescribed in regulations made by the Secretary of State by statutory instrument; and any such regulations shall be subject to annulment in pursuance of a resolution of either House of Parliament.

EXPLANATORY NOTES

Paragraphs 8 to 10

These paragraphs implement Recommendation 9.8(3) (para. 9.44).

Section 73(2)(e).

SCHEDULE 2

ENACTMENTS PROVIDING BENEFITS WHICH ARE NOT
TO BE TREATED AS DEBTOR'S EARNINGS

1. The Family Income Supplements Act 1970 (c.55)
2. The Social Security Acts 1975 (cc.14 and 60)
3. The Industrial Injuries and Diseases (Old Cases) Act 1975
(c.16)
4. The Child Benefit Act 1975 (c.61)
5. The Supplementary Benefits Act 1976 (c.71)

EXPLANATORY NOTES

Schedule 2

This schedule implements Recommendation 6.3(5) (para. 6.45).

SCHEDULE 3

DEDUCTIONS TO BE MADE UNDER EARNINGS
ARRESTMENT

TABLE A—DEDUCTIONS WHERE EMPLOYEE PAID
WEEKLY

Net Earnings					Deduction £
£0.00-35	..	..	..	..	Nil
£35.01-40	..	..	..	..	1
£40.01-45	..	..	..	..	2
£45.01-50	..	..	..	..	3
£50.01-55	..	..	..	..	4
£55.01-60	..	..	..	..	5
£60.01-65	..	..	..	..	6
£65.01-70	..	..	..	..	7
£70.01-75	..	..	..	..	8
£75.01-80	..	..	..	..	9
£80.01-85	..	..	..	..	10
£85.01-90	..	..	..	..	11
£90.01-95	..	..	..	..	12
£95.01-100	..	..	..	..	13
£100.01-110	..	..	..	..	15
£110.01-120	..	..	..	..	17
£120.01-130	..	..	..	..	19
£130.01-140	..	..	..	..	21
£140.01-150	..	..	..	..	23
£150.01-160	..	..	..	..	26
£160.01-170	..	..	..	..	29
£170.01-180	..	..	..	..	32
£180.01-190	..	..	..	..	35
£190.01-200	..	..	..	..	38
£200.01-220	..	..	..	..	46
£220.01-240	..	..	..	..	54
£240.01-260	..	..	..	..	63
£260.01-280	..	..	..	..	73
£280.01-300	..	..	..	..	83
Over £300	..	..	..	..	£83 in respect of first £300 plus 50 per cent. of remaining balance.

EXPLANATORY NOTES

Schedule 3

This schedule implements Recommendation 6.9 (para. 6.76).

The Debtors (Scotland) Bill

TABLE B—DEDUCTIONS WHERE EMPLOYEE PAID
MONTHLY

Net Earnings					Deduction £
£0.00-152	..	..	..	..	Nil
£152.01-170	..	..	..	..	5
£170.01-185	..	..	..	..	8
£185.01-200	..	..	..	..	11
£200.01-220	..	..	..	..	14
£220.01-240	..	..	..	..	18
£240.01-260	..	..	..	..	22
£260.01-280	..	..	..	..	26
£280.01-300	..	..	..	..	30
£300.01-320	..	..	..	..	34
£320.01-340	..	..	..	..	38
£340.01-360	..	..	..	..	42
£360.01-380	..	..	..	..	46
£380.01-400	..	..	..	..	50
£400.01-440	..	..	..	..	58
£440.01-480	..	..	..	..	66
£480.01-520	..	..	..	..	74
£520.01-560	..	..	..	..	82
£560.01-600	..	..	..	..	90
£600.01-640	..	..	..	..	98
£640.01-680	..	..	..	..	109
£680.01-720	..	..	..	..	121
£720.01-760	..	..	..	..	133
£760.01-800	..	..	..	..	145
£800.01-900	..	..	..	..	180
£900.01-1,000	..	..	..	..	220
£1,000.01-1,100	..	..	..	..	262
£1,100.01-1,200	..	..	..	..	312
£1,200.01-1,300	..	..	..	..	362
Over £1,300	..	..	..	..	£362 in respect of first £1,300 plus 50 per cent. of the remaining balance.

EXPLANATORY NOTES

The Debtors (Scotland) Bill

TABLE C—DAILY DEDUCTIONS WHERE NET EARNINGS
REQUIRE TO BE CALCULATED ON A DAILY BASIS

Net Daily Earnings					Deduction
					£ p
£0.00-5	..	..	..	..	Nil
£5.01-6	..	..	..	..	0.15
£6.01-7	..	..	..	..	0.30
£7.01-8	..	..	..	..	0.45
£8.01-9	..	..	..	..	0.60
£9.01-10	..	..	..	..	1.00
£10.01-11	..	..	..	..	1.20
£11.01-12	..	..	..	..	1.40
£12.01-13	..	..	..	..	1.60
£13.01-14	..	..	..	..	1.80
£14.01-15	..	..	..	..	2.00
£15.01-17	..	..	..	..	2.40
£17.01-19	..	..	..	..	2.70
£19.01-21	..	..	..	..	3.20
£21.01-23	..	..	..	..	3.70
£23.01-25	..	..	..	..	4.30
£25.01-27	..	..	..	..	5.00
£27.01-30	..	..	..	..	6.00
£30.01-33	..	..	..	..	7.00
£33.01-36	..	..	..	..	8.50
£36.01-39	..	..	..	..	10.00
£39.01-42	..	..	..	..	11.50
Over £42 ..	..	..	..	..	£11.50 per day in respect of first £42 plus 50 per cent. of the remaining balance.

EXPLANATORY NOTES

1. The first part of the text is a general statement about the importance of the study. It is followed by a list of the main objectives of the study.

2. The second part of the text is a detailed description of the methodology used in the study. It includes information about the sample size, the data collection methods, and the statistical analysis.

3. The third part of the text is a discussion of the results of the study. It includes a comparison of the findings with previous research and a conclusion about the significance of the study.

4. The fourth part of the text is a conclusion about the study. It includes a summary of the main findings and a statement about the limitations of the study.

5. The fifth part of the text is a list of references. It includes a list of the books, articles, and other sources that were used in the study.

6. The sixth part of the text is a list of appendices. It includes a list of the tables, figures, and other supplementary material that are included in the study.

7. The seventh part of the text is a list of footnotes. It includes a list of the notes that are included in the study.

8. The eighth part of the text is a list of acknowledgments. It includes a list of the people and organizations that provided support for the study.

9. The ninth part of the text is a list of abbreviations. It includes a list of the abbreviations that are used in the study.

10. The tenth part of the text is a list of symbols. It includes a list of the symbols that are used in the study.

11. The eleventh part of the text is a list of definitions. It includes a list of the definitions that are used in the study.

12. The twelfth part of the text is a list of references. It includes a list of the books, articles, and other sources that were used in the study.

DISBURSEMENTS BY SHERIFF CLERKS UNDER
CONJOINED ARRESTMENT ORDER

1. Where all the debts are ordinary debts, in every disbursement by the sheriff clerk, each creditor shall be paid the same proportion of the amount of his debt.

2. Where all the debts are current maintenance, then, in any such disbursement, if the sum available for disbursement is—

- (a) sufficient to satisfy every creditor in respect of the amount of maintenance payable to every creditor for the number of days between the pay day in respect of which the sum to be disbursed was received by the sheriff clerk and the immediately preceding pay day, each creditor shall be paid that amount;
- (b) insufficient to satisfy every creditor in respect of the amount of maintenance specified in paragraph (a) above, each creditor shall be paid the same proportion of that amount.

3. Where the debts comprise both ordinary debts and current maintenance, then, in any such disbursement—

- (a) if only one of the debts is an ordinary debt, the creditor in that debt shall be paid the sum which would be payable to him if the debt were being enforced by an earnings arrestment;
- (b) if more than one of the debts is an ordinary debt, each of the creditors in those debts, out of the sum which would be payable to a creditor if the debt were a single debt being enforced by an earnings arrestment, shall be paid the same proportion of the amount of his debt;
- (c) if only one of the debts is current maintenance, the creditor in that debt shall be paid the sum which would be payable to him under section 79 of this Act if the debt were being enforced by a current maintenance arrestment;
- (d) if more than one of the debts is current maintenance, each of the creditors in those debts shall receive a payment in accordance with paragraph 2 of this Schedule:

Provided that, if the sum available for any disbursement is insufficient to enable the provisions of this paragraph to operate both in relation to the ordinary debts and the current maintenance, priority shall be given in the disbursement to the ordinary debts.

4. For the purposes of this Schedule, the amount of an ordinary debt—

- (a) of a creditor whose debt was being enforced by an earnings arrestment which was recalled under section 87(3) of this Act, shall be the amount specified in the earnings arrestment schedule;

EXPLANATORY NOTES

Schedule 4

This schedule regulates the apportionment amongst the conjoined creditors of sums received by the sheriff clerk from the debtor's employer under a conjoined arrestment order.

Paragraphs 1 and 4

These paragraphs implement Recommendation 6.44(1) to (3) (para. 6.244).

Paragraph 2

This paragraph implements Recommendation 6.46(2) (para. 6.252).

Paragraph 3

This paragraph implements Recommendation 6.47 (para. 6.255).

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- (b) of any other creditor, shall be the amount specified in the conjoined arrestment order or the order under section 88(5) of this Act.

5. In paragraph 2(a) of this Schedule, the reference to the immediately preceding pay day, in a case where the pay day in respect of which the sum is to be disbursed was the first day on which the employer concerned paid earnings to the debtor, shall be construed as a reference to the date on which the sheriff clerk served a copy of the conjoined arrestment order on that employer.

EXPLANATORY NOTES

SCHEDULE 5

RECOVERY OF RATES AND TAXES ETC.

The Local Government (Scotland) Act 1947 (c.43)

1. For section 247 there shall be substituted the following sections—

“Recovery of rates. 247.—(1) Subject to subsections (4) and (5) below, arrears of rates may be recoverable by the collector of rates of a rating authority by diligence—

- (a) authorised by a summary warrant granted under subsection (2) below; or
- (b) in pursuance of a decree granted in an action of payment.

(2) Subject to subsection (4) below, the sheriff, on an application by the collector of rates accompanied by a certificate by the collector of rates—

- (a) stating that none of the persons specified in the application has paid the rates due by him;
- (b) stating that the collector has given written notice to each such person requiring him to make payment of the amount due by him within a period of 14 days after the date of the giving of the notice;
- (c) stating that the said period of 14 days has expired without payment of the said amount; and
- (d) specifying the amount due and unpaid by each such person,

shall grant a summary warrant in a form prescribed by act of sederunt authorising the recovery by any of the diligences mentioned in subsection (3) below of the amount remaining due and unpaid along with a surcharge of 10 per cent. (or such percentage as may be prescribed) of that amount.

(3) The diligences referred to in subsection (2) above are—

- (a) a poinding and sale in accordance with Schedule 6 to the Debtors (Scotland) Act 1985;
- (b) an earnings arrestment;
- (c) an arrestment and action of furthcoming or sale.

(4) It shall be incompetent for the sheriff to grant a summary warrant under subsection (2) above in

EXPLANATORY NOTES

Schedule 5

This schedule amends the various statutes dealing with the recovery of rates and taxes by means of summary warrants. The technique used is to insert new provisions in place of the existing provisions.

Paragraph 1

This paragraph deals with local government rates. *New section 247(1)* and (2) restate the existing law in a different form. *New section 247(3)* implements Recommendations 7.3 (para. 7.18) and 7.4 (para. 7.20). *New section 247(4)* and (5) implement Recommendation 7.1 (para. 7.8). *New section 247(6)* restates the existing law. *New section 247(7)*, authorising the variation by regulations of the amount of the surcharge (currently 10%) contained in subsection (2) above, implements Recommendation 7.13 (para. 7.57). *New section 247A* implements Recommendations 7.2 (para. 7.11) and 7.14 (para. 7.61).

The Debtors (Scotland) Bill

respect of rates due by a debtor if an action has already been raised for the recovery of those rates; and without prejudice to subsection (5) below, on the raising of an action for the recovery of rates, any existing summary warrant in so far as it relates to the recovery of those rates shall cease to have effect.

(5) It shall be incompetent to raise an action for the recovery of rates if, in pursuance of a summary warrant, any of the diligences mentioned in subsection (3) above for the recovery of those rates has been executed.

(6) In any proceedings for the recovery of rates, whether by summary warrant or otherwise, no person shall be entitled to found upon failure of the rating authority or any other authority to comply with any provision of this Part of this Act relating to the date by which something shall be done, not being a provision in this section or a provision regulating the diligence.

(7) Regulations under subsection (2) above shall be made by statutory instrument and shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Sheriff officer's
fees and
outlays.

247A.—(1) Subject to subsection (2) below and without prejudice to paragraphs 25 to 33 of Schedule 6 to the Debtors (Scotland) Act 1985 (expenses of poinding and sale), the sheriff officer's fees, together with the outlays necessarily incurred by him, in connection with the execution of a summary warrant shall be chargeable against the debtor.

(2) No fee shall be chargeable by the sheriff officer against the debtor for collecting, and accounting to the collector of rates for, sums paid to him by the debtor in satisfaction of the amount owing to the creditor.”.

The Taxes Management Act 1970 (c.9)

2. For section 63 there shall be substituted the following sections—

“Recovery of
tax in
Scotland.

63.—(1) Subject to subsection (3) below, in Scotland, where any tax is due and has not been paid, the sheriff, on an application by the collector accompanied by a certificate by the collector—

(a) stating that none of the persons specified in the application has paid the tax due by him;

EXPLANATORY NOTES

Paragraphs 2 to 4

These paragraphs make provision for recovery of tax similar to the provisions of paragraph 1 on recovery of rates. They implement, in addition to the recommendations noted above, Recommendation 7.11 (para. 7.48).

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- (b) stating that the collector has demanded payment under section 60 of this Act from each such person of the amount due by him;
- (c) stating that 14 days have elapsed since the date of such demand without payment of the said amount; and
- (d) specifying the amount due and unpaid by each such person,

shall grant a summary warrant in a form prescribed by act of sederunt authorising, by any of the diligences mentioned in subsection (2) below, the recovery of the amount remaining due and unpaid.

(2) The diligences referred to in subsection (1) above are—

- (a) a poinding and sale in accordance with Schedule 6 to the Debtors (Scotland) Act 1985;
- (b) an earnings arrestment;
- (c) an arrestment and action of furthcoming or sale.

(3) It shall be incompetent for the sheriff to grant a summary warrant under subsection (1) above in respect of tax due by a debtor if an action has already been raised for the recovery of that tax; and, without prejudice to section 68A of this Act, on the raising of an action for the recovery of tax, any existing summary warrant in so far as it relates to the recovery of that tax shall cease to have effect.

Sheriff officer's
fees and
outlays.

63A.—(1) Subject to subsection (2) below and without prejudice to paragraphs 25 to 33 of Schedule 6 to the Debtors (Scotland) Act 1985 (expenses of poinding and sale), the sheriff officer's fees, together with the outlays necessarily incurred by him, in connection with the execution of a summary warrant shall be chargeable against the debtor.

(2) No fee shall be chargeable by the sheriff officer against the debtor for collecting, and accounting to the collector for, sums paid to him by the debtor in satisfaction of the amount owing to the creditor.”.

3. At the end of section 68 there shall be added the following subsection —

“(3) As respects Scotland, this section is subject to section 68A of this Act.”.

4. After section 68 there shall be inserted the following section—

EXPLANATORY NOTES

The Debtors (Scotland) Bill

“Execution of diligence under summary warrant to preclude action for payment in Scotland.

68A. As respects Scotland, it shall be incompetent to raise an action for the recovery of tax if, in pursuance of a summary warrant, any of the diligences mentioned in section 63(2) of this Act for the recovery of that tax has been executed.”.

5. In section 69(a) for “68” there shall be substituted “68A”.

The Car Tax Act 1983 (c.53)

6. In paragraph 3(2) of Schedule 1 (recovery of car tax), for the words from “and (b)” to the end there shall be substituted the following sub-paragraph—

1970 c. 9. “(3) In respect of Scotland, the following provisions of the Taxes Management Act 1970—

- (a) section 63 (recovery of tax in Scotland);
- (b) section 63A (sheriff officer’s fees and outlays); and
- (c) section 68A (execution of diligence under summary warrant to preclude action for payment in Scotland);

shall apply for the purpose of the recovery of car tax as they apply for the purpose of the recovery of tax under that Act subject to the substitution for any reference to the collector of a reference to the proper officer within the meaning of the Customs and Excise Management Act 1979 and any other necessary modifications.”.

1979 c. 2.

The Value Added Tax Act 1983 (c.55)

7. In paragraph 6(4) of Schedule 7 (recovery of value added tax), for the words from “and (b)” to the end there shall be substituted the following sub-paragraph—

“(5) In respect of Scotland, the following provisions of the Taxes Management Act 1970—

- (a) section 63 (recovery of tax in Scotland);
- (b) section 63A (sheriff officer’s fees and outlays); and
- (c) section 68A (execution of diligence under summary warrant to preclude action for payment in Scotland);

shall apply for the purpose of the recovery of value added tax as they apply for the purpose of recovery

EXPLANATORY NOTES

These paragraphs apply the provisions for recovery of income tax set out in paragraphs 2 to 4 above to car tax and value added tax respectively.

Paragraphs 6 and 7

These paragraphs apply the provisions for recovery of income tax set out in paragraphs 2 to 4 above to car tax and value added tax respectively.

The Debtors (Scotland) Bill

1979 c. 2. of tax under that Act subject to the substitution for any reference to the collector of a reference to the proper officer within the meaning of the Customs and Excise Management Act 1979 and any other necessary modifications.”.

EXPLANATORY NOTES

SCHEDULE 6

POINDINGS AND SALES IN PURSUANCE OF SUMMARY
WARRANTS

Exemptions from poinding

1.—(1) Articles belonging to a debtor of any of the following descriptions shall be exempt from poinding at the instance of a creditor in respect of a debt due to him by the debtor—

- (a) clothing reasonably required for the use of the debtor or any member of his household;
- (b) implements, tools of trade, books or other equipment reasonably required for the use of the debtor or any member of his household in the practice of the debtor's or such member's profession, trade or business, not exceeding in aggregate value £500 or such other sum as may be prescribed in regulations made by the Secretary of State;
- (c) medical aids or medical equipment reasonably required for the use of the debtor or any member of his household;
- (d) books or other articles reasonably required for the education or training of the debtor or any member of his household not exceeding in aggregate value £500 or such other sum as may be prescribed in regulations made by the Secretary of State;
- (e) toys for the use of any child who is a member of the debtor's household;
- (f) articles reasonably required for the care or upbringing of any child who is a member of the debtor's household.

(2) Articles belonging to a debtor of any of the descriptions set out in the list at the end of this sub-paragraph shall be exempt from such poinding if the article at the time of the poinding is in a dwellinghouse in which—

- (a) the debtor is residing; or
- (b) the debtor is not residing, but another person is residing, and the article is reasonably required for the use in the dwellinghouse of the person residing there or any member of that person's household.

LIST

- (i) beds or bedding;
- (ii) household linen;
- (iii) chairs or settees;
- (iv) tables;
- (v) food;
- (vi) lights or light fittings;

EXPLANATORY NOTES

Schedule 6

This schedule sets out a uniform procedure applicable to all summary warrant poidings. It incorporates many of the changes made in Part III of the Bill to ordinary poidings but retains the summary character of the existing poiding procedures used to enforce rates and taxes. The schedule generally implements Recommendations 7.4 (para. 7.20) and 7.5 (para. 7.22).

Paragraph 1

This paragraph is the equivalent of *clause* 43. *Sub-paragraph* (4) empowers the sheriff to release articles on the ground that they are exempt from poiding and implements Recommendation 7.8 (para. 7.39).

The Debtors (Scotland) Bill

- (vii) heating appliances;
- (viii) curtains;
- (ix) floor coverings;
- (x) furniture, equipment or utensils used for cooking, storing or eating food;
- (xi) one refrigerator;
- (xii) articles used for cleaning, mending or pressing clothes;
- (xiii) articles used for cleaning the dwellinghouse;
- (xiv) furniture used for storing clothing, bedding or household linen or storing articles used for cleaning the dwellinghouse;
- (xv) articles used for safety in the dwellinghouse.

(3) The Secretary of State may by regulations add to, delete or vary any of the items contained in the list set out in sub-paragraph (2) above.

(4) Subject to sub-paragraphs (5) and (6) below, the sheriff shall—

- (a) on an application by the debtor (whether or not the poinded article is in a dwellinghouse in which the debtor is residing), make an order releasing such an article from the poinding, if the sheriff is satisfied that the article is exempt therefrom under sub-paragraph (1) or (2) above;
- (b) if a poinded article is in a dwellinghouse in which the debtor is not residing, but another person is residing, on an application by that person, make such an order as aforesaid, if the sheriff is satisfied that the article is exempt therefrom under sub-paragraph (2) above.

(5) No application under sub-paragraph (4) above shall be competent unless it is made within a period of 14 days after the date of the execution of the poinding.

(6) No order under sub-paragraph (4) above releasing an article from the poinding shall take effect while the order is appealable or subject to an appeal or a further appeal.

(7) Regulations under sub-paragraph (1)(b) or (d) or (3) above shall be made by statutory instrument and shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Restrictions on the number of articles which may be poinded

2. The sheriff officer shall be entitled to poind under a summary warrant only such number of articles belonging to the debtor as, if sold at the valuations made under paragraph 5(1)(b) of this Schedule, would satisfy the unpaid debt and the likely fees of the sheriff officer and the outlays likely to be incurred by him in the execution of the warrant.

EXPLANATORY NOTES

Paragraph 2

This paragraph applies the common law restriction as to the extent of a poinding to all summary warrant poindings.

The Debtors (Scotland) Bill

Restrictions on time when poinding is allowed

3.—(1) No poinding shall be executed on a Sunday, Christmas Day, New Year's Day or Good Friday nor on such other day as may be prescribed.

(2) The execution of a poinding shall not—

- (a) be commenced before 8 a.m. or after 8 p.m.; or
- (b) be continued after 8 p.m.;

unless prior authority for such commencement or continuation has been obtained from the sheriff; and any rule of law which prohibits poindings outwith the hours of daylight shall cease to have effect.

Powers of entry in connection with poinding

4. Notwithstanding that a sheriff officer is in possession of a warrant authorising him to open shut and lockfast places for the purpose of executing a poinding, he shall not enter a dwellinghouse for that purpose where, at the time of his intended entry, there appears to him to be nobody, or only children under the age of 16 years, present in the dwellinghouse unless at least 4 days before the date of his intended entry he has served—

- (a) notice on the debtor specifying that date; and
- (b) in the case where there appears to him to be only children under the age of 16 years present in the dwellinghouse, a copy of that notice on the director of social work of the local authority:

Provided that the sheriff, on an application made to him by the sheriff officer which shall not require to be intimated to the debtor or to the director of social work, may dispense with service under this paragraph, if it appears to the sheriff that such service would be likely to prejudice the execution of the poinding.

Poinding procedure

5.—(1) The procedure relating to a poinding shall be as follows—

- (a) before executing the poinding, the sheriff officer shall—
 - (i) exhibit the summary warrant or, if the warrant does not identify the debtor, a certified copy of the warrant together with a statement certified by the creditor that the summary warrant applies to the debtor in question;
 - (ii) demand payment, from the debtor or any other person present who is authorised to act for him, of the debt, including any expenses which have been incurred and which are chargeable against the debtor in the poinding;
 - (iii) make enquiry of any person present as to the ownership of the articles proposed to be poinded;

EXPLANATORY NOTES

Paragraph 3

This paragraph is the equivalent of *clause 44*.

Paragraph 4

This paragraph is the equivalent of *clause 45*. It implements Recommendation 7.10 (para. 7.45).

Paragraph 5

This paragraph is the equivalent of *clause 46*. In providing for a valuation at the time of pouncing and giving the debtor an entitlement to redeem articles at their appraised values it implements Recommendation 7.6(1) and (2) (para. 7.30).

The Debtors (Scotland) Bill

- (b) the poinded articles shall be valued by the sheriff officer according to the price which they would be likely to fetch if sold on the open market, but, if he considers that the articles are such that a valuation by a professional valuator or other suitably skilled person is advisable, he may arrange for such a valuation;
 - (c) the sheriff officer shall prepare a schedule ("the poinding schedule") in the prescribed form which shall specify—
 - (i) the poinded articles, at whose instance they have been poinded and their respective values; and
 - (ii) the amount of the debt and any expenses which have been incurred and which are chargeable against the debtor in the poinding;
 - (d) on completion of the valuation of the poinded articles, the sheriff officer shall—
 - (i) inform the debtor (if present) of his right to redeem any of the poinded articles under sub-paragraph (5) below; and
 - (ii) sign the poinding schedule and deliver it to the person in whose possession the articles were poinded (and, if the possessor is not the debtor and it is reasonably practicable, send a copy of it to the debtor) or leave it on the premises in which the poinding took place;
 - (e) the sheriff officer shall leave the poinded articles at the place where they were poinded.
- (2) The sheriff, on an application by the creditor, a sheriff officer or the debtor, may at any time after the execution of a poinding make an order—
- (a) for the security of any of the poinded articles; or
 - (b) in relation to any of the articles which are of a perishable nature or which are likely to deteriorate substantially and rapidly in condition or value, for their immediate disposal and, in the event of their disposal by sale, for payment of the proceeds of sale to the creditor or for consignment of the proceeds in court until the diligence is completed or otherwise ceases to have effect;
- and a decision of the sheriff under paragraph (b) above for the immediate disposal of articles shall be final.
- (3) It shall not be competent for a sheriff officer in executing a poinding to examine a person on oath as to the ownership of any article.
- (4) A sheriff officer in executing a poinding shall be entitled to proceed on the assumption that any article in the possession of the debtor is owned by him unless the sheriff officer knows or ought to know that the contrary is the case:

EXPLANATORY NOTES

The Debtors (Scotland) Bill

Provided that the sheriff officer shall not be precluded from relying on that assumption by reason only—

- (a) that the article belongs to a class which is commonly held under a hire, hire-purchase or conditional sale agreement or on some other limited title of possession; or
- (b) that an assertion has been made that the article is not owned by the debtor.

(5) The debtor shall be entitled, within 14 days after the date of execution of the poinding, to redeem any of the poinded articles at the valuations made under sub-paragraph (1)(b) above.

(6) The sheriff officer shall, on receiving payment from the debtor for the redemption under sub-paragraph (5) above of a poinded article, grant a receipt in the prescribed form to the debtor; and the receipt shall operate as a release of the article from the poinding.

(7) Subject to paragraph 20(2)(b) of this Schedule, the revaluation in the same poinding of an article which has been valued under sub-paragraph (1)(b) above shall be incompetent.

(8) For the purposes of this Schedule and any other enactment or any rule of law, a poinding shall be deemed to have been executed when the poinding schedule has been delivered to the possessor of the poinded articles, or left on the premises in which the poinding took place, in pursuance of sub-paragraph (1)(d)(ii) above.

(9) At any time before a sheriff officer has executed a poinding on behalf of a creditor, he shall, if requested to do so by any other creditor who has exhibited to him a summary warrant authorising the poinding of articles belonging to the debtor concerned, conjoin that creditor in the poinding in respect of the debt for which he holds that warrant.

Release of poinded article on ground of undue harshness

6.—(1) The sheriff may, on an application by the debtor made within 14 days after the date of execution of a poinding, make an order releasing an article from the poinding if it appears to the sheriff that the continuation of the poinding of that article or its sale under the summary warrant would be unduly harsh in the circumstances.

(2) Where the sheriff has made an order under this paragraph releasing an article from a poinding, then, notwithstanding paragraph 8 of this Schedule, he may, on an application by the creditor, authorise the poinding of other articles belonging to the debtor in the same premises.

(3) An order under this paragraph releasing an article from a poinding shall not take effect while the order is appealable or subject to an appeal or a further appeal.

EXPLANATORY NOTES

Paragraph 6

This paragraph is the equivalent of *clause* 48. It implements Recommendations 7.8 (para. 7.39) and 7.12 (para. 7.53).

Recall of poinding

7.—(1) The sheriff shall recall a poinding at any time before the sale of the poinded articles, at his own instance or on an application by the debtor, if he is satisfied that the poinding is invalid or has ceased to have effect:

Provided that, without prejudice to sub-paragraph (4) of paragraph 1 of this Schedule, it shall be incompetent for the sheriff to recall a poinding on the ground that the poinded articles are, or any of them is, exempt from the poinding under that paragraph.

(2) The sheriff may, on an application by the debtor, recall a poinding at any time before the sheriff officer intimates to the debtor under paragraph 12 of this Schedule the date arranged for the removal of the poinded articles for sale or, if the articles are to be sold in the premises where they are situated, the date arranged for the holding of the sale, on any of the following grounds—

- (a) that it would be unduly harsh in the circumstances for the poinded articles to be sold under the summary warrant;
- (b) that the aggregate of the valuations of the poinded articles made under paragraph 5(1)(b) of this Schedule were substantially below the aggregate of the prices which they would have been likely to fetch if sold on the open market;
- (c) that the likely proceeds of sale of those articles and any articles which have been poinded under any further poinding would not exceed the expenses likely to be incurred in the taking of further steps in the diligence and any such further diligence on the assumption that those steps are unopposed.

(3) The sheriff, on an application by the creditor, may continue an application under sub-paragraph (2)(c) above to enable the creditor to execute a further poinding.

(4) In sub-paragraphs (2)(c) and (3) above, “a further poinding” means a poinding in respect of the same debt which has been authorised under paragraph 6(2), 19(5) or 20(2), or has become competent by reason of paragraph 18(3), 21(5) or 22(6), of this Schedule or section 9(7), 18(7) or 30(6) of this Act.

(5) The sheriff shall not recall a poinding under this paragraph at his own instance or dispose of an application thereunder without first giving the parties—

- (a) an opportunity to make representations; and
- (b) if either party wishes to be heard, an opportunity to be heard.

(6) The sheriff clerk shall intimate to the debtor the recall at the instance of the sheriff of a poinding under sub-paragraph (1) above.

(7) An order under this paragraph recalling a poinding shall not take effect while the order is appealable or subject to an appeal or a further appeal.

EXPLANATORY NOTES

Paragraph 7

This paragraph is the equivalent of *clause 49*. It implements Recommendations 7.6(3) (para. 7.30), 7.9 (para. 7.42) and 7.12 (para. 7.53).

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Second poinding in same premises

8. Subject to sections 9(7), 18(7) and 30(6) of this Act and paragraphs 6(2), 18(3), 19(5), 20(2), 21(5) and 22(6) of this Schedule, where articles are poinded in any premises (whether or not the poinding is valid) another poinding in those premises to enforce the same debt shall be incompetent except in relation to poindable articles which have been brought on to the premises since the execution of the first poinding.

Sist of proceedings in poinding of mobile homes

9.—(1) Where a caravan, houseboat or other moveable structure is the only or principal residence of a debtor or another person and it has been poinded, the sheriff, on an application by the debtor or that other person made at any time after the execution of the poinding and before the sheriff officer intimates to the debtor under paragraph 12 of this Schedule the date arranged for the removal of the poinded articles for sale or, if the articles are to be sold in the premises where they are situated, the date arranged for the holding of the sale, may order that for such period as he may determine no further steps shall be taken in the poinding.

(2) In calculating under paragraph 17(1) or (2) of this Schedule the period during which a poinding under sub-paragraph (1) above shall remain effective, there shall be disregarded any such period as is mentioned in that sub-paragraph.

Arrangements for sale

10.—(1) Every sale in pursuance of a summary warrant shall be by public auction.

(2) No sale in pursuance of a summary warrant shall be held in a dwellinghouse except with the consent in writing of the occupier thereof and, if he is not the occupier, the debtor.

(3) No such sale shall be held in premises (not being a dwellinghouse or an auction room) which are occupied by a person other than the debtor or the creditor except with the consent in writing of the occupier thereof:

Provided that, where the poinded articles are situated in the premises of the occupier and the occupier does not give his consent under this sub-paragraph to the holding of the sale in those premises, then the sheriff, on an application being made to him by the creditor or the sheriff officer, if the sheriff considers that it would be unduly costly to require the removal of the poinded articles to other premises for sale, may direct that the sale shall be held in the premises where they are situated.

(4) The decision of the sheriff under the proviso to sub-paragraph (3) above shall be final.

EXPLANATORY NOTES

Paragraph 8

This paragraph is the equivalent of *clause 50*.

Paragraph 9

This paragraph is the equivalent of *clause 51*.

Paragraph 10

Sub-paragraph (1) is the equivalent of *clause 55(1)*, *sub-paragraph (2)* is the equivalent of *clause 54(2)*, *sub-paragraph (3)* is the equivalent of *clause 54(5)*, *sub-paragraph (5)* is the equivalent of *clause 55(3)* and *sub-paragraph (6)* is the equivalent of *clause 54(6)*.

(5) Where a sale of pointed articles is to be held in premises other than where they are situated, the sheriff officer shall be empowered to remove the articles to those premises for the purpose of the sale.

(6) In this paragraph “occupier”, in relation to a dwellinghouse or other premises, means the person named in the valuation roll as the occupier of the dwellinghouse or premises; and, if there are two or more such occupiers, means any one of them.

Circumstances in which pointed articles belonging to debtor may be released or redeemed

11.—(1) Where a sale of pointed articles is to be held in premises other than where they are situated, the sheriff officer shall—

(a) be entitled to remove to those premises only such number of the pointed articles as, if sold at the valuations made under paragraph 5(1)(b) of this Schedule, would satisfy the sums recoverable by the creditor out of the proceeds of sale; and

(b) release the remaining pointed articles from the pointing.

(2) Subject to sub-paragraph (3) below, the debtor may, within 7 days after the date when the sheriff officer intimates under paragraph 12 of this Schedule the date arranged for the removal of the pointed articles for sale or, if the articles are to be sold in the premises where they are situated, the date arranged for the holding of the sale, redeem any pointed article by paying to the sheriff officer a sum equal to the valuation of the article made under paragraph 5(1)(b) of this Schedule.

(3) The sheriff officer shall, on receiving payment from the debtor under sub-paragraph (2) above, grant a receipt in the prescribed form to the debtor, and the receipt shall operate as a release of the article from the pointing.

(4) The creditor and the debtor may by agreement release articles from a pointing.

Intimation and publication of forthcoming sale

12.—(1) The sheriff officer who is arranging the sale of the pointed articles shall intimate to the debtor and, if he is a different person from the debtor, the possessor of the articles—

(a) the date and place arranged for the holding of the sale; and

(b) if the sale is to be held in premises other than where they are situated, the date arranged for the removal of the articles for the purposes of sale;

and intimation under this sub-paragraph shall be given not less than 14 days before the date arranged for the sale or such removal.

(2) In whatever premises the sale is to be held, the sheriff officer shall, at the same time as he intimates to the debtor the date arranged for the holding of the sale, send prescribed particulars of the

EXPLANATORY NOTES

Paragraph 11

This paragraph is the equivalent of *clause 53*. *Sub-paragraph (2)* implements Recommendation 7.6(2) (para. 7.30).

Paragraph 12

This paragraph is the equivalent of *clause 56*.

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arrangements for the sale to the sheriff clerk of the sheriff court within whose jurisdiction the articles were poinded; and the sheriff clerk shall arrange for those particulars to be displayed on a public notice board within the court.

(3) All sales shall be advertised by public notice.

(4) No public notice of a sale of poinded articles to be held in premises other than the debtor's premises (except a public notice under sub-paragraph (2) above) shall name him or disclose that the articles for sale are poinded articles.

(5) Where the sale is to be held in premises other than the debtor's premises or an auction room, any public notice of the sale shall state that the articles to be sold do not belong to the occupier of those premises.

Cancellation of arrangements and new arrangements for sale

13.—(1) Except as provided in the following provisions of this paragraph, after intimation has been given under paragraph 12 of this Schedule to the debtor of the date arranged for the holding of a sale or for the removal of the poinded articles for the purposes of sale, the creditor or officer of court shall not be entitled to arrange a new date for the holding of the sale or for such removal.

(2) The creditor shall be entitled to instruct a sheriff officer to arrange such a new date as is mentioned in sub-paragraph (1) above where, for any reason for which the creditor or officer of court cannot be held responsible, it is not possible to adhere to the date which has been arranged, and the officer of court shall intimate that new date to the debtor:

Provided that no date arranged under this sub-paragraph shall be less than 7 days after the date of such intimation.

(3) Without prejudice to sub-paragraph (2) above, in order to enable the debt to be paid by instalments or otherwise in accordance with an agreement between the creditor and the debtor, the creditor may, subject to sub-paragraph (4) below, on one occasion only after intimation has been given under paragraph 12 of this Schedule to the debtor of the date arranged for the sale, cancel the arrangements made for the sale.

(4) Where the sale is to be held in premises other than where they are situated, the creditor shall not for the purposes of sub-paragraph (3) above be entitled to cancel the arrangements made for the sale after the poinded articles have been removed for sale from the premises where they are situated.

(5) Where the debtor is in breach of an agreement mentioned in sub-paragraph (3) above, the creditor may instruct a sheriff officer to make new arrangements for the sale of the poinded articles at any time while the articles remain poinded.

EXPLANATORY NOTES

Paragraph 13

Sub-paragraphs (1) and (2) are the equivalent of subsections (8) and (9) of clause 57. Sub-paragraphs (3) to (5) are the equivalent of clause 58.

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The sale

14.—(1) No bid for the purchase of a poinded article at the auction shall be accepted unless it is at least equal to—

- (a) the valuation of the article made under paragraph 5(1)(b) of this Schedule; or
- (b) such smaller amount as the creditor may have authorised as acceptable:

Provided that the valuation and amount mentioned in paragraphs (a) and (b) above need not be disclosed to anyone bidding for such purchase.

(2) Any poinded article exposed for sale may be purchased by—

- (a) any creditor, including the creditor on whose behalf the poinding was executed; or
- (b) a person who owns the article in common with the debtor.

(3) Without prejudice to sub-paragraph (4) below, ownership of a poinded article which remains unsold after being exposed for sale shall pass to the creditor after it ceases to be exposed for sale.

(4) The ownership of a poinded article which has passed to the creditor under sub-paragraph (3) above, in a case where the sale is held in premises of the debtor, shall revert to the debtor unless—

- (a) if the sale is held in a dwellinghouse in which the debtor is residing, the creditor uplifts the article by 8 p.m., or such time as may be prescribed, on the same day as the sale was completed;
- (b) if the sale is held in other premises of the debtor, the creditor uplifts the article before 8 p.m., or such time as may be prescribed, on the third day following the date of the completion of the sale;

and a sheriff officer may remain on or re-enter any premises for the purpose of enabling the creditor to uplift any article under paragraph (a) or (b) above.

(5) Sub-paragraphs (3) and (4) above are without prejudice to the rights of any third party in any of the poinded articles.

(6) Where at the auction any article is unsold or is sold at a price below the valuation made under paragraph 5(1)(b) of this Schedule, the debtor shall be credited with an amount equal to that valuation.

Disposal of proceeds of sale

15. The sheriff officer who arranges the sale shall dispose of the proceeds of the sale—

- (a) by handing over to the creditor or his agent the proceeds so far as necessary to meet the debt and any expenses chargeable against the debtor (subject to any agreement

EXPLANATORY NOTES

Paragraph 14

Sub-paragraph (1) is the equivalent of *clause 59(3)*. It implements Recommendation 7.6(4) (para. 7.30).

Sub-paragraph (2) is the equivalent of *clause 59(4)*.

Sub-paragraphs (3) to (6) are the equivalent of *subsections (5) to (8)* of *clause 59*. They implement Recommendation 7.7 (para. 7.36).

Paragraph 15

This paragraph is the equivalent of *clause 60*.

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between the sheriff officer and the creditor or his agent relating to the fees or outlays of the sheriff officer); and

- (b) by handing over to the debtor or his agent any surplus remaining after the debt and any expenses chargeable against the debtor have been met or, if the debtor or agent cannot be found, by consigning that sum in court.

Report of sale to the creditor and debtor

16.—(1) The sheriff officer who arranged the sale shall send a report of the sale in the prescribed form to the creditor setting out—

- (a) any articles which have been sold and the amount for which they have been sold;
- (b) any articles which remain unsold;
- (c) the expenses of the diligence; and
- (d) any balance due by, or surplus handed over or due to, the debtor;

and the sheriff officer shall send a copy of the report to the debtor.

(2) The creditor or the debtor shall be entitled to have the report of sale taxed by the auditor of court of the sheriff court within whose jurisdiction the articles were poinded.

Period for which poinding remains effective

17.—(1) Subject to the following provisions of this paragraph, a poinding shall cease to have effect on the expiry of a period of one year after the date of execution of the poinding.

(2) The sheriff, on an application by the creditor or a sheriff officer made before the expiry of the said period of one year—

- (a) may, where he thinks that, by extending the period during which the poinding shall remain effective, the debtor is likely to comply with an agreement between the creditor and the debtor for the payment of the debt by instalments or otherwise, extend the period for such further period as he considers may reasonably be required to give effect to the agreement; or
- (b) may extend the period to enable further proceedings to be taken in the diligence where the termination of the poinding would prejudice the creditor and the creditor cannot be held responsible for the circumstances giving rise to the need for the extension;

and the sheriff may grant a further extension or further extensions under this sub-paragraph on an application made to him before the expiry of the previously extended period.

(3) The decision of the sheriff under sub-paragraph (2) above shall be final and shall be intimated to the debtor by the sheriff clerk.

EXPLANATORY NOTES

Paragraph 16

This paragraph provides for the result of sale to be intimated to the creditor and debtor without requiring the officer to make a report of the sale to the sheriff as in ordinary poinding procedure (see *clause 61*).

Paragraph 17

This paragraph is the equivalent of *subsections (1), (2), (3)(a) and (6) of clause 62*.

(4) Where, within the period mentioned in sub-paragraph (1) above or within that period as extended under sub-paragraph (2) above, an application is made under sub-paragraph (2) above, the poinding shall continue to have effect until the disposal of the application.

Authorised removal of poinded articles

18.—(1) The debtor or the possessor of poinded articles may remove them to another location if—

- (a) the creditor or sheriff officer has consented to their removal; or
- (b) the sheriff, on an application by the debtor or the possessor, has authorised their removal.

(2) The removal of poinded articles to another location in accordance with sub-paragraph (1) above shall not by itself have the effect of releasing the articles from the poinding.

(3) Where poinded articles have been removed from the debtor's premises to another location under sub-paragraph (1) above, the creditor may, under the same warrant to poind, again poind any of the articles so removed and, notwithstanding paragraph 8 of this Schedule, any articles which were not so removed, whether or not they were previously poinded; and, on the execution of any such further poinding, the original poinding shall be deemed to have been abandoned.

Removal of poinded articles in breach of poinding

19.—(1) The removal from premises of poinded articles by the debtor or a third party, without consent or authority under paragraph 18(1)(a) or (b) of this Schedule, shall be a breach of the poinding and, if the debtor or third party at the time of such removal knew that the articles had been poinded, the removal may be dealt with as a contempt of court.

(2) The removal of poinded articles to another location in breach of the poinding shall not by itself have the effect of releasing the articles from the poinding.

(3) Subject to sub-paragraph (4) below, where in breach of a poinding articles have been removed from premises by the debtor or by a third party, the sheriff, on an application by the creditor or the sheriff officer—

- (a) may make an order requiring the debtor or third party or such other person as is in possession of those articles to restore them to the premises from which they have been removed within a period specified in the order; and
- (b) if a requirement under paragraph (a) above is not complied with and it appears to the sheriff that the articles are likely to be found in premises specified in the application, may grant a warrant to sheriff officers—

EXPLANATORY NOTES

Paragraph 18

This paragraph is the equivalent of *clause 63*.

Paragraph 19

This paragraph is the equivalent of *clause 64*.

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- (i) to search for the articles in the premises so specified;
and
- (ii) to restore the articles to the premises from which they have been removed or to make such other arrangements for their security as the sheriff may direct,

and any such warrant shall be deemed to include authority to open shut and lockfast places for the purpose of its execution.

(4) Where it appears to the sheriff, on an application made to him, that any article which has been removed as mentioned in sub-paragraph (3) above has been acquired for value and without knowledge of the poinding, he shall not make an order under paragraph (a) of that sub-paragraph relating to that article and shall recall any such order which he has already made.

(5) Where in breach of a poinding poinded articles have been removed from premises in circumstances in which the debtor is at fault, the sheriff, on an application by the creditor, may, notwithstanding paragraph 8 of this Schedule, authorise the poinding of other articles belonging to the debtor in the same premises.

(6) Where a third party knowing that an article has been poinded removes it from premises in breach of the poinding and the article—

(a) in the course of the removal or subsequently, is damaged or destroyed;

(b) is subsequently lost or stolen; or

(c) is acquired from or through that third party by another person without knowledge of the poinding and for value,

the sheriff may order the third party to consign in court until the completion of the sale or until the poinding otherwise ceases to have effect—

(i) where the article has been damaged but not so damaged as to make it worthless, a sum equal to the difference between the valuation of the article made under paragraph 5(1)(b) of this Schedule and the value of the article as damaged;

(ii) in any other case, a sum equal to the valuation made under that paragraph.

(7) Any sum consigned in court under sub-paragraph (6) above shall, on completion of the sale or on the poinding otherwise ceasing to have effect, be paid to the creditor to the extent that may be necessary to satisfy his debt, any surplus thereof being paid to the debtor.

Damage or destruction of poinded articles

20.—(1) The wilful damage or destruction of poinded articles by the debtor or a third party who knows that the articles have been poinded shall be a breach of the poinding and may be dealt with as a contempt of court.

EXPLANATORY NOTES

Paragraph 20

This paragraph is the equivalent of *clause 65*.

(2) Where poinded articles have been damaged or destroyed in circumstances in which the debtor is at fault, the sheriff, on an application by the creditor or sheriff officer may—

- (a) authorise, notwithstanding paragraph 8 of this Schedule, the poinding of other articles belonging to the debtor in the premises in which the original poinding took place; or
- (b) authorise the revaluation of any damaged article in accordance with paragraph 5(1)(b) of this Schedule.

(3) Where a third party knowing that an article has been poinded wilfully damages or destroys it, the sheriff may order the third party to consign in court until the completion of the sale or until the poinding otherwise ceases to have effect—

- (a) where the article has been damaged but not so damaged as to make it worthless, a sum equal to the difference between the valuation of the article made under paragraph 5(1)(b) of this Schedule and the value of the article as damaged;
- (b) where the article has been destroyed or so damaged as to make it worthless, a sum equal to the valuation made under that paragraph.

(4) Any sum consigned in court under sub-paragraph (3) above shall, on the completion of the sale or on the poinding otherwise ceasing to have effect, be paid to the creditor to the extent that may be necessary to satisfy his debt, any surplus thereof being paid to the debtor.

Release from poinding of articles belonging to third party

21.—(1) A sheriff officer may, at any time after the execution of a poinding and before the sale of the poinded articles, release an article from the poinding if a third party or a person acting on his behalf claims that it belongs to the third party, unless the debtor or the possessor of the article, if different from the debtor, denies the claim.

(2) The sheriff shall, at any time after the execution of a poinding and before the sale of the poinded articles, on an application made to him by a third party, make an order releasing an article from a poinding where he is satisfied that the article belongs to that third party.

(3) The making of an application under sub-paragraph (2) above is without prejudice to the taking of other proceedings by the third party for the recovery of poinded articles belonging to him, and a determination of the sheriff under that sub-paragraph shall not be binding in any other proceedings.

(4) An order under sub-paragraph (2) above releasing articles from a poinding shall not take effect while the order is appealable or subject to an appeal or a further appeal.

EXPLANATORY NOTES

Paragraph 21

This paragraph is the equivalent of *clause* 66. It implements Recommendation 7.12(2)(a) (para. 7.53).

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(5) Where any article has been released under sub-paragraph (1) or (2) above from a poinding, the creditor may, notwithstanding paragraph 8 of this Schedule, poind other articles belonging to the debtor in the same premises.

Poinding and sale of articles in common ownership

22.—(1) Articles which are owned in common by a debtor and third party may be poinded and disposed of in accordance with the provisions of this Schedule in satisfaction of the debts of that debtor.

(2) Where a third party or a person acting on his behalf, at any time after the execution of a poinding and before the sale of the poinded articles—

- (a) claims that any such article is owned in common by the debtor and the third party; and
- (b) pays to the sheriff officer a sum equal to the value of the debtor's interest in the article,

the sheriff officer may, unless the debtor or the possessor of the article if different from the debtor, denies the claim, release the article from the poinding.

(3) The sheriff shall, at any time after the execution of a poinding and before the sale of the poinded articles, on an application made to him by a third party, make an order releasing any article from poinding where he is satisfied that the article is owned in common by the debtor and that third party and either—

- (a) the third party pays to the sheriff officer a sum equal to the value of the debtor's interest in the article; or
- (b) the sheriff is satisfied that the continuation of the poinding of that article or its sale under summary warrant would be unduly harsh to the third party in the circumstances.

(4) A release under sub-paragraph (2) above or, where payment is made under paragraph (a) of sub-paragraph (3) above, a release under that sub-paragraph, shall become effective on the granting of a receipt for payment thereunder; and, on such a receipt being granted, the debtor's interest in the released article shall be deemed to be transferred to the third party.

(5) An order under sub-paragraph (3) above releasing articles from a poinding shall not take effect while the order is appealable or subject to an appeal or a further appeal.

(6) Where any article is released in pursuance of sub-paragraph (3)(b) above from a poinding, the creditor may, notwithstanding paragraph 8 of this Schedule, poind other articles belonging to the debtor in the same premises.

(7) This sub-paragraph applies where—

- (a) at any time after the execution of a poinding, a third party claims that any of the poinded articles is owned in common

EXPLANATORY NOTES

Paragraph 22.

This paragraph is the equivalent of *clause 67*.

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by the debtor and himself but does not seek release of the article from the poinding, and either

- (b) the claim is admitted by the creditor and the debtor; or
- (c) the claim is not admitted by the creditor or the debtor, but the sheriff, on an application made to him, is satisfied that the claim is valid.

(8) Where sub-paragraph (7) above applies, then the creditor shall pay to the third party—

- (a) if the article is or has been sold, a sum out of the proceeds of sale or out of the valuation of that article under paragraph 5(1)(b) of this Schedule (whichever is the greater) which bears the same relation to those proceeds or that valuation as the value of the third party's interest in the article bears to the value of the total interest of all those who own the article in common;
- (b) if ownership of the article passes or has passed to the creditor in default of sale, a sum which bears the same relation to the valuation of the article under paragraph 5(1)(b) of this Schedule as the value of the third party's interest in the article bears to the value of the total interest of all those who own the article in common.

Certain proceedings under Schedule 6 to sist further steps in the diligence

23.—(1) Where, in relation to a poinding, an application under this Schedule mentioned in sub-paragraph (2) below has been made then—

- (a) during a relevant period it shall be incompetent to remove the poinded articles for sale, or to hold a sale of them, in pursuance of the summary warrant; and
- (b) a relevant period shall be disregarded in calculating the period during which the poinding remains effective by virtue of paragraph 17 of this Schedule.

(2) The applications referred to in sub-paragraph (1) above are an application under—

- (a) paragraph 1(4), 6(1), 21(2) or 22(3) (release of poinded articles);
- (b) paragraph 7(1) or (2) (recall of poinding);
- (c) paragraph 9(1) (sist of proceedings in poinding of mobile homes);
- (d) paragraph 19(3) (restoration of articles removed in breach of a poinding);
- (e) paragraph 19(4) (recall of order under paragraph 19(3))

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Paragraph 23

This paragraph is the equivalent of *clause 68*.

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(3) In this paragraph “a relevant period” means any of the following periods—

- (a) the period while the application concerned is pending;
- (b) any period during which the decision of the sheriff disposing of that application is appealable or subject to an appeal or a further appeal.

Power to enter premises and open shut and lockfast places

24. A summary warrant shall contain a warrant authorising a sheriff officer to enter premises in the occupancy of the debtor in order to execute the poinding or the sale, or the removal and sale of the poinded articles and, for any of those purposes, to open shut and lockfast places.

Expenses of poinding and sale

25.—(1) Subject to paragraphs 26, 27 and 28 of this Schedule, there shall be chargeable against the debtor any expenses incurred in taking any of the following steps—

- (a) in serving a notice and a copy thereof under paragraph 4 of this Schedule before entering a dwellinghouse for the purpose of executing a poinding;
- (b) in executing a poinding under paragraph 5(1) of this Schedule;
- (c) in granting a receipt under sub-paragraph (6) of paragraph 5 of this Schedule for payment for redemption under sub-paragraph (5) of that paragraph by the debtor of any poinded article;
- (d) in making intimation, sending prescribed particulars of the arrangements for the sale to the sheriff clerk and giving public notice under paragraph 12 of this Schedule;
- (e) in removing any poinded articles for sale;
- (f) in making arrangements for, and holding, the sale;
- (g) in granting a receipt under sub-paragraph (3) of paragraph 11 of this Schedule for payment for the redemption of poinded articles;
- (h) in making a report of sale under paragraph 16 of this Schedule;
- (i) in granting a receipt under paragraph 22(4) of this Schedule for payment for the release from a poinding of any article which is owned in common;
- (j) in opening shut and lockfast places in the execution of the diligence.

EXPLANATORY NOTES

Paragraph 24

This paragraph makes it clear that a summary warrant includes a warrant to open shut and lockfast places. It implements Recommendation 7.10(1) (para. 7.45).

Paragraphs 25 to 33

These paragraphs reproduce *Schedule 1* (expenses of pointing and sale) with such modifications as are necessary in view of the different procedure.

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(2) The Secretary of State may by regulations made by statutory instrument amend any of paragraphs (a) to (j) of sub-paragraph (1) above or may delete any of, or add to, the steps specified therein.

(3) No regulations shall be made under sub-paragraph (2) above unless a draft of the regulations has been laid before Parliament and approved by resolution of each House of Parliament.

26. Where a new date is arranged under paragraph 13(2) of this Schedule for the holding of the sale or for the removal of the articles for sale, there shall be chargeable against the debtor the expenses incurred in connection with arranging the new date but not those incurred in connection with arranging the original date.

27. Where arrangements for a sale are cancelled under sub-paragraph (3) of paragraph 13 of this Schedule, then, if new arrangements are made for the sale in the circumstances mentioned in sub-paragraph (5) of that paragraph, there shall be chargeable against the debtor the expenses incurred in the making of the new arrangements but not in the making of the arrangements which have been cancelled.

28. Where any such further poinding as is mentioned in paragraph 18(3) of this Schedule has been executed, there shall be chargeable against the debtor the expenses incurred in that poinding but not the expenses incurred in the original poinding.

29. Subject to paragraph 32 of this Schedule, the liability for any expenses incurred by the creditor or the debtor—

- (a) in an application by the creditor or an officer of court to the sheriff under any provision of this Schedule; or
- (b) in implementing an order under—
 - (i) paragraph 5(2) of this Schedule (order for security or immediate disposal of poinded articles); or
 - (ii) paragraph 19 or 20 of this Schedule (orders dealing with breach of poinding),

shall be as determined by the sheriff.

30. Expenses awarded by the sheriff against the debtor in favour of the creditor in a determination under paragraph 29 of this Schedule in respect of an application other than an application under paragraph 19 or 20 of this Schedule, shall be calculated, whether or not the application is opposed by the debtor, as if it were unopposed, except that, if the debtor opposes the application on grounds which appear to the sheriff to be frivolous, the sheriff may award an additional sum of expenses, not exceeding £25 or such amount as may be prescribed, against the debtor.

31. The debtor shall not be liable to the creditor nor the creditor to the debtor for any expenses incurred by the other party—

- (a) in an application by the debtor to the sheriff under any provision of this Schedule;

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- (b) in connection with a hearing held by virtue of paragraph 7(5)(b) of this Schedule:

Provided that if—

- (i) the application or the opposition to the application appears to the sheriff to be frivolous; or
- (ii) a party requires a hearing to be held on grounds which appear to the sheriff to be frivolous,

the sheriff may award a sum of expenses, not exceeding £25 or such amount as may be prescribed, against the party acting frivolously in favour of the other party.

32. The creditor shall be liable for any expenses incurred by the debtor or himself in connection with an application by the creditor or the officer of court under paragraph 10(3)(b) of this Schedule.

33.—(1) Any expenses chargeable against the debtor by virtue of any of paragraphs 25 to 31 of this Schedule shall be recoverable out of the proceeds of sale.

(2) In paragraph 30, and in the proviso to paragraph 31, of this Schedule, “prescribed” means prescribed in regulations made by the Secretary of State by statutory instrument; and any such regulations shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Interpretation of “dwellinghouse” in Schedule 6

34. In this Schedule “dwellinghouse” includes a caravan or a houseboat or any structure adapted for use as a residence.

Adaptation of Schedule 6 for purposes of different enactments

35.—(1) In this Schedule, “creditor” means for the purposes of—

- 1947 c. 43. (a) section 247 of the Local Government (Scotland) Act 1947, the collector of rates of a rating authority;
- 1970 c. 9. (b) section 63 of the Taxes Management Act 1970, any collector of taxes;
- 1983 c. 53. (c) paragraph 3 of Schedule 1 to the Car Tax Act 1983 and paragraph 6 of Schedule 7 to the Value Added Tax Act 1983, the proper officer within the meaning of the Customs and Excise Management Act 1979.
- 1983 c. 55.
- 1979 c. 2.

(2) In this Schedule, “debt” for the purposes of—

- (a) the said section 247, includes the surcharge recoverable thereunder but excludes interest;
- (b) the said section 63, includes interest.

EXPLANATORY NOTES

Paragraph 34

This paragraph is the equivalent of *clause 71*.

SCHEDULE 7

MINOR AND CONSEQUENTIAL AMENDMENTS

General amendment

Any reference in any enactment to an order being enforceable in like manner as a recorded decree arbitral shall be construed as a reference to such an order being enforceable in like manner as an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland.

Specific amendments

The Bank Notes (Scotland) Act 1765 (c.49)

1. In section 4 (summary execution on banker's notes), for the words from "letters of horning" to "the other" there shall be substituted the word "the".

The Debtors (Scotland) Act 1838 (c.114)

2. At the end of section 22 (arrestments to prescribe in three years), there shall be added the following subsections—

"(2) In the case of an arrestment which—

- (a) secures a debt which is subject to a time to pay direction or a time to pay order; or
- (b) is subject to an interim order under section 5(3) or 20(1) of the Debtors (Scotland) Act 1985 (order pending disposal of application for time to pay order or debt arrangement scheme),

there shall be disregarded, in computing the period at the end of which the arrestment prescribes, the period during which the direction, time to pay order or interim order is in effect.

(3) Nothing in this section shall apply to an arrestment of earnings in the hands of a debtor's employer."

The Harbours, Docks, and Piers Clauses Act 1847 (c.27)

3. In section 57 (unserviceable vessels to be altogether removed from harbour), for the word "poinding" there shall be substituted the word "arrestment".

The Lyon King of Arms Act 1867 (c.17)

4. In section 2 (admittance to office of messenger-at-arms), for the words "according to the present law and practice" there shall be substituted the words "in accordance with Part VI of the Debtors (Scotland) Act 1985 and any act of sederunt made thereunder".

EXPLANATORY NOTES

Schedule 7

General amendment

This amendment implements Recommendation 8.6(2) (para. 8.40).

Paragraph 1

This paragraph implements Recommendation 9.2(1) (para. 9.12).

Paragraph 2

This paragraph implements Recommendations 3.18(3) (para. 3.85), 4.13(4) (para. 4.109) and 6.17 (para. 6.112).

Paragraph 3

This paragraph implements Recommendation 5.52 (para. 5.246).

Paragraph 4

This paragraph implements Recommendation 8.4 (para. 8.28).

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The Court of Session Act 1868 (c.100)

5. At the end of section 14 (induciae of summonses and other writs passing the signet), there shall be added the following subsection—

“(2) Nothing in this section shall apply to a charge for payment.”.

The Titles to Land Consolidation (Scotland) Act 1868 (c.101)

6. In section 138 (import of short clauses of consent to registration), for the words from “letters of horning” to the end there shall be substituted the words “, upon the issue of an extract containing a warrant for execution, all lawful execution shall pass thereon”.

The Judicial Statistics (Scotland) Act 1869 (c.33)

7. In section 2 (returns to be made by clerks of court and other public officers)—

(a) after the words “Her Majesty” there shall be inserted the words “and third, messengers-at-arms and sheriff officers”;

(b) at the end there shall be added the following subsection—

“(2) All expenses incurred by messengers-at-arms and sheriff officers under this section shall be defrayed out of money provided by Parliament.”.

The Writs Execution (Scotland) Act 1877 (c.40)

8. For section 3 there shall be substituted the following section—

“Power to
execute
diligence by
virtue of
warrant.

3. The warrant inserted in an extract of a document registered in the Books of Council and Session or in sheriff court books which contains an obligation to pay a sum or sums of money shall have the effect of authorising—

(a) the charging of the debtor to pay to the creditor within a period specified in the charge the sum or sums specified in the extract and any interest accrued on the sum or sums and, in the event of failure to make such payment within that period, the execution of an earnings arrestment against the debtor’s earnings and the poinding of articles belonging to the debtor and, if necessary for the purpose of executing the poinding, the opening of shut and lockfast places;

(b) an arrestment other than an arrestment of the debtor’s earnings in the hands of his employer;

(c) subject to section 82 of the Debtors (Scotland) Act 1985, a current maintenance arrestment against the debtor’s earnings.”.

EXPLANATORY NOTES

Paragraph 5

This paragraph implements Recommendation 5.2 (para. 5.12).

Paragraph 6

This paragraph implements Recommendation 9.2(1) (para. 9.12).

Paragraph 7

This paragraph implements Recommendation 8.28 (para. 8.148).

Paragraph 8

This paragraph reproduces *clause* 112 for extracts of documents registered in books of court.

The Debtors (Scotland) Bill

The Debtors (Scotland) Act 1880 (c.34)

9. In section 4 (abolition of imprisonment for debt, with certain exceptions), for paragraph 1 there shall be substituted the following paragraph—

“1. Fines imposed for contempt of court or under section 91 of the Court of Session Act 1868.”.

The Sheriff Courts (Scotland) Extracts Act 1892 (c.17)

10. In section 7(1) (import of the warrant for execution), for the words from “it shall” to the end there shall be substituted the following words—

“ the said warrant shall have the effect of authorising—

- (a) the charging of the debtor to pay to the creditor within a period specified in the charge the sum or sums specified in the extract and any interest accrued on the sum or sums and, in the event of failure to make such payment within that period, the execution of an earnings arrestment against the debtor's earnings and the poinding of articles belonging to the debtor and, if necessary for the purpose of executing the poinding, the opening of shut and lockfast places;
- (b) an arrestment other than an arrestment of the debtor's earnings in the hands of his employer; and
- (c) subject to section 82 of the Debtors (Scotland) Act 1985, a current maintenance arrestment against the debtor's earnings.”.

The Merchant Shipping Act 1894 (c.60)

11. In section 693 (sums ordered to be leviable by poinding and sale of ship), for the word “poinding” there shall be substituted the word “arrestment”.

The Execution of Diligence (Scotland) Act 1926 (c.16)

12. In section 1 (sheriff officer to have the powers of a messenger-at-arms in certain places), for the word “county” in both places where it occurs there shall be substituted the words “sheriff court district”.

13. In section 2(1)(b) (execution of arrestment or charge by registered letter in certain cases), for the word “county” there shall be substituted the words “sheriff court district”.

EXPLANATORY NOTES

Paragraph 9

This paragraph implements Recommendation 7.17(1) and (2) (para. 7.80).

Paragraph 10

This paragraph reproduces *clause 112* for extracts of sheriff court decrees.

Paragraph 11

This paragraph implements Recommendation 5.52 (para. 5.246).

The Debtors (Scotland) Bill

The Illegal Trawling (Scotland) Act 1934 (c.18)

14. In section 1(4) (penalties for illegal trawling), for the word “poinding” there shall be substituted the word “arrestment”.

The Conveyancing and Feudal Reform (Scotland) Act 1970 (c.35)

15. In Schedule 3 (standard conditions incorporated in standard security), at the end of paragraph 9 there shall be added the following sub-paragraph—

“(3) For the purposes of this condition, a proprietor shall not be taken to be insolvent by reason only that in respect of him an interim order has been made under section 5(3) or 20(1) of the Debtors (Scotland) Act 1985 or a time to pay decree or a time to pay order has been granted or that he has applied for or has been made subject to a debt arrangement scheme.”.

The Prevention of Oil Pollution Act 1971 (c.60)

16. In section 20(1) (enforcement and application of fines), for the word “poinding” there shall be substituted the word “arrestment”.

The Town and Country Planning (Scotland) Act 1972 (c.52)

17. In section 267(8) (local inquiries), for the words “a recorded decree arbitral” there shall be substituted the words “an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland”.

The Prescription and Limitation (Scotland) Act 1973 (c.52)

18. After section 7 there shall be inserted the following section—

“Debt
arrangement
scheme to
preclude
running of
prescriptive
period.

7A.—(1) Where a debtor in an obligation to which section 6 or 7 of this Act applies has applied for a debt arrangement scheme, then, in the computation for the purposes of section 6 or 7 of a prescriptive period in relation to any such obligation, there shall be disregarded any of the following periods—

- (a) the period after the first notice date as defined in section 15(2)(a) of the Debtors (Scotland) Act 1985 while the application for the scheme is pending;
- (b) any period during which the decision of the sheriff disposing of the application for the scheme is appealable or subject to an appeal or a further appeal;
- (c) any period while the scheme is in force.

(2) The period to be disregarded under subsection (1) above shall not be treated as separating the time immediately before it from the time immediately after it.”.

EXPLANATORY NOTES

Paragraph 14

This paragraph implements Recommendation 5.52 (para. 5.246).

Paragraph 15

This paragraph implements Recommendation 4.23(3) (para. 4.174).

Paragraph 16

This paragraph implements Recommendation 5.52 (para. 5.246).

Paragraph 17

This paragraph implements Recommendation 8.6(2) (para. 8.40).

Paragraph 18

This paragraph implements Recommendation 4.30 (para. 4.216).

The Debtors (Scotland) Bill

The Consumer Credit Act 1974 (c.39)

19. After section 93 there shall be inserted the following section—

“Summary
diligence
incompetent in
Scotland.

93A. Summary diligence shall be incompetent in Scotland to enforce payment of a debt due under a regulated agreement or under any security related thereto.”.

20. In section 129 (time orders)—

(a) at the beginning of subsection (1) there shall be added the words “Subject to subsection (3) below,”;

(b) at the end there shall be added the following subsection—

“(3) Where in Scotland a time to pay direction or a time to pay order has been made in relation to a debt, then (whether the direction or order is in effect or not) it shall be incompetent to make a time order in relation to the same debt.”.

21. At the end of section 130 (supplemental provisions about time orders), there shall be added the following subsection—

“(7) In Scotland, where—

(a) an application by a debtor for a debt arrangement scheme is pending or such a scheme has been confirmed under section 24 of the Debtors (Scotland) Act 1985, and

(b) there are in force both a time order under section 129(2)(a) of this Act relating to a debt of that debtor and another order relating to that debt, or to the agreement under which the debt is owed, made under section 129(2)(b), 131, 133, 135(1) or 136 of this Act,

then, the court may, if it revokes the time order, vary or revoke any of those other orders.”.

22. At the end of section 139 (reopening of extortionate agreements), there shall be added the following subsection—

“(8) In Scotland—

(a) where a debtor has applied for a debt arrangement scheme, it shall be incompetent for him to make an application under this section at any time during any of the following periods—

(i) the period after the first notice date as defined in section 15(2)(a) of the Debtors (Scotland) Act 1985 while the application for the scheme is pending;

EXPLANATORY NOTES

Paragraphs 19 and 20

These paragraphs implement Recommendation 3.25 (para. 3.127).

Paragraph 21

This paragraph implements Recommendation 4.28 (para. 4.205).

Paragraph 22

This paragraph implements Recommendation 4.16 (para. 4.138).

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- (ii) any period during which the decision of the sheriff disposing of the application for the scheme is appealable or subject to an appeal or a further appeal;
- (iii) any period while the scheme is in force;
- (b) in subsection (1)(b) and (c) above, "proceedings" do not include proceedings on an application for a debt arrangement scheme."

The Criminal Procedure (Scotland) Act 1975 (c.21)

23. In section 411 (recovery by civil diligence), in subsection (1) for the words from "the words" to "14 days" there shall be substituted the words "a warrant for civil diligence in a form prescribed by act of adjournal which shall have the effect of authorising—

- (a) the charging of the person who has been fined to pay the fine within a period specified in the charge and, in the event of failure to make such payment within that period, the execution of an earnings arrestment against his earnings and the poinding of articles belonging to him and, if necessary for the purpose of executing the poinding, the opening of shut and lockfast places;
- (b) an arrestment other than an arrestment of earnings in the hands of his employer;"

The Crofting Reform (Scotland) Act 1976 (c.21)

24. In section 17(1) (extension of powers of Land Court), for the words from "as if" to "to be enforced" there shall be substituted the words "in like manner as an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland".

The Patents Act 1977 (c.37)

25. In sections 93(b) and 107(3) (orders for expenses), for the words "a recorded decree arbitral" there shall be substituted the words "an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland."

The Employment Protection (Consolidation) Act 1978 (c.44)

26. In section 122 (employee's rights on insolvency of employer)—

- (a) in subsection (8)—
 - (i) after the words "subsection (3)(e)" there shall be inserted the word "(a)";
 - (ii) at the end there shall be added the words "or
(b) in a case where the employer is subject to a debt arrangement scheme, if it is included in the scheme";

EXPLANATORY NOTES

Paragraph 23

This paragraph reproduces *clause* 112 in relation to fines and other sums ordered to be paid by a criminal court.

Paragraphs 24 and 25

These paragraphs implement Recommendation 8.6(2) (para. 8.40).

Paragraphs 26 to 28

These paragraphs implement Recommendation 4.11(4) (para. 4.96).

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- (b) in subsection (9), after the word “manager” there shall be inserted the words “an administrator of a debt arrangement scheme,”.

27. In section 123(6) (payment of unpaid contributions to occupational pension scheme), after the word “manager” there shall be inserted the words “an administrator of a debt arrangement scheme,”.

28. In section 127(2) (interpretation of sections 122 to 126), after paragraph (a) there shall be inserted the following paragraph—

“(aa) he has become subject to a debt arrangement scheme;”.

The Customs and Excise Management Act 1979 (c.2)

29. In section 117 (execution and diligence against revenue traders), for subsection (9) there shall be substituted the following subsection—

“(9) This section shall apply to Scotland subject to the following modifications—

- (a) in subsection (3) for the words from “issue” to the end there shall be substituted the words “granting of a warrant for the recovery of a sum owing by the revenue trader, those goods shall not be liable to be taken in execution under this section.”;

- (b) in subsection (4) for the word “seized” in both places where it occurs there shall be substituted the words “taken in execution”;

- (c) for subsection (5) there shall be substituted the following subsection—

“(5) The sheriff, on an application by the proper officer accompanied by a certificate by him that relevant excise duty payable by a revenue trader remains unpaid after the time within which it is payable, may grant a warrant authorising a sheriff officer—

- (a) to take possession, by force if necessary, of anything liable to be taken in execution under this section and for that purpose to open shut and lockfast places; and
- (b) to sell anything so taken possession of by public auction after giving 6 days notice of the sale.”;
- (d) in subsection (6) for the word “distrained” in both places where it occurs there shall be substituted the words “taken possession of”;

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Paragraph 29

This paragraph implements Recommendation 7.16 (para. 7.69).

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- (e) in subsection (7) for the words “of the distress and sale” there shall be substituted the words “incurred in the taking possession and sale of the things under that subsection”.

The Education (Scotland) Act 1980 (c.44)

30. In paragraph 8 of Schedule 1 (local inquiries), for the words “a recorded decree arbitral” there shall be substituted the words “an extract registered decree arbitral bearing a warrant for execution issued by the sheriff court of any sheriffdom in Scotland.”.

The Betting and Gaming Duties Act 1981 (c.63)

31. Section 29 (recovery of duty in Scotland), shall have effect subject to the following modifications—

- (a) for subsection (1) there shall be substituted the following subsection—

“(1) The sheriff, on an application by the proper officer accompanied by a certificate by him that a person, on written demand by the proper officer, has refused or neglected to pay any amount recoverable from him by way of general betting duty or bingo duty or by virtue of section 12(1) or 14 above or of Schedule 2 to this Act, may grant a warrant authorising a sheriff officer—

- (a) to take possession, by force if necessary, of any of that person’s corporeal moveables which would not be exempted from poinding and for that purpose to open shut and lockfast places; and
 - (b) to sell anything so taken possession of by public auction after giving 6 days’ notice of the sale”;
- (b) in subsection (2) for the word “poinded” in both places where it occurs there shall be substituted the words “taken possession of”;
- (c) in subsection (3)—
 - (i) for the words “the poinding and” there shall be substituted the words “incurred in taking possession of the corporeal moveables and their”;
 - (ii) in paragraph (a) for the word “poinded” there shall be substituted the words “taken possession of”;
 - (iii) in paragraph (b) for the word “poinded” there shall be substituted the words “when they were taken possession of by the sheriff officer”;

EXPLANATORY NOTES

Paragraph 30

This paragraph implements Recommendation 8.6(2) (para. 8.40).

Paragraph 31

This paragraph implements Recommendation 7.16 (para. 7.69).

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- (d) in subsection (4) for the words “poinded” and “poinding” there shall be substituted respectively the words “taken possession of” and “taking possession of the corporeal moveables”.

The Civil Jurisdiction and Judgments Act 1982 (c.27)

32. At the end of paragraph 4 of Schedule 9 (continuance of certain existing jurisdictions), there shall be added the words “or a debt arrangement scheme.”.

The British Fishing Boats Act 1983 (c.8)

33. In section 5(2)(a) (recovery of fines), for the word “poinding” there shall be substituted the word “arrestment”.

The Rent (Scotland) Act 1984 (c.58)

34. For section 110 (restriction on diligence), there shall be substituted the following section—

“Restriction
on
sequestration
for rent.

110.At any stage before the grant of a warrant of sale in an action of sequestration for payment, or in security, of rent of any dwelling-house let on a protected tenancy or subject to a statutory tenancy, the sheriff may sist the proceedings or adjourn them for such period or periods as he thinks fit, in order to enable the tenant to pay the rent in such manner as the sheriff may determine (whether by instalments or otherwise).”.

The Bankruptcy (Scotland) Act 1985 (c.)

35. At the end of section 8 (further provisions relating to presentation of petitions), there shall be added the following subsection—

“(7) Every petition for sequestration presented by—

- (a) a living debtor, shall contain a statement that he is not subject to a debt arrangement scheme; or
- (b) a creditor, shall contain a statement that, to the best of his knowledge and belief, the debtor is not subject to a debt arrangement scheme.”.

36. After section 32 there shall be inserted the following section—

“Sist of
sequestration
in relation to
mobile homes.

32A. Where a caravan, houseboat or other moveable structure is the only or principal residence of the debtor, the Court of Session or the sheriff, on an application by the debtor made at any time after the date of sequestration, may order that, for such period as the Court of Session or sheriff may determine, no

EXPLANATORY NOTES

Paragraph 32

This paragraph is a consequential of Recommendation 4.8 (para. 4.60).

Paragraph 33

This paragraph implements Recommendation 5.52 (para. 5.246).

Paragraph 34

This paragraph implements Recommendation 3.23 (para. 3.114).

Paragraph 35

This paragraph is a consequential of Recommendation 4.46(3) (para. 4.311). In *paragraphs* 35 to 39 references to the Bankruptcy (Scotland) Act 1985 are references to the Bankruptcy (Scotland) Bill 1984 (Bill 48) as brought from the House of Lords to the House of Commons, and ordered to be printed, on 18 December 1984.

Paragraph 36

This paragraph implements Recommendation 5.51(3) (para. 5.244).

further steps shall be taken in the sequestration in relation to such caravan, houseboat or structure.”.

37. In section 36 (effect of sequestration on diligence), after subsection (5) there shall be inserted the following subsection—

“(5A) Nothing in subsection (4) or (5) above shall apply to an earnings arrestment, a current maintenance arrestment or a conjoined arrestment order.”.

38. In paragraph 10 of Schedule 7 (arrestments and poindings)—

(a) in sub-paragraph (3) after the words “a sale” there shall be inserted the words “or receives payment in respect of a poinded article upon its redemption by the debtor”;

(b) at the end there shall be added the following sub-paragraph—

“(5) Nothing in this paragraph shall apply to an earnings arrestment, a current maintenance arrestment or a conjoined arrestment order.”.

39. In paragraph 11(a) of Schedule 7 (application of section 32 of Bankruptcy Act 1883 to Scotland), after the word “Act” there shall be inserted the words “but shall not include the case of a person the payment of whose debts is regulated by a debt arrangement scheme”.

EXPLANATORY NOTES

Paragraph 37

This paragraph implements Recommendations 6.15 (para. 6.103), 6.31(1) (para. 6.189) and 6.50(3) (para. 6.270).

Paragraph 38

Sub-paragraph (b) implements Recommendations 6.41(2) (para. 6.228) and 6.46(1) (para. 6.252).

Paragraph 39

This paragraph implements Recommendation 4.47 (para. 4.314).

TRANSITIONAL PROVISIONS

1971 c. 58.

1. Notwithstanding the repeal by this Act of subsection (4) of section 36 of the Sheriff Courts (Scotland) Act 1971—

- (a) any direction made under that subsection, which is in force immediately before the commencement of this Act, shall continue in force; and
- (b) any summary cause action for payment, which is pending immediately before such commencement, shall proceed and be disposed of,

as if this Act had not been passed.

2. The sheriff may refuse to make a time to pay order if, on an objection being duly made in pursuance of section 5(5)(a) of this Act, he is satisfied that a direction has been made under section 36(4) of the said Act of 1971 whereby the debt concerned was payable by instalments, but the right to pay by instalments has ceased by reason of failure to pay an instalment.

3. Without prejudice to paragraphs 4 to 6 of this Schedule, a warrant issued before the commencement of this Act, for the enforcement by diligence of an obligation to pay money, contained in an extract of a decree or of a document which has been registered in the Books of Council and Session or in sheriff court books shall be treated as if it were a warrant contained in a decree granted after the commencement of this Act.

4. Nothing in Part III of this Act shall affect a poinding which is in effect immediately before the commencement of this Act; and further proceedings in such a poinding and in any sale to follow thereon shall be in accordance with the law in force immediately before such commencement.

5. Nothing in this Act shall affect an arrestment of earnings in the hands of an employer which has been executed before the commencement of this Act nor preclude the raising of an action of furthcoming in pursuance of such an arrestment or the granting of a decree in any such action.

6. Where an arrestment of a debtor's earnings in the hands of an employer which has been executed before the commencement of this Act has or shall have effect in relation to earnings payable on the first pay day occurring after such commencement, the execution of an earnings arrestment or a current maintenance arrestment during the period between such commencement and that pay day against earnings payable to the debtor by the employer shall be incompetent.

7.—(1) A summary warrant granted before the commencement of this Act under or by virtue of any of the enactments to which this paragraph applies shall be deemed to authorise, and authorise only—

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- (a) a poinding and sale in accordance with Schedule 6 to this Act;
- (b) an earnings arrestment; and
- (c) an arrestment other than an arrestment of the debtor's earnings in the hands of his employer:

Provided that, if at the commencement of this Act diligence executed in pursuance of such a warrant is pending, that diligence shall proceed as if this Act had not been passed.

(2) This paragraph applies to the following enactments—

- 1947 c. 43. (a) section 247 of the Local Government (Scotland) Act 1947;
- 1970 c. 9 (b) section 63 of the Taxes Management Act 1970;
- 1972 c. 41. (c) paragraph 13 of Schedule 1 to the Finance Act 1972;
- (d) paragraph 16(2) of Schedule 7 to the Finance Act 1972;
- 1983 c. 53. (e) paragraph 3 of Schedule 1 to the Car Tax Act 1983;
- 1983 c. 55. (f) paragraph 6 of Schedule 7 to the Value Added Tax Act 1983.

8.—(1) Where before the commencement of this Act—

- (a) a warrant has been granted under any of the enactments to which this paragraph applies, but
 - (b) no diligence has been executed in pursuance of the warrant
- the warrant shall cease to have effect.

(2) Where before the commencement of this Act—

- (a) a warrant has been granted under any of the enactments to which this paragraph applies; and
 - (b) diligence has been executed in pursuance of the warrant
- the diligence shall proceed as if this Act has not been passed.

(3) This paragraph applies to the following enactments—

- 1952 c. 44. (a) section 253 of the Customs and Excise Act 1952;
- (b) paragraph 10 of Schedule 2 to the Betting and Gaming Duties Act 1972;
- 1972 c. 25. (c) section 117 of the Customs and Excise Management Act 1979;
- 1979 c. 2. (d) section 29 of the Betting and Gaming Duties Act 1981.
- 1981 c. 63.

9.—(1) This paragraph applies to the following diligences—

- (a) a poinding and sale;
- (b) an arrestment and action of furthcoming or sale;

being diligences which are pending at the commencement of this Act

(2) The provisions of this Act relating to the liability for the expenses of a diligence shall not apply in relation to a diligence to which this paragraph applies.

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(3) Section 118(1) or (2) of this Act shall not prevent a creditor from taking proceedings in court to recover any expenses chargeable against the debtor of a diligence to which this paragraph applies.

(4) Notwithstanding section 120 of this Act, a diligence to which this paragraph applies shall cease to have effect on payment or tender of the debt other than the expenses of the diligence.

EXPLANATORY NOTES

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SCHEDULE 9

Repeals

<i>Chapter</i>	<i>Short Title</i>	<i>Extent of Repeal</i>
1503 c.45.	The Diligence Act 1503.	The whole Act.
1579 c.13.	The Registration Act 1579.	The whole Act.
1579 c.45.	The Hornings Act 1579.	The whole Act.
1584 c.15.	The Execution of Decrees Act 1584.	The whole Act.
1587 c.30.	The Officers of Arms Act 1587.	The whole Act.
1592 c.29.	The Lyon King of Arms Act 1592.	Section (3). In section (5) the words from "As alsua" to the end.
1593 c.34.	The Hornings Act 1593.	The whole Act.
1600 c.22.	The Hornings Act 1600.	The whole Act.
1607 c.13.	The Convention of Burghs Act 1607.	The whole Act.
1621 c.20.	The Hornings Act 1621.	The whole Act.
1661 c.218.	The Poinding Act 1661.	The whole Act.
1669 c.5.	The Poinding Act 1669.	The whole Act.
1669 c.95.	The Lyon King of Arms Act 1669.	The words from "the fourtie sext" to "Together also with".
1672 c.47.	The Lyon King of Arms Act 1672.	The words from "are judges" to "office and".
1681 c.5.	The Subscription of Deeds Act 1681.	The word "hornings".
1681 c.86.	The Bills of Exchange Act 1681.	The words from "Letters of horning" to "and other".

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<i>Chapter</i>	<i>Short Title</i>	<i>Extent of Repeal</i>
20 Geo. 2 c.43.	The Heritable Jurisdictions (Scotland) Act 1746.	Section 28.
20 Geo. 2 c.50.	The Tenures Abolition Act 1746.	Sections 12 and 13.
5 Geo. 3 c.49.	The Bank Notes (Scotland) Act 1765.	In section 6 the words from "issuing" to "all other".
12 Geo. 3 c.72.	The Bills of Exchange (Scotland) Act 1772.	In section 42 the words "by horning or other diligence". In section 43 the words "by horning or other diligence".
1 & 2 Vict. c.114.	The Debtors (Scotland) Act 1838.	Sections 2 to 15. Sections 23 to 31. In section 32 the words "excepting in the case of poindings". Section 35. All the Schedules.
9 & 10 Vict. c.67.	The Citations (Scotland) Act 1846.	In section 1 the words "excepting only in cases of poinding as aforesaid".
19 & 20 Vict. c.56.	The Exchequer Court (Scotland) Act 1856.	In section 28 the words from "except that" to the end. Sections 29 to 34. Section 36. Schedules G to K.
19 & 20 Vict. c.91.	The Debts Securities (Scotland) Act 1856.	In section 6, the words "of hornings".

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<i>Chapter</i>	<i>Short Title</i>	<i>Extent of Repeal</i>
33 & 34 Vict. c.63.	The Wages Arrestment Limitation (Scotland) Act 1870.	The whole Act.
43 & 44 Vict. c.34	The Debtors (Scotland) Act 1880.	In section 4, the proviso, the word from "a warrant" to "or under" and the words "or obligation".
45 & 46 Vict. c.42.	The Civil Imprisonment (Scotland) Act 1882.	Section 5.
55 & 56 Vict. c.17.	The Sheriff Courts (Scotland) Extracts Act 1892.	Section 7(6).
10 & 11 Geo. 6 c.43.	The Local Government (Scotland) Act 1947.	Sections 248, 249 and 251.
10 & 11 Geo. 6 c.44.	The Crown Proceedings Act 1947.	In section 46, proviso (a).
8 & 9 Eliz. 2 c.21.	The Wages Arrestment Limitation Amendment (Scotland) Act 1960.	The whole Act.
1966 c.19.	The Law Reform (Miscellaneous Provisions) (Scotland) Act 1966.	Sections 2 and 3.
1968 c.49.	The Social Work (Scotland) Act 1968.	In section 80, subsections (2) and (3).
1970 c.9.	The Taxes Management Act 1970.	Section 64.
1970 c.36.	The Merchant Shipping Act 1970.	In section 11(1)(a), the words "or arrestment".
1971 c.58.	The Sheriff Courts (Scotland) Act 1971.	Section 36(4).

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The Debtors (Scotland) Bill

<i>Chapter</i>	<i>Short Title</i>	<i>Extent of Repeal</i>
1979 c.39.	The Merchant Shipping Act 1979.	In section 39, subsection (2) and in subsection (3) the words “or arrestment” and the words from “and, as” to the end.
1979 c.54.	The Sale of Goods Act 1979.	Section 40.
1984 c.43.	The Finance Act 1984.	Section 16.

EXPLANATORY NOTES

APPENDIX B

SUMMARY OF RECOMMENDATIONS

This Appendix contains a summary of the recommendations made in this report. Most of the recommendations are implemented by the draft Bill in Appendix A. Some recommendations, however, would require to be implemented by subordinate legislation or administrative action. These are marked with an asterisk and consist of the following, namely, Recommendations 3.11(2), 3.15(2), 3.17(2), 3.25(3), 4.46(7), 5.7, 5.8, 5.19(1)(g), 5.32(3), 5.47(2), 5.48(3), 6.3(4), 6.18(2), 6.20, 6.32(1), 6.37, 6.39(1), 6.42 (5) and (6), 6.44(4), 7.13, 7.17(2) and (4), 8.8(1) to (3), 8.9, 8.11(1), (3), (4) and (5), 8.12(6), 8.13, 8.19(3), 8.20, 8.21, 8.22, 8.23(8), 8.24(8), 8.28(2), 8.29, 9.1(1), 9.6(2) to (4), 9.9(8), 9.10(4) and 9.11(6).

Recommendation
No.

TIME TO PAY DECREES AND ORDERS

Time to pay decrees

- 3.1 The present jurisdiction of the courts to grant instalment decrees in summary cause actions should be replaced by a jurisdiction to grant decrees containing directions (called time to pay directions) providing for payment of the debt by instalments or by a deferred lump sum.
(Paragraph 3.4; clause 1(1).)
- 3.2 (1) Title to apply for a time to pay direction should be conferred on a debtor who is an individual and who is either (a) personally liable under the decree or (b) liable in a fiduciary or representative capacity as tutor of an individual or as judicial factor *loco tutoris*, curator *bonis* or judicial factor *loco absentis* on an individual's property.
- (2) Where an individual is liable to make payments under a decree both in a personal capacity and in a fiduciary or representative capacity, (e.g. as a trustee, executor or office-bearer of a voluntary association), it should be competent for the court to include in the decree a time to pay direction applying to the individual's personal liability, but not to his liability in his other capacity unless that other capacity is one of those mentioned in paragraph (1)(b) above.
- (3) A time to pay direction should cease to have effect on the debtor's death or on the *inter vivos* transmission of his obligation to pay the debt.
(Paragraph 3.9; clause 12.)
- 3.3 (1) Subject to the monetary limit proposed in Recommendation 3.6 (paragraph 3.25), time to pay decrees should be competent not only in sheriff court summary cause actions

for payment of a principal sum but also in other actions in the sheriff court or Court of Session for payment of a principal sum.

(2) Time to pay decrees should not be competent, however, where:

(a) the sum due under the decree consists of or includes an award of financial provision on divorce or aliment; or

(b) the decree provides for the recovery by periodic payments of the cost of supplementary benefit from a relative liable to maintain the recipient of the benefit or is a contribution order or similar order against the relative of a child in the care of a local authority.

(Paragraph 3.13; clause 1(1), (4)(b) and (c), and (7).)

3.4 A creditor in a time to pay decree should be entitled to claim interest not quantified in the decree only if he intimates the amount of interest claimed to the debtor not later than a date prescribed by act of sederunt occurring before the date when payment of the last instalment or of the deferred lump sum falls due.

(Paragraph 3.16; clause 1(5).)

3.5 (1) In an action for payment of a principal sum, the court's power to make a time to pay direction relating to the expenses of the action should be exercisable only when it grants decree decerning for payment of the principal sum and either decerning for payment of the expenses or making a finding as to liability for the expenses; and accordingly where the expenses are taxed by the auditor of court at a later stage, a time to pay direction relating to those expenses should not be competent at that stage.

(2) Where the court grants a decree not decerning for payment of a principal sum but making a finding as to liability for expenses (whether or not the decree also decerns for payment of the expenses), it should not be competent for the court to make a time to pay direction relating to those expenses.

(Paragraph 3.21; clause 1(1) and (2).)

3.6 The court's power to make a time to pay direction should be exercisable only if the principal sum (i.e. disregarding interest and expenses) does not exceed a monetary limit fixed by statute at £10,000 initially but variable by statutory instrument.

(Paragraph 3.25; clause 1(4)(a) and (6).)

3.7 (1) A time to pay decree, while it is in operation, should render the debt unenforceable by a charge for payment and by the

diligences used for enforcing payment of ordinary unsecured debts, namely, poinding and warrant sale, earnings arrestment (recommended below), arrestment and action of furthcoming, arrestment and action of sale (of vessels), and adjudication for debt, but should not prevent the registration of an inhibition based on the debt.

- (2) On making a time to pay decree, the court should have a new discretionary power to make an ancillary order recalling or restricting an existing arrestment on the dependence of the action in which the decree was granted, or an existing arrestment in security of the debt to which the decree relates. This ancillary power should be additional to its common law powers to recall or restrict arrestments on the dependence or in security.
- (3) The court should be empowered to impose on the debtor conditions which must be fulfilled before the making of the ancillary order, and to defer pronouncing decree to allow time for the debtor to fulfil the conditions.
- (4) The foregoing ancillary power should not apply to inhibitions on the dependence or in security or adjudications in security.
(Paragraph 3.35; clause 2.)

- 3.8 It should not be competent for a creditor to raise an action of adjudication to enforce a debt payable under a liquid document of debt or a bill of exchange or promissory note unless:
- (a) the debt has been constituted by a decree; or
 - (b) the document of debt, or a protest of the bill of exchange or the promissory note, as the case may be, has been registered for execution in the books of court.
- (Paragraph 3.37; clause 126.)

- 3.9 The diligences to be rendered unenforceable by a time to pay decree or subject to recall by an order ancillary to such a decree, should not include a sequestration for rent or feuduty under the landlord's or superior's hypothec, a poinding of the ground or an action of maills and duties.
(Paragraph 3.42; clauses 2 and 11(1)(a).)

- 3.10
- (1) Sums due under a time to pay decree decerning for payment of a principal sum should become payable only after intimation by the creditor of the extract decree to the debtor.
 - (2) Where a court grants a time to pay direction relating to expenses in a decree which either:
 - (a) finds expenses due but does not decern for payment of them; or

(b) decerns for payment of the expenses as taxed by the auditor of court but does not specify the expenses as a quantified sum,

the expenses should be payable in terms of the direction only after intimation by the creditor to the debtor of an extract decree for expenses specifying their amount.

- (3) The privilege of time to pay by instalments conferred by a time to pay decree should lapse automatically if, on the due date for payment of an instalment, the debtor is already two prior instalments in arrears. If the debtor is in arrears with one prior instalment on the date when the last instalment falls due, or if he is not in arrears but fails to pay that instalment on that date, the privilege should lapse if he had not paid the unpaid balance of the debt within three weeks after that date.
- (4) A time to pay direction relating to a deferred lump sum should lapse 24 hours after the time for payment has arrived.
- (5) Where the court makes a time to pay direction in a decree for payment of a principal sum and subsequently grants a decree for payment of the expenses of the action, the lapse of the direction through default in paying a sum or sums due under one of the decrees should terminate also the privilege of time to pay the sums due under the other decree.

(Paragraph 3.45; clauses 1(1) and (3); and 3(1)–(4).)

- 3.11
- (1) A court which has made a time to pay decree should be empowered to vary or recall the time to pay direction in the decree and, subject to such prior conditions as the court thinks fit, to recall or restrict any arrestment securing the debt, on a subsequent application by the debtor or creditor.
 - (2)* Provision should be made by act of sederunt to ensure that the form of intimation of an extract time to pay decree should notify the debtor of his right to apply for a variation of the time to pay direction in the decree and for recall or restriction of an arrestment securing the debt.

(Paragraph 3.48; clause 3(5), (6) and (7).)

Time to pay orders

- 3.12
- (1) A new jurisdiction should be conferred on the courts to make an order (to be called a time to pay order) whereby a debt which has already been constituted by decree would be payable by instalments or by a deferred lump sum.
 - (2) Time to pay orders should be available to the same categories of persons and subject to the same limitations as are time to pay directions in terms of Recommendation 3.2 above.

(Paragraph 3.53; clauses 4(1) and (2), and 12.)

- 3.13 (1) A time to pay order should be competent where (a) the debt has been constituted by a decree or other document of debt bearing a warrant for diligence; or (b) the debt consists of or includes tax or rates arrears for the enforcement of which the sheriff has granted a summary warrant authorising diligence.
- (2) Such an order, however, should not be competent where:
- (a) the debt due under the decree consists of or includes financial provision on divorce, or aliment; or
 - (b) the decree provides for the recovery of the cost of supplementary benefit or is a contribution order as mentioned in Recommendation 3.3(b); or
 - (c) the debt is due under a non-Scottish decree, analogous to those mentioned above, which is enforceable in Scotland; or
 - (d) the debt is a civil fine or penalty imposed for contempt of court in civil proceedings, or for breach of an order under section 91 of the Court of Session Act 1868, or for professional misconduct under any enactment; or
 - (e) the debt is a fine or other sum due under an order of a court in criminal proceedings.
- (Paragraph 3.58; clause 4(1) and (7).)
- 3.14 (1) A time to pay order should only be competent where a charge to pay or arrestment in common form had been executed, an action of adjudication for debt had been raised, or a summary warrant granted, for recovery of the debt.
- (2) A time to pay order should not be competent after a diligence enforcing the debt had proceeded to an advanced stage (viz. warrant of sale of poinded goods; intimation of the date of removal or impending sale of goods poinded under the recommended new summary warrant poinding procedure; decree of furthcoming or sale of arrested property; or entry into possession of adjudged property with the debtor's consent or acquiescence or a decree of mails and duties or of removing or ejection relating to such property) and until the date when the diligence had been completed or for any reason had ceased to have effect, after which date a time to pay order should again become competent.
- (Paragraph 3.63; clause 4(1) and (4).)
- 3.15 (1) A time to pay order should be competent only where:
- (a) the debt (exclusive of interest but including expenses decerned for as a quantified sum in the extract decree and diligence expenses) does not exceed a prescribed

sum (fixed initially at £10,000 variable by statutory instrument); and

(b) a time to pay direction or time to pay order relating to the debt has not already been made.

(2)* Provision should be made by act of sederunt requiring a debtor applying for a time to pay order to state in his application that no time to pay direction or order relating to the debt has been made.

(Paragraph 3.66; clause 4(3) and (6).)

3.16 (1) The sheriff courts should have exclusive jurisdiction to make time to pay orders.

(2) The sheriff court which granted the decree for payment or summary warrant for recovery of a debt should have jurisdiction to make a time to pay order affecting that debt. In all other cases, jurisdiction should be conferred on the sheriff court of the place where the debtor is domiciled or, if he is not domiciled in Scotland, a place where he carries on business, or if he has no domicile or place of business in Scotland, a place where he has property (or a source of income) liable to diligence.

(Paragraph 3.71; clause 4(2) and (7) (definition of "sheriff").)

3.17 (1) The procedure in an application for a time to pay order should be as outlined at paras. 3.72 to 3.75 of this report.

(2)* So far as the procedure in an application for a time to pay order is not prescribed by clauses 5 and 6 of the Bill annexed to this report, it should be prescribed by act of sederunt. Provision should be made by act of sederunt to secure that where possible a debtor applying for a time to pay order should furnish particulars of the decree concerned to the sheriff and those particulars should be set out in the charge and other documents served on a debtor in the execution of diligence.

(Paragraph 3.76; clauses 5 and 6.)

3.18 (1) The sheriff should make an interim order sisting diligence by the creditor pending disposal of an application for a time to pay order.

(2) The interim order should not stop the execution of new poindings and arrestments. It should however stop poindings and arrestments from proceeding to warrant of sale or decree of furthcoming or, in a summary warrant poinding, intimation of either removal for sale or sale. It should stop new actions of adjudication for debt and, if such an action had been raised, it should stop the creditor from entering into possession of the adjudged property but it should not

stop the registration of a notice of litigiosity in connection with the action, nor the obtaining and recording of an abbreviate or decree of adjudication.

- (3) The period during which an interim sist of diligence is in force should be disregarded in computing the period during which by law a diligence subsists.

(Paragraph 3.85; clauses 5(3) and 7; Schedule 7, paragraph 2.)

3.19

- (1) A time to pay order should preclude enforcement of the debt by any new charge, poinding (other than a poinding of the ground), earnings arrestment, arrestment in common form, or action of adjudication for debt.

- (2) The sheriff should have:

(a) a duty to recall an existing earnings arrestment; to recall, or exclude the debt from, a conjoined arrestment order; and to prohibit further steps in an adjudication for debt other than the registration of a notice of litigiosity and the obtaining and recording of an abbreviate and decree of adjudication; and

(b) a power to recall or restrict an arrestment and to recall a poinding (other than a poinding of the ground), and if he does not recall the poinding or arrestment, he should make an order "freezing" the diligence by prohibiting the creditor from taking further steps in the diligence and rendering incompetent the grant of warrant of sale or of decree of furthcoming or sale. This freezing order would not however prevent an officer of court from lodging a report of the poinding nor prevent an application for the disposal of perishable goods or for security of goods.

- (3) The period during which a diligence is "frozen" by such an order should be ignored in reckoning the time limits on the duration of the diligence.

- (4) A time to pay order and its ancillary orders should cause an unexpired charge to lapse but should not retrospectively annul the effect which an expired charge has had in creating "apparent insolvency" within the meaning of bankruptcy legislation.

- (5) If the sheriff, being unaware of the existence of a diligence, omits to make an ancillary order recalling, restricting or freezing it as recommended above, the diligence should continue in operation, and further steps may be taken in it, unless and until it is recalled, restricted or "frozen" by a subsequent order.

(Paragraph 3.93; clause 8; Schedule 7, paragraph 2.)

3.20

The provisions on automatic lapse of time to pay orders, the variation and recall of such orders, and the recall and restriction of existing diligences securing the debt should be similar to the

corresponding provisions applying to time to pay decrees, but with minor modifications.

(Paragraph 3.97; clause 9.)

Recommendations applying to both time to pay decrees and time to pay orders

- 3.21 (1) A debt to which a time to pay direction or time to pay order relates should not entitle the creditor to present, or concur in, a petition for the debtor's sequestration while the direction or order is in effect.
- (2) A time to pay direction in a decree or a time to pay order should be terminated by an award of sequestration of the debtor's estate, a trust deed for his creditors, an extra-judicial composition contract with his creditors or the circulation of a notice requesting creditors to verify their debts in an application for a debt arrangement scheme such as we recommend in Chapter 4.

(Paragraph 3.100; clause 10.)

- 3.22 The recall of an arrestment or poinding should not affect any right which the creditor had acquired through his arrestment or poinding to a *pro rata* share in the proceeds of other arrestments and poindings under bankruptcy legislation.

(Paragraph 3.102; clause 11(2).)

- 3.23 The restriction on diligence enforcing rent imposed by the Rent (Scotland) Act 1984, section 110, should be limited to actions of sequestration for payment, or in security, of rent and should be amended to provide that the sheriff has powers to sist or adjourn the action to enable the rent to be paid by instalments or otherwise which are exercisable at any stage between the first deliverance and the grant of warrant of sale of the sequestrated goods and effects.

(Paragraph 3.114; Bill, Schedule 7, paragraph 34.)

- 3.24 A time to pay decree and a time to pay order or interim order should not affect the right of a creditor to recover his debt by the exercise of any rights and remedies available to him (such as rights of set off, retention, lien, or recourse against cautioners; the exercise of security rights, e.g. under standard securities or pledges; contractual rights to recover possession of heritable or moveable property, e.g. under hire-purchase agreements; and the rights of electricity or gas boards to disconnect supply) other than the diligences used to enforce unsecured debts and sequestration, and except as mentioned in Recommendation 3.25 below.

(Paragraph 3.118; clause 11(1).)

- 3.25
- (1) Where a time order has been made under the Consumer Credit Act 1974, it should not be competent thereafter to make a time to pay direction or time to pay order under our recommended legislation for the same debt whether or not the time order is still in operation.
 - (2) Conversely, where a time to pay decree or order has been granted under our recommended legislation, it should not be competent thereafter to grant a time order under the 1974 Act for the same debt whether or not the time to pay decree or order is still in operation.
 - (3)* Provision should be made by act of sederunt requiring:
 - (a) the creditor or owner in an action brought to enforce a regulated agreement or any related security within the meaning of the 1974 Act to lodge a copy of any existing or previous time order relating to the debt;
 - (b) a debtor applying for a time to pay order to state in his application that no time order under the 1974 Act relating to the debt has been made; and
 - (c) a debtor applying for a time order under the 1974 Act to state in his application that no time to pay direction or order relating to the debt has been made under our recommended legislation.
 - (4) Summary diligence should be incompetent to enforce payment of a sum owed under a regulated agreement or any related security within the meaning of the 1974 Act.
(Paragraph 3.127; clause 13; Schedule 7, paragraphs 19 and 20.)

DEBT ARRANGEMENT SCHEMES

Introduction of debt arrangement schemes

- 4.1
- A new legal process, to be known as a debt arrangement scheme, providing for the orderly and regular payment by an individual debtor of the debts due to his several creditors should be introduced in Scots law.
(Paragraph 4.34; clause 14(1).)

Content and nature of debt arrangement schemes

- 4.2
- (1) A debt arrangement scheme should provide for:
 - (a) an extension of time for payment of debts; or
 - (b) payment of debts only to the extent of a composition; or
 - (c) a combination of the two foregoing types of proposal for payment.
 - (2) The maximum period allowed by a debt arrangement scheme for the payment by the debtor of instalments should

normally be three years from the coming into force of the scheme (when the sheriff's order confirming the scheme takes effect on the expiry of the appeal days or the disposal of an appeal).

- (3) The sheriff however should have power to extend that period to be a period not exceeding five years in all. This power should be exercisable either on confirming the scheme or in an application for variation of the scheme after it has been confirmed.
- (4) A scheme providing for a composition should state the proportion of each debt which the creditor in that debt would be paid, and the total amount to be paid to all creditors under the scheme.

(Paragraph 4.41; clauses 14(2), (3) and (9), 24(6) and (10), and 28(6).)

- 4.3 (1) A debt arrangement scheme should provide for payment of debts through an administrator and should regulate the method and times of in-payments and disbursements.
- (2) Every scheme should state expressly that a pay deduction order may be made.

(Paragraph 4.44; clause 14(4) and (7).)

- 4.4 (1) It should be competent to include in a debt arrangement scheme a provision requiring the payment to the administrator of specified funds belonging to the debtor, or the realisation of items of the debtor's property and payment of their net proceeds, to the administrator for disbursement to creditors under the scheme. The scheme could include conditions designed to secure compliance with the provision, e.g. by third parties acting under the debtor's mandate.
- (2) The administrator should report to the sheriff on the debtor's compliance with the provision and the sheriff should be under a duty to revoke the scheme, after giving the debtor an opportunity to be heard, if he found that the debtor had not so complied.

(Paragraph 4.47; clauses 14(5), and 30(4) and (5).)

- 4.5 (1) It should be competent to include in a scheme a restriction on the debtor obtaining credit exceeding an amount specified in the scheme but with exemptions for credit to pay rent and gas and electricity charges for the debtor's residence and any other items so specified.
- (2) On the debtor's breach of the restriction, the sheriff should have power to revoke the scheme.

(Paragraph 4.49; clauses 14(6) and 30(1).)

- 4.6 A debtor, but not a creditor, should have a title to apply for a debt arrangement scheme, and it should be expressly provided by statute that the debtor may withdraw his application at any time before the scheme is confirmed.
(Paragraph 4.54; clause 14(10).)

Forum and conditions of competence of scheme applications

- 4.7 The sheriff court should have exclusive jurisdiction to entertain applications for debt arrangement schemes and to confirm, vary and recall such schemes (subject to appeals on questions of law to the Court of Session as recommended in Chapter 9).
(Paragraph 4.56; clauses 14(1), 19, 24, 28 and 30.)
- 4.8 Jurisdiction in debt arrangement schemes should be exercisable by the sheriff having jurisdiction over the debtor's domicile within the meaning of the Civil Jurisdiction and Judgments Act 1982, section 41, or, in the absence of a Scottish domicile, the debtor's established place of business.
(Paragraph 4.60; clause 42(1) (definition of "sheriff").)
- 4.9
- (1) Only persons who are individuals (not bodies corporate or unincorporate) should have a title to apply for a debt arrangement scheme.
 - (2) Only debts for which the debtor is personally liable should be included in a scheme.
 - (3) Debtors who are self-employed, as well as other debtors, should be entitled to apply for a scheme and debts incurred in the course of the debtor's present and previous profession, trade or business, if any, should be included in a scheme.
 - (4) A scheme application should be competent only if:
 - (a) the debtor is unable to pay his debts as they fall due;
 - (b) he owes not less than three debts;
 - (c) at least one of the debts has been constituted by decree and a charge to pay or arrestment has been executed or an action of adjudication has been raised, or a summary warrant for recovery of rates or taxes has been granted.
 - (5) A scheme application should be entertained only if it appears to the sheriff that:
 - (a) the total debts (exclusive of interest and expenses and disregarding a heritably secured debt) do not exceed a prescribed sum fixed initially at, say, £10,000 but variable by statutory instrument; and
 - (b) the product of the scheme is likely to reach a minimum prescribed sum (fixed initially at £600 but variable by statutory instrument) over three years.
- (Paragraph 4.72; clauses 14(1) and (8), and 17(1) and (3)–(5).)

Inclusion and ranking of debts, stoppage of diligence, effect of scheme on creditors' other rights and remedies, and payments outside scheme

- 4.10 (1) For the purpose of calculating the amount due to a creditor in terms of a scheme and of ranking creditors on each of the disbursements under a scheme, the amount of the debts initially included in a scheme should so far as practicable be fixed by reference to a single date occurring at an early stage of a scheme application: the proposed date is the date when the first statutory notice is served on a creditor by an administrator in the procedure recommended below for requiring creditors to verify the amounts of their debts ("the first notice date").
- (2) Only debts (including interest and legal expenses) presently payable and undisputed at the first notice date would be initially eligible for inclusion in a scheme.
- (3) Interest payable between the first notice date and the end of a successful scheme on an interest-bearing unsecured debt should be recoverable by the creditor only if (a) the scheme provided for payment of debts in full and (b) the interest was claimed in the procedure for discharge of debts at the end of a successful scheme as proposed below.
- (4) The expenses of court proceedings due by the debtor should be initially included in a scheme only if a decree for expenses had been extracted, or the amount of expenses agreed by the parties, before the first notice date.
- (5) The expenses of an action for payment of a principal sum against the debtor raised while a scheme application or scheme subsisted should be included only if either (a) the creditor was not aware of the application or scheme when he raised the action or (b) the action was necessary to resolve a dispute as to liability or quantum. Where the expenses of an action were excluded in terms of this rule, and the principal sum was included in the scheme, any discharge of debts at the termination of the scheme should operate to discharge the debtor's liability for those expenses.
- (6) Diligence expenses chargeable against the debtor and incurred before the first notice date should be included unless disputed by the debtor, except that the expenses of a diligence taking the form of a court action would be subject to the rule in paragraph (4) above.

(Paragraph 4.80; clauses 15(1)–(4), 16(2)(a), 29 and 39.)

- 4.11 (1) In debt arrangement schemes, all included creditors should rank *pari passu* on the product of a scheme and on each disbursement by the administrator to creditors under the scheme.

- (2) There should be no category of preferred creditors. In particular, no preference should be given to creditors supplying accommodation or essential goods and services to the debtor, nor to creditors having a preferential status in sequestrations under bankruptcy legislation.
- (3) The sheriff should disregard any objection to an application for confirmation, or any contention in an application for revocation of a scheme, made by a creditor, who would have a preference in sequestration, to the effect that he would not obtain that preference in the scheme, but pending a scheme application such a creditor should be entitled to apply for the sheriff's leave to petition for sequestration as recommended below.
- (4) Part VII of the Employment Protection (Consolidation) Act 1978 (payment by Secretary of State from redundancy fund of benefits to employees of insolvent person) should apply to a debtor subject to a debt arrangement scheme, with subrogation of the Secretary of State, following payment of benefits, to the employee's ranking in the scheme.

(Paragraph 4.96; clauses 16(1), 25 and 30(2); Schedule 7, paragraph 26.)

- 4.12 Business creditors and married persons who would be postponed creditors in a sequestration should rank in a debt arrangement scheme equally with ordinary unsecured creditors.

(Paragraph 4.98; clause 16(1).)

- 4.13
- (1) On appointing an administrator in a scheme application, the sheriff should make an interim order "sisting" diligence against the debtor.
 - (2) A copy of the order should be intimated as soon as practicable to each of the known creditors and should bind the creditor from the date of intimation.
 - (3) The interim order should have the following effects:
 - (a) It should render incompetent the grant of a warrant of sale of poinded goods; but it should not prevent a creditor from executing a poinding in common form; (the references here are to "personal" poindings, not to the secured creditor's diligence of poinding of the ground).
 - (b) It should render incompetent intimation of the sale, or removal and sale, of goods poinded under a summary warrant for rates and taxes under the procedure outlined in Chapter 7; but it should not prevent the execution of such a poinding.
 - (c) It should render incompetent the execution of an earnings arrestment but it should not affect an earnings

arrestment already executed. It should neither prevent nor affect a current maintenance arrestment or a conjoined arrestment order.

- (d) It should render incompetent the raising of an action of furthcoming or sale of arrested property or ships or the grant of decree in an action already raised, but it should not render incompetent the execution of an arrestment in common form.
- (e) It should render incompetent the raising of an action of adjudication for debt or, if such an action had already been raised the taking of any steps (such as entry into possession, ejection of the debtor) other than the registration of a notice of litigiosity in connection with the action, the obtaining and extracting of decree, registration of an abbreviate of adjudication and the completion of title (by recording the decree in the property or personal registers). But it should not affect any steps already taken in the diligence.
- (f) It should not render incompetent the procedure for obtaining and registering a warrant of inhibition or notice of inhibition nor affect any existing inhibition (or notices) which had already been registered.
- (g) It should render incompetent the grant of a warrant for the civil imprisonment of an aliment defaulter.
- (4) Time limits on the duration of diligences should be extended by the period during which the interim order affects the diligence.

(Paragraph 4.109; clause 20(1)–(3) and (5); Schedule 7, paragraph 2.)

- 4.14
- (1) A debt arrangement scheme, while in force, should render incompetent the commencement or execution of a charge for payment and any of the ordinary diligences used to enforce or secure unsecured debts, namely, poinding and sale in common form (not being a poinding of the ground) or under summary warrant, earnings arrestment, arrestment and action of furthcoming or sale, inhibition, and adjudication for debt, including diligences (arrestments and inhibitions) used on the dependence or in security as well as diligences in execution. The same prohibition should apply while the order confirming the scheme is appealable or subject to appeal.
 - (2) As regards diligences already commenced, the scheme should render ineffectual:
 - (a) a poinding in common form (not being a poinding of the ground) not already followed by warrant of sale;
 - (b) a summary warrant poinding not already followed by intimation of the dates of removal and sale, or of sale;

- (c) an arrestment in common form not already followed by decree of furthcoming or sale;
 - (d) an earnings arrestment and a conjoined arrestment order such as are recommended in Chapter 6; and
 - (e) an inhibition.
- (3) A debt arrangement scheme should not affect any action of adjudication for debt which had already been raised. An adjudging creditor's debt should be excluded from a scheme unless the creditor, at the first notice date (or subsequently in terms of the rules on "late" inclusion), had abandoned his action, discharged any notice of litigiosity or abbreviate of adjudication already registered, and discharged any decree of adjudication already obtained, as the case may be.
- (4) An unexpired charge should lapse.
(Paragraph 4.118; clauses 15(9), and 18(1)(a), (5)(a), (b) and (6).)
- 4.15
- (1) Where an existing inhibition was rendered ineffectual on the coming into force of a debt arrangement scheme, the debtor should be entitled to have the inhibition discharged by registering in the personal registers a notice (in a form prescribed by statutory rules) of the order confirming the scheme.
- (2) The sheriff should have power, exercisable (on the debtor's application intimated to the creditor concerned) on or after confirming a debt arrangement scheme, to make an order declaring ineffectual:
- (i) any inhibition or notice of inhibition which was incompetent by reason of being registered after the confirmation of the scheme; and
 - (ii) a notice of litigiosity, an abbreviate of adjudication or a decree of adjudication registered in connection with an action of adjudication for debt which was incompetent by reason of the raising of the action either in contravention of an interim order sisting diligence or after confirmation of the scheme.
- A certified copy of the order should be registrable in the same registers (personal or property registers) as the document concerned was registrable. The declaratory order should not be subject to appeal and should take effect only after the confirmation order is no longer appealable nor subject to an appeal.
- (3) The dues of registration of the notice or certified copy presented by or on behalf of the debtor should be borne by him in the first instance.

- (4) As regards liability for expenses and registration dues:
- (a) the debtor should bear the expense of obtaining and registering a prescribed notice of the order confirming the scheme mentioned in paragraph (1) above;
 - (b) the debtor should be entitled to recover from the creditor the expense of obtaining and registering a declaratory order relating to an adjudication document which was ineffectual by reason of the raising of the action of adjudication for debt in contravention of the interim order served on the adjudging creditor; and
 - (c) where a notice of inhibition or an inhibition had been registered, or an action of adjudication for debt had been raised, after the confirmation of the scheme, the debtor should be entitled to recover from the creditor the expense of obtaining and registering a declaratory order relating to the inhibition or adjudication document only if (i) the creditor had been aware, at the time of registration of the document, that the registration would be ineffectual and (ii) the creditor had refused to discharge, or unduly delayed in discharging, the registration of the document at his own expense.

(Paragraph 4.124; clause 40.)

- 4.16 (1) Subject to the recommendation made below on "late" inclusion, there should be excluded from a debt arrangement scheme any debt which, at the first notice date, was:
- (a) future or contingent;
 - (b) either (i) unconstituted by decree (or other document of debt) and disputed as to liability or quantum or (ii) constituted but disputed as to the amount remaining unpaid;
 - (c) due under a credit agreement subject to an application under the Consumer Credit Act 1974, section 139 (re-opening of extortionate credit agreements).
- (2) (a) An application by the debtor under the 1974 Act, section 139 should not be competent after the first notice date in a scheme application and thereafter while the scheme application was pending or the scheme was in force.
- (b) The sheriff's powers under the 1974 Act, section 139 to reopen extortionate credit agreements should not be exercisable in a scheme application but only in other proceedings (if commenced before the first notice date).
- (3) (a) As a general rule, the administrator should include in a draft scheme:
- (i) any debt identified after the first notice date and while the scheme application was pending;

- (ii) any debt newly incurred since the first notice date which was undisputed as to liability or quantum and otherwise eligible under the above rules; and
 - (iii) any debt ineligible for inclusion by reason of being future, contingent, disputed or subject to challenge under the 1974 Act, section 139 at the first notice date if that reason ceased to obtain while the scheme application was pending.
- (b) The administrator should not, however, include the debt where:
- (i) the sheriff took the view that, having regard to the stage which the scheme application had reached, a later application by the debtor for variation of the scheme after its confirmation would be a more appropriate way of dealing with the question of inclusion; or
 - (ii) the inclusion of the debt would have the effect that the total included debts would exceed to a substantial extent the upper limit on indebtedness recommended above.
- (c) If the existence, and eligibility for inclusion, of the debt was ascertained by the administrator after copies of the draft scheme had been served on creditors, the scheme should be adjusted to include the debt, and re-served on creditors. A new period for objections should be allowed.
- (4) The sheriff should have a discretionary power, on application by a creditor and after giving interested persons an opportunity to make representations, to vary a confirmed scheme so as to include a debt which:
- (a) had been omitted from the scheme in error;
 - (b) had been incurred since the first notice date and was undisputed; or
 - (c) had been excluded from the scheme as future, contingent, disputed or subject to an application under the 1974 Act, section 139 as at the first notice date but had subsequently become eligible for inclusion as presently payable and no longer disputed nor subject to such an application.

But there should be no such inclusion if the effect would be that the total included debts would exceed to a substantial extent the upper limit on indebtedness recommended above.

- (5) A creditor omitted from a scheme should have the options of making an application to the sheriff for inclusion of his debt by variation of the scheme, or for revocation of the scheme, or a combined application in the alternative for

variation or revocation, or of staying outside the scheme and enforcing his debt in full on termination of the scheme notwithstanding any composition in the scheme of the other debts.

(Paragraph 4.138; clauses 15(1), (3) and (5)(c), 23(1), (2), (4) and (5), 28(1) and (3), and 30; Schedule 7, paragraph 22.)

- 4.17 (1) Where the administrator included in a draft scheme a debt which was:
- (a) payable and otherwise eligible for inclusion at the first notice date but only identified by the administrator thereafter; or
 - (b) incurred after the first notice date; or
 - (c) ineligible for inclusion at the first notice date (as being future, contingent, disputed, etc.) but became eligible for inclusion thereafter,
- the amount of the debt should be fixed by reference to the date when the administrator became satisfied as to the eligibility of the debt for inclusion and as to its amount, including court and diligence expenses incurred to that date for which the debtor was liable. That date should be specified in the draft scheme originally served on creditors or, if the debt was included after such service, in the scheme as adjusted and re-served on creditors.
- (2) (a) Where the sheriff included a debt by variation of a confirmed scheme, the amount of the debt should be fixed by reference to the date when the application was lodged.
- (b) Creditors previously included in a scheme would continue to rank on future disbursements rateably in proportion to the amount of their debts as fixed by reference to the first notice date or other date fixed for ascertaining the amount of their debt under the above proposals.
- (3) A debt included "late" after confirmation of a scheme should be excepted from the discharge of debts on termination of a successful scheme. But at the time of granting the discharge of other debts the sheriff should be required to grant a decree decerning (a) for payment of the unpaid balance of the sum due to the creditor under the scheme (being in a composition scheme the unpaid balance of the dividend, and including interest claimed in a scheme providing for payment in full) together with a time to pay direction for payment of that balance by instalments or deferred lump sum, and (b) if the time to pay direction ceases to have effect by reason of the debtor's default or death, for payment of the unpaid balance of the whole debt (not the unpaid balance of the dividend in a com-

position scheme). The time to pay direction should be subject to variation, but not recall, by the sheriff's order. (Paragraph 4.143; clauses 16(2), and 31(1), (6)–(8) and (10).)

- 4.18
- (1) Recommendation 4.14 above, to the effect that a debt arrangement scheme should render existing diligences ineffectual and render incompetent diligences executed while a scheme was in force, should apply to diligences at the instance of omitted creditors as well as included creditors.
 - (2) The following safeguards for creditors executing diligence while a scheme was in force should be enacted.
 - (a) A creditor should not be liable in damages for executing diligence rendered incompetent by a scheme unless at the time of execution he had been aware that the scheme was in force.
 - (b) The registration of a scheme recommended below should not be treated as constructive notice to a creditor of a scheme.
 - (c) A creditor executing diligence while unaware of a scheme should be entitled, after termination of the scheme, to enforce recovery in full of the diligence expenses chargeable against the debtor notwithstanding Recommendation 9.9(1) for restricting the recovery of such expenses.
 - (3) The restriction on second poindings in the same premises recommended in Chapter 5 should not apply to poindings enforcing debts undischarged on termination of a scheme if the previous poinding had been either executed before confirmation of the scheme and rendered ineffectual by it or had been executed after confirmation when the creditor was unaware that the scheme subsisted.
 - (4) It should be competent to include diligence expenses chargeable against the debtor in a debt arrangement scheme (notwithstanding Recommendation 9.9(1) restricting the recovery of those expenses), unless the creditor was entitled to complete his diligence despite the scheme.
- (Paragraph 4.148; clauses 18(1)–(4) and (6), 38(2), and 118(4)(b) and (5).)

- 4.19
- (1) The sheriff should have power to make an order requiring a creditor to give information to the administrator as to payments received by him outside the scheme.
 - (2) Where a creditor whose debt was included in a scheme or draft scheme received payment of the full amount due to him under the scheme, whether wholly from payments outside the scheme or partly from such payments and partly from payments under the scheme, he should as a

general rule intimate that fact to the administrator as soon as practicable. As an exception to the general rule, payments by a co-obligant would be disregarded for this purpose unless payment by the co-obligant satisfied the unpaid balance of the whole debt (not the composition in a composition scheme).

- (3) The sheriff should be empowered to order repayment to the administrator of sums paid by the administrator after the creditor had received the total amount due to him with interest at the statutory rate for sheriff court decrees. The order should be enforceable by diligence. The sheriff should also have power to order the creditor to inform the administrator of the amount of any over-payment.
- (4) The early discharge of an included debt wholly or partly by payments outside the scheme should result in an increase in the rate of disbursements to creditors under the scheme.
- (5) A procedure should be prescribed enabling the administrator to adjust a draft scheme to exclude a debt which was satisfied before confirmation of a scheme and to re-serve the adjusted scheme. A procedure should also be prescribed requiring the administrator to cease payments when the debt (or composition) was satisfied during the currency of the scheme and requiring the sheriff to vary the scheme by excluding the debt and increasing the disbursements to the other creditors. Where the creditor did not himself intimate satisfaction of the debt, the sheriff should give him an opportunity to be heard before excluding the debt.
- (6) After the administrator receives intimation from the creditor or is otherwise satisfied of payment of a debt outside a scheme, there should be a short delay (of 14 days) before the scheme is varied under the foregoing procedure, to give time for a co-obligant to claim subrogation to the original creditor's debt as proposed in Recommendation 4.27 below.

(Paragraph 4.153; clause 33.)

- 4.20 Sums recovered by diligence after the first notice date should be treated in the same way as payments to account of a debt would be treated in terms of Recommendation 4.19 above.

(Paragraph 4.155; clause 33.)

- 4.21 (1) Priority should in effect be given to criminal fines by excluding them from debt arrangement schemes and by permitting their enforcement by imprisonment, or civil diligence under a warrant of the criminal court, while a scheme is in force.

- (2) The same rule should apply to other debts (such as bail, caution, security or compensation) due under an order of a court in criminal proceedings, and fines or penalties imposed for contempt of court in civil proceedings.

(Paragraph 4.160; clause 42(1) (definition of “debt”), as read with clause 4(7).)

- 4.22
- (1) A maintenance creditor to whom maintenance (periodical allowance on divorce or pecuniary aliment) is owed should rank for arrears accrued up to the first notice date, but not for maintenance payable after that date.
 - (2) An interim order sisting diligence should not preclude or affect a current maintenance arrestment, or a conjoined arrestment order enforcing current maintenance, such as we recommend in Chapter 6.
 - (3) The confirmation of a scheme should render incompetent and ineffectual new and existing current maintenance arrestments and conjoined arrestment orders enforcing current maintenance.
 - (4) Diligences enforcing arrears of maintenance should be affected by an interim order and the coming into force of a scheme in the same way as diligences enforcing ordinary debts would be so affected (as recommended above).
 - (5) An interim order sisting diligence and the coming into force of a scheme should render incompetent an application for, and the grant of, a warrant for civil imprisonment of the debtor for failure to pay aliment.
 - (6) The above rules should apply to maintenance agreements registered for execution, decrees and contribution orders for periodical sums enforcing recovery of supplementary benefit or the cost of maintaining children in care, and analogous non-Scottish judgments and instruments enforceable in Scotland.
- (Paragraph 4.168; clauses 15(1), 18(1) and (4), 20(3), 23(3), 28(2), 42(1) (definition of “debt” and “decree”), and 74 (definition of “maintenance” and “maintenance order”).)

- 4.23
- (1) An interim order sisting diligence and a debt arrangement scheme should not affect the entitlement of the creditor under a contractual security to exercise the rights and remedies by which his security is enforceable (such as rights of calling-up the security, entry into possession, ejection from heritage, realisation of the security subjects, and acquisition of the subjects by foreclosure in default of sale).
 - (2) A debt secured by a contractual security over heritable or moveable property of the debtor (as distinct from the property of a cautioner or other co-obligant) should be

excluded from the scheme unless and until the creditor had discharged the security, or sold the security subjects under his power of sale, or acquired them in partial satisfaction of the debt.

- (3) Provision should be made amending the Conveyancing and Feudal Reform (Scotland) Act 1970, Schedule 3, paragraph 9 (which makes it a standard condition in a standard security that the debtor shall be held in default when the proprietor of the security subjects has become insolvent) to make it clear that the proprietor should not be held insolvent for the purposes of that paragraph by reason only of the fact that a debt arrangement scheme has been applied for or confirmed.
- (4) In determining whether the debtor's resources after meeting his "daily needs" would exceed the "minimum product threshold" for scheme applications recommended above, the sheriff should be empowered, but not required, to treat as "daily needs" payments by the debtor outside a scheme in respect of a security over his residence.
- (5) The sheriff should be empowered to make an order requiring a heritable creditor who had exercised his power of sale to pay to the administrator the surplus proceeds of sale otherwise due to the debtor. The order should be enforceable by diligence.

(Paragraph 4.174; clauses 15(7)(a), 17(4)(a), 23(1)(g), 26(4), 28(1)(g), 37 and 41(1); Schedule 7, paragraph 15.)

- 4.24
- (1) An interim order sisting diligence and a debt arrangement scheme should not affect the right of a creditor to use the "security diligences" of poinding of the ground or sequestration under the landlord's or superior's hypothec.
 - (2) Any debt enforceable by poinding of the ground or sequestration under the hypothecs should be excluded from a scheme unless and until the creditor agrees not to use those remedies to enforce that debt.

(Paragraph 4.176; clauses 15(8), 18(8), 20(3) and (7), 23(1)(g), 28(1)(g), and 41(1).)

- 4.25
- (1) Debts secured by liens or rights of retention over goods other than papers should be treated in the same way as debts secured by contractual securities under Recommendation 4.23(1) and (2) (paragraph 4.174) above.
 - (2) Debts secured by a lien over papers should be eligible for inclusion in a scheme in the same way as unsecured debts and the scheme should not affect the creditor's right to retain possession of the papers during the currency of the scheme. The lien should be discharged by a discharge of the debt at the end of a scheme or on payment of the sums

due under a time to pay decree mentioned at Recommendation 4.17(3).

(Paragraph 4.178; clauses 15(7)(b), 23(1)(g), 28(1)(g) and 41(2).)

- 4.26
- (1) No statutory rules are needed to regulate questions of compensation (set off) of liquid debts, or of retention of illiquid debts for the purpose of eventual compensation, in cases where one of the parties has applied for or obtained a debt arrangement scheme.
 - (2) In applying, however, the common law rule that compensation, or retention and compensation, of a debt due to an insolvent person against a debt due by him cannot be competently pleaded where there was no concurrence of credit or debit before notice of bankruptcy, the registration of a debt arrangement scheme should not by itself be treated as giving such notice.

(Paragraph 4.182; clause 38(2).)

- 4.27
- (1) A creditor's right of recourse against a scheme debtor's co-obligant should not be affected by the inclusion of the debt in a scheme, or by the creditor's acceptance of a disbursement under the scheme, or by the discharge of the debtor's liability to the creditor at the end of a scheme.
 - (2) Where after the first notice date:
 - (a) a co-obligant pays the unpaid balance of the full amount of the debt (not the composition in a composition scheme); or
 - (b) if the co-obligant's liability is less than that of the scheme debtor, where the co-obligant pays the unpaid balance of the full amount (not the composition) of the part of the debt for which he is liable,and thereby acquires a right of relief against the scheme debtor, then the co-obligant may apply to the administrator to vary the scheme or draft scheme by subrogating him for the original creditor to the extent of his right of relief. In no other circumstances should a co-obligant be entitled to have a claim of relief, acquired after the first notice date against the debtor, included in a debt arrangement scheme.
 - (3) Where the co-obligant's claim of relief arises by virtue of his payment of part of the debt, he should rank along with the original creditor on the original creditor's share of future disbursements under the scheme in such proportions as will secure, so far as practicable, that the sums due to the original creditor and the co-obligant under the scheme are satisfied at the same time.
 - (4) The common law should regulate questions of ranking where one or more of the co-obligants is or are insolvent.

- (5) There should be a simple procedure whereby the administrator could effect the subrogation of a co-obligant in the creditor's place in a draft scheme or confirmed scheme.
- (6) A co-obligant should be required to make his election between subrogation in a confirmed scheme and remaining outside the scheme, within a short period (say 14 days) after the payment was made by virtue of which he became entitled to subrogation.

(Paragraph 4.193; clauses 27(6), 28(4)(b) and 34.)

4.28

- (1) Where a debt secured by a contractual security over the property of the debtor was payable by the debtor under a regulated agreement under the Consumer Credit Act 1974, or under a related "security" (e.g. a guarantee), it should be excluded from a scheme in accordance with the general rule on secured debts in Recommendation 4.23(2) above. Time orders and other orders under the 1974 Act relating to the debt should not be affected by the scheme unless and until the debt was included in the scheme. The same rules should apply to debts under regulated agreements being enforced by adjudications or enforceable by poinding of the ground. (See Recommendations 4.14(3) and 4.24(2) above).
- (2) A debt due by the debtor under a hire purchase or conditional sale agreement, whether regulated under the 1974 Act or not, should be excluded from a scheme unless and until (a) the agreement had been terminated and (b) if by virtue of section 130(4) of the 1974 Act the debtor were treated as custodian of the goods in terms of the agreement, until he ceased to be so treated.
- (3) Where a debt was subject to a time order for payment by instalments under section 129(2)(a), or that section as read with section 132, of the 1974 Act, then:
 - (a) if another order relating to the debt, or to the agreement under which the debt is owed, was in force, being an order made under:
 - section 129(2)(b) (remedying by debtor or hirer of a non-monetary breach of agreement);
 - section 131 (protection order);
 - section 133 (return order or transfer order relating to goods comprised in a regulated hire purchase or conditional sale agreement);
 - section 135(1) (order attaching conditions to, or suspending the operation of, any order made in relation to a regulated agreement); or
 - section 136 (variation of agreements or securities);the debt should be excluded from the scheme until the

order under section 129(2)(a) had been revoked under section 130(6) or had otherwise ceased to have effect;

- (b) if another order mentioned in the foregoing list relating to the debt or agreement is not in force, the debt may be included in the scheme on its confirmation or by variation, and the order confirming or so varying the scheme should have the effect of revoking the order under section 129(2)(a).

- (4) Where a scheme application was pending or a scheme had been confirmed and the court revoked a time order under section 129(2)(a), the court should have power to vary or revoke any other order mentioned in paragraph (3)(a) above made in relation to the debt, or the agreement under which the debt was due.

- (6) In the case of a debt due by the debtor as hirer under a regulated consumer hire agreement, where at the first notice date an application under the 1974 Act, section 132(1) (financial relief of hirer), or proceedings in which the court may make an order under section 132(2), were pending, the debt should be excluded from the scheme until the application or proceedings were disposed of.

(Paragraph 4.205; clauses 15(5)(a) and (b), 15(6), 18(5)(c), 23(1)(f) and (g), and 28(1)(f), (g) and (5); Schedule 7, paragraph 21.)

- 4.29
 - (1) Any legislation introducing debt arrangement schemes should make it clear that an interim order sisting diligence and a scheme would not affect creditors' remedies other than the diligences enforcing unsecured debts.
 - (2) In particular, such an order or scheme should not affect the rights of the electricity and gas boards to discontinue supply to a defaulting customer nor the right of a landlord to recover possession for non-payment of rent.

(Paragraph 4.213; clause 41.)

- 4.30 In computing the short negative prescriptive period of 5 years under section 6 of the Prescription and Limitation (Scotland) Act 1973, and the long negative prescriptive period of 20 years under section 7 of that Act, none of the following periods, namely:

- (a) the period after the first notice date while a scheme application was pending;
- (b) the period when the sheriff's order disposing of a scheme application was appealable or subject to appeal;
- (c) the period while a scheme was in force, should be reckoned as, or as part of, the prescriptive period.

(Paragraph 4.216: Bill, Schedule 7, paragraph 18.)

Functions, recruitment, etc. of administrators of debt arrangement schemes

- 4.31 (1) The legislation following on this report should provide that sheriff clerks, and their deputies and assistants, should be eligible for appointment as administrator.
- (2) It should, however, be competent for the Secretary of State to institute arrangements whereby, throughout Scotland or in particular sheriff court districts, it would be competent for the sheriff to appoint a person from a list compiled by the sheriff principal.
- (3) Subordinate legislation should govern such matters as resignation, removal from office, discharge and replacement for any necessary cause and, in the case of administrators who are not sheriff clerks or their assistants, caution and (where the administrator does not consent to act gratuitously) remuneration.
- (4) Persons appointed from the list should be entitled to elect either to act gratuitously or to require payment of fees as a condition of acceptance of office. The fees would be a prior charge on payment made by the debtor under a confirmed scheme but to the extent that the fees were not so paid, they should be met by public funds.

(Paragraph 4.229; clause 36.)

The procedure in scheme applications

- 4.32 (1) A scheme application should be initiated by lodging a form prescribed by act of sederunt and a statement of affairs containing particulars also prescribed by act of sederunt.
- (2) If the application appears to satisfy the conditions of competence of scheme applications, the sheriff would make an order appointing an administrator.
- (3) Within a prescribed period the administrator should require creditors within 10 days to verify their debts and state whether interest accrued before the first notice date was claimed. Failure of a creditor to do so would normally bar him from objecting to the scheme on the ground that the debt or interest was not included or was incorrectly stated in the scheme.
- (4) There should be no advertisement for creditors' claims unless ordered by the sheriff. The expenses of any advertisement should be met by the debtor.

(Paragraph 4.238; clause 19.)

- 4.33 (1) The sheriff at any time during a scheme application, acting on his own or the administrator's motion without objection by a creditor, should have:

- (a) a *duty* to refuse a scheme application if he was satisfied that the conditions of competence were not met, or the financial conditions were to a substantial extent not met, or that the debtor was unlikely to comply with a scheme, or the application was incompetent by reason of sequestration proceedings or a trust deed for creditors or composition contract;
 - (b) a *power* to refuse a scheme application on the debtor's failure to disclose information to, or to co-operate with, the administrator.
- (2) The debtor should have an opportunity to make representations before the sheriff reaches his decision.
 - (3) On refusing the scheme application, the sheriff should recall the interim order sisting diligence but the recall should not take effect until the expiry of the days of appeal against the refusal of the scheme application or the disposal of any such appeal.

(Paragraph 4.244; clause 21.)

- 4.34 The administrator should be empowered to require the debtor not to dispose of or remove property from a place in Scotland. The sheriff should have a power to refuse the scheme application if the undertaking was breached.

(Paragraph 4.249; clauses 20(6) and 21(3)(b).)

- 4.35 The sheriff should have power to order a valuation of items of property of the debtor, the cost of which should be borne by the debtor.

(Paragraph 4.251; clause 22(3) and (4).)

- 4.36
- (1) Within a prescribed period, (which may be extended by the sheriff on cause shown) the administrator should prepare a draft scheme and serve it on the parties entitled to object to a scheme together with a copy of the scheme application, a full statement of the debtor's affairs so far as known to the administrator, and a notice giving an opportunity to object in writing within three weeks (or other period prescribed by act of sederunt) after service.
 - (2) The following parties should be entitled to object to a scheme, namely:
 - (a) the included creditors;
 - (b) excluded creditors who may become eligible for inclusion;
 - (c) any co-obligant of the debtor who on paying the debt would acquire a right of relief against the debtor; and
 - (d) maintenance creditors, though not ranking in the scheme for arrears.

(Paragraph 4.256; clause 22(1) and (2).)

- 4.37
- (1) If no objections are made to a scheme, the sheriff should make an order confirming it. It should be competent for him to modify it without re-service on creditors to correct any error in it not materially affecting the interest of any creditor.
 - (2) Any objection should be intimated to the debtor and the creditors and co-obligants entitled to object who should be given an opportunity to make representations and, failing agreement as to the confirmation or terms of the scheme, an opportunity to be heard.
 - (3) Following objections or representations by creditors, the sheriff should be under a duty to refuse a scheme application on the same grounds as require him to refuse such an application on his own or the administrator's motion in terms of Recommendation 4.33 above.
 - (4) In any other case, the sheriff should have a discretion to confirm the scheme with or without modifications or to refuse the scheme application, subject to the requirement to disregard objections by preferred creditors and creditors wishing to sequestrate proposed at Recommendations 4.11(3) and 4.46(5).
 - (5) An order confirming a scheme or refusing a scheme application should recall the interim sist of diligence.
 - (6) The administrator should forthwith intimate an order confirming a scheme (together with a copy of the scheme) or an order refusing a scheme application to the debtor, the creditors and co-obligants who received copies of the scheme application. On the coming into force of the scheme, he should also intimate the order confirming the scheme to an employer operating an earnings arrestment or current maintenance arrestment, or to a sheriff clerk operating a conjoined arrestment order in a different court.
 - (7) An order confirming a scheme or refusing a scheme application, should not take effect until the expiry of the appeal days or the disposal of any appeal, but in the case of an order confirming the scheme, the recall of the interim sist of diligence should take effect immediately.

(Paragraph 4.265; clause 24(1)–(4) and (7)–(10).)

- 4.38
- Prescribed particulars of schemes, discharges of debts and termination of schemes should be registered in the register of insolvencies and by each sheriff clerk in a public register for his own court.

(Paragraph 4.267; clause 38(1) and (3).)

- 4.39
- (1) On or after confirming a scheme, and after giving the debtor an opportunity to make representations, the sheriff should be empowered to make an order requiring an

employer of the debtor to deduct and pay to the administrator on each pay day the whole or a specified part of the debtor's earnings until cessation of the employment or intimation of either an order to cease payments or the termination of the scheme.

- (2) The employer should have seven days' grace before being required to operate the order.
- (3) If the employer does not comply, the administrator should be entitled to obtain an order for the recovery by diligence of the sums which the employer should have deducted and the employer should not be entitled to recover those sums from the debtor.
- (4) An employer should be entitled to the same fee on each pay day as an employer operating an earnings arrestment would under Recommendation 6.21 below.
- (5) The administrator should hand over to the debtor any sums paid by the employer in excess of those currently due by the debtor to the administrator under the scheme.
- (6) The order should be subject to variation or recall by the sheriff.

(Paragraph 4.270; clause 25.)

- 4.40
- (1) The debtor should not act as the administrator's agent in making payments to creditors.
 - (2) The debtor should be bound to disclose a material change in his circumstances to the administrator and subject to any direction by the sheriff, the administrator should, on request, report to creditors on the debtor's compliance with the scheme.
 - (3) The sheriff should be empowered, on cause shown by the administrator, a creditor or co-obligant, to interdict the debtor from disposing of property or removing property from any place in Scotland.

(Paragraph 4.274; clause 26(1) to (3).)

- 4.41
- (1) The sheriff should have a discretionary power, on cause shown, to vary a scheme on the application of any creditor (included or not), the debtor or the administrator, after giving the debtor and the included creditors an opportunity to make representations.
 - (2) A variation should not reduce the amount payable to a creditor under the scheme below the sums already disbursed to him under the scheme.
 - (3) When the right to payment of an included debt is assigned or transmits from the creditor to another person, there should be a simple procedure to enable the administrator

to vary the scheme by subrogating the new creditor in place of the original creditor.

(Paragraph 4.279; clauses 27; 28(7) to (9).)

- 4.42
- (1) The sheriff should have a discretionary power to revoke a scheme, on the grounds of the debtor's default or misconduct or on other cause shown on application by any creditor, included or not, the debtor or the administrator, and after giving the debtor and included creditors an opportunity to make representations.
 - (2) On revocation, the unpaid balance of the debts (not merely of the dividend due in a composition scheme) would again become enforceable by diligence.
 - (3) Revocation should not take effect till expiry of the appeal days or, when an appeal was taken, the disposal of the appeal.

(Paragraph 4.285; clause 30(1), (3), (6) and (7).)

- 4.43
- (1) The sheriff should be empowered, on application by the administrator or debtor, to grant a discharge of the debts included in the scheme as originally confirmed where the debtor had paid all the sums required to be paid under the scheme to the administrator in respect of those debts.
 - (2) An application for discharge should be intimated to creditors whose debts are included, or were included but have since been satisfied to the extent of the creditor's entitlement under the scheme.
 - (3) The creditors whose debts are included should have an opportunity to make representations and, if agreement was not reached as to whether a discharge should be granted, an opportunity to be heard.
 - (4) In a 5-year scheme, the sheriff should have power to extend the scheme, once only, for a further period not exceeding 3 months, if it appears likely that the debts would be paid within that period.
 - (5) The application for discharge should be competent when the debtor's payments under the scheme have been made, but not later than one month, or such longer period as the sheriff may allow, after expiry of the period specified in the scheme for making those payments.
 - (6) A discharge should not take effect until the expiry of the appeal days or the disposal of any appeal.

(Paragraph 4.289; clause 31(1), (2)(a), (4), (5), (11) and (12).)

- 4.44
- (1) (a) In the case of a scheme providing for payment of debts in full, creditors whose debts are included, or were included but have been satisfied to the extent of the creditor's entitlement under the scheme, should have

an opportunity to claim interest arising after the first notice date on an interest-bearing debt and to state its amount. The sheriff should determine any dispute as to liability or amount and have power to grant a decree for interest with or without a time to pay direction.

(b) A discharge of debts:

- (i) in a scheme providing for payment in full, should discharge any interest arising after the first notice date if it is not claimed and allowed by the foregoing procedure;
- (ii) in a scheme providing for a composition, should discharge any interest arising after the first notice date.

- (2) An order determining a dispute as to interest should not take effect till expiry of the appeal days or disposal of any appeal, and a decree for payment of an unpaid debt such as is proposed at Recommendation 4.10(3) above, and a decree for interest should only take effect when the discharge or determination takes effect.

(Paragraph 4.294; clauses 29, and 31(2)(b), (3), (9), (10), (12) and (13).)

- 4.45
- (1) A scheme should cease to have effect on the occurrence of any of the events mentioned in paragraph 4.295 of this report.
 - (2) There should be a procedure for disposing of unpaid disbursements at the termination of a scheme.
 - (3) The procedure for discharge of the administrator after termination of a scheme should be governed by regulations made by statutory instrument.

(Paragraph 4.298; clauses 32 and 36(5)(b)(i).)

Debt arrangement schemes, "apparent insolvency", sequestrations and other insolvency proceedings.

- 4.46
- (1) The making of the interim order sisting diligence in a scheme application should be treated as constituting "apparent insolvency" in the statutory sense for the purpose of clauses in legal documents (other than statutory standard conditions in standard securities).
 - (2) A scheme application should not be competent if:
 - (a) at the time of the scheme application:
 - (i) a petition for sequestration of the debtor's estate was pending, or sequestration had been awarded but the debtor had not yet obtained his discharge; or
 - (ii) a trust deed for creditors or composition contract was subsisting; or

- (iii) a scheme was already in force or a prior scheme application by the debtor was pending; or
 - (b) during the scheme application sequestration is awarded or a trust deed for creditors is granted or a composition contract is made.
 - (3) A qualified creditor petitioning for the debtor's sequestration at any time between the intimation to the creditor of an interim order sisting diligence and the disposal of the scheme application, should not be required to establish that the debtor was "apparently insolvent" in the statutory sense.
 - (4) (a) While a scheme application is pending, a creditor should not be entitled to present a petition for the debtor's sequestration unless he has obtained the leave of the sheriff having jurisdiction in the scheme application.
 - (b) Leave should be granted only if it appears to the sheriff that sequestration would be in the best interests of the general body of creditors, or that the scheme would be unduly prejudicial to a particular creditor or class of creditors.
 - (c) There should be procedures for sisting the scheme application to allow a petition for sequestration to be presented; for recalling the sist and restarting the procedure if sequestration is not awarded; and for refusing the scheme application if sequestration is awarded.
 - (5) A creditor should not be entitled to oppose a scheme application on the ground that he wished to petition for sequestration.
 - (6) A petition for sequestration should not be competent while a scheme is in force, without prejudice to a creditor's right to apply for revocation of a scheme, and to petition for sequestration if the scheme is revoked.
 - (7)* An act of sederunt should require an applicant for a scheme to state in his application that no trust deed for creditors, composition contract, scheme, or scheme application was subsisting, nor to his knowledge any petition for, or award of, sequestration was subsisting.
- (Paragraph 4.311; clauses 17(2); 18(1)(c); 20(4); 21(2)(d), (e) and (f); 24(4)(a)(iv), (v) and (vi); 24(5); and 35.)

4.47

The disqualifications from public office applying to an undischarged bankrupt should not be extended to a debtor who has applied for or obtained a debt arrangement scheme.
(Paragraph 4.314; Bill, Schedule 7, paragraph 39.)

POINDING AND WARRANT SALES

Charging the debtor to pay

- 5.1 The service of a charge requiring the debtor to pay the debt should continue to be a necessary preliminary to the execution of a poinding to enforce that debt.
(Paragraph 5.9; clause 115(1).)
- 5.2 The present multiplicity of different periods prescribed for the days of charge in a charge for payment should be replaced by a single period. This period should be fixed at 14 days where service is to be made within the United Kingdom and otherwise at 28 days.
(Paragraph 5.12; clause 115(2).)
- 5.3 No change should be made in the present law, whereby, with certain statutory exceptions in the case of charges proceeding on summary cause decrees, charges for payment must be served by hand by an officer of court.
(Paragraph 5.17.)
- 5.4 It should continue to be necessary for an officer of court serving a charge for payment otherwise than by post to be accompanied by a witness.
(Paragraph 5.20.)
- 5.5 It is unnecessary to introduce a new rule requiring creditors to obtain leave of the court to serve a charge for payment after a prescribed period has elapsed since the granting of the decree.
(Paragraph 5.23.)
- 5.6 To simplify the law, a poinding should be incompetent if executed more than 2 years after the date of service of a charge. However, it should continue to be competent for a creditor to reconstitute the right to poind by serving a new charge for payment. The expenses of a second or subsequent charge to implement a decree should not be recoverable from the debtor.
(Paragraph 5.29; clause 115(4) and (5).)
- 5.7* (1) An act of sederunt should prescribe the form of the charge and explanatory notes to be served on the debtor along with a charge, with a view to making the charge more intelligible to debtors.
- (2) The charge should specify the decree on which it proceeds and the full amount of the debt (including the expenses of serving the charge) and should demand payment within the days of charge to the creditor or a specified agent.
- (3) The charge and other forms served on the debtor in connection with the diligence should indicate that the

debtor should consider consulting a solicitor, Citizens Advice Bureau or other local advice centre if advice or assistance is required.

- (4) The explanatory note should inform the debtor of the consequences of non-payment, in particular liability to pouncing and becoming notour bankrupt or apparently insolvent (which entitles a creditor to petition for the debtor's sequestration), and of the applications that the debtor can make to the court.

(Paragraph 5.32.)

5.8* If edictal charges on Court of Session decrees are to be retained, an act of sederunt should be made along the following lines:

- (1) It should cease to be competent to charge edictally a debtor with a known residence or place of business furth of Scotland but within the United Kingdom. Such a debtor should be charged postally, the days of charge being 14.
- (2) A charge should be served edictally where the debtor's whereabouts are unknown or where the debtor has a known residence or place of business furth of the United Kingdom. In the latter case a copy of the charge should be sent by post to the debtor or his or her Scottish solicitor (if any). The days of charge of an edictal charge should be 28 days.

(Paragraph 5.38.)

Pouncing the debtor's goods

- 5.9 (1) It should not be competent to pounce articles in the debtor's dwellinghouse which are reasonably required for the use of the debtor or any member of the debtor's household, being articles of the following descriptions:

beds or bedding;
household linen;
chairs or settees;
tables;
food;
lights or light fittings;
heating appliances;
curtains;
floor coverings;
furniture, equipment or utensils used for cooking, storing or eating food;
one refrigerator;
articles used for cleaning the dwellinghouse or cleaning, mending or pressing clothes;
articles used for safety in the dwellinghouse (such as fireguards);
furniture used for storing clothes, bedding, household linen and articles used for cleaning the dwellinghouse.

- (2) The above list of articles should be capable of being amended by regulations made by the Secretary of State by means of statutory instrument subject to negative resolution.

(Paragraph 5.48; clause 43(2), (3) and (7).)

5.10 There should be exempt from poinding:

- (a) clothing reasonably required for the use of the debtor or any member of the debtor's household; and
- (b) articles reasonably required for the care or upbringing of any child who is a member of the debtor's household; and
- (c) toys for the use of any child who is a member of the debtor's household.

(Paragraph 5.51; clause 43(1)(a), (e) and (f).)

- 5.11 (1) The common law exemption for tools of trade should be replaced by a statutory rule exempting implements, tools, books and other equipment reasonably required in the practice of the profession, trade or business of the debtor or any member of the debtor's household not exceeding in aggregate value £500 (or such other sum as may be prescribed).
- (2) The Diligence Act 1503, which makes provision for the temporary and conditional exemption from poinding of "plough goods," should be repealed.
- (3) Articles reasonably required for the educational or vocational training of the debtor or any member of the debtor's household should be exempt from poinding up to an aggregate value of £500 (or such other sum as may be prescribed).
- (4) Medical aids or equipment reasonably required for the use of the debtor or a member of the debtor's household should be exempt from poinding.

(Paragraph 5.57; clause 43(1)(b), (c) and (d), and (7); Schedule 9.)

- 5.12 (1) Where a caravan or other moveable structure which is the only or principal residence of the debtor is poinded, the debtor should be entitled at any time before warrant of sale is granted to apply to the sheriff for a sist of further proceedings.

- (2) The period of the sist should be at the discretion of the sheriff and should be renewable on application for a further period or periods.

(Paragraph 5.60; clause 51.)

- 5.13 (1) The sheriff should have power, on application by the debtor made within 14 days after the date of the poinding, to

order the release of specified articles from the poinding on the grounds that:

- (a) the articles were exempt from poinding; or
- (b) the continuation of the poinding of the articles or their sale would be unduly harsh.

- (2) The sheriff on granting an order releasing articles on grounds of undue harshness should have power to authorise a poinding of further articles in the debtor's premises in order to restore the value of the creditor's poinding.

(Paragraph 5.65; clauses 43(4) and (5), and 48.)

- 5.14 The common law rule whereby a creditor in possession of goods of the debtor may poind those goods should be retained.
(Paragraph 5.69.)

- 5.15 Section 40 of the Sale of Goods Act 1979 (poinding and arrestment by seller of goods in possession of the seller) should be repealed.
(Paragraph 5.72; Bill, Schedule 9.)

- 5.16 The seller of goods otherwise exempt from poinding should not be entitled to poind them in order to recover the unpaid price.
(Paragraph 5.74.)

- 5.17 (1) No poinding should be competent on a Sunday, Christmas Day, New Year's Day or Good Friday nor on such other day as may be prescribed by act of sederunt.
(2) It should be incompetent to commence a poinding before 8 a.m. or after 8 p.m. or to continue a poinding after 8 p.m. without in either case prior authority from the sheriff.
(Paragraph 5.78; clause 44.)

- 5.18 (1) Warrants for poinding in extract decrees should continue to contain warrants to open shut and lockfast places.
(2) It should not be competent for a warrant to open shut and lockfast places to be used to gain entry to a dwellinghouse where there appears to be nobody or only persons under 16 years present unless the officer:
(a) had at least four days previously given notice of intended entry; and
(b) if on the first visit only children under 16 appeared to be present, had sent a copy of the notice to the local Social Work Department.
(3) The sheriff should be empowered, on application, to dispense with the requirements in paragraph (2) above if it appears that notice would be likely to prejudice the execution of the poinding.
(Paragraph 5.85; clause 45.)

- 5.19 (1) The procedure in executing a pointing should be as follows:
- (a) The opening ceremony (the saying of three oyezses and the reading of the extract decree and execution of the charge) should be expressly abolished by statute. The officer should however exhibit the extract decree and execution of the charge on which the pointing proceeds.
 - (b) Before carrying out the pointing the officer should, as at present, demand payment of the debt and expenses and make enquiries of any person present on the premises as to the ownership of the goods proposed to be pointed.
 - (c) The goods should be valued by the officer, but the officer should be entitled to have them valued by a professional valuator if the officer considers that the nature of the goods makes it advisable.
 - (d) The officer should be accompanied by only one witness.
 - (e) If the debtor is present the officer should inform him or her of the right to redeem the goods within 14 days on payment of their values.
 - (f) The officer should prepare a pointing schedule specifying the pointing creditor, the pointed goods, and their values, the amount of the debt and expenses due.
 - (g)* An act of sederunt should be made prescribing the form of the pointing schedule which should contain, in addition to the above matters, information on the applications which the debtor may make to the court and the right to redeem.
 - (h) The officer should, along with the witness, sign the pointing schedule and deliver it to, or leave it in the premises for, the possessor of the pointed goods. Delivery of the schedule should be deemed to be the time of execution of the pointing for all legal purposes. Where the debtor is a different person from the possessor, the officer should if reasonably practicable send a copy of the pointing schedule to the debtor.
 - (i) As at present the officer should leave the pointed goods on the premises in which they were pointed.
- (2) The debtor should be entitled to redeem some or all of the pointed goods on payment of their appraised values to the officer of court within 14 days after the execution of the pointing. The officer of court should be under a duty to give the debtor a receipt identifying the redeemed goods and the issue of the receipt should have the effect of releasing the goods from the pointing.
- (Paragraph 5.95; clause 46(1), (5), (6) and (8).)

- 5.20 An officer valuing pointed goods should be required to value

each article on the basis of what it would be likely to fetch if sold on the open market.

(Paragraph 5.101; clause 46(1) (c).)

- 5.21 Subject to Recommendation 5.26 (revaluation if the goods are damaged or destroyed) the sheriff should have no power to order a revaluation of poinded goods.

(Paragraph 5.104; clause 46(7).)

- 5.22 The statutory procedure for conjoining creditors before execution of a poinding should be retained, but it should not be competent to conjoin ordinary creditors and summary warrant creditors.

(Paragraph 5.109; clause 46(9).)

- 5.23 (1) The officer of court should be required to make a report of poinding in prescribed form to the sheriff within 14 days after the execution of the poinding (or such longer period as the sheriff may, on cause shown, allow).

(2) The sheriff may refuse to receive a report only on the grounds that it is not signed by the officer and witness or that it was not submitted within the required period.

(3) If the sheriff refuses to receive a report the poinding should cease to have effect.

(Paragraph 5.113; clause 47.)

- 5.24 The sheriff should have power, on an application by either the creditor or the debtor made after the execution of the poinding, to order the immediate disposal of goods which are perishable or likely to deteriorate in value rapidly, and make consequential orders including orders as to the disposal of the proceeds of sale.

(Paragraph 5.115; clause 46(2) (b).)

- 5.25 (1) The debtor (or possessor) of poinded goods may remove them to other premises if:

(a) the poinding creditor or officer of court consents; or

(b) the sheriff, on application, authorises such removal.

(2) Where poinded goods are removed to other premises the creditor should be entitled to poind them again there, and should also be entitled to poind again any goods remaining on the original premises. Where a new poinding of poinded goods for the same debt is executed, the original poinding should be deemed to have been abandoned so that further proceedings in that poinding would be incompetent.

(3) The debtor should be liable for the expenses of the second or subsequent poinding but not for the expenses of the original poinding deemed to have been abandoned.

(Paragraph 5.120; clause 63; Schedule 1, paragraph 5.)

- 5.26 Section 30 of the Debtors (Scotland) Act 1838 (unlawful intruder to restore or pay double the appraised value on pain of imprisonment) should be replaced by a new provision on the following lines:
- (1) Where the debtor or a third party removes goods in breach of poinding the sheriff should have power, on application by the creditor, to order restoration of the goods within a specified time, and in default of restoration to grant warrant to officers of court to search for and restore the goods.
 - (2) An order for restoration of the goods should not be competent against a third party who acquires the goods for value and without knowledge of the poinding.
 - (3) Where goods have been removed, damaged or destroyed in breach of poinding the sheriff should have power, on application, to authorise the creditor to poind further articles of the debtor, or in the case of damaged or destroyed goods to authorise a revaluation of those goods.
 - (4) Where a third party has removed, damaged or destroyed goods in the knowledge that they were poinded the sheriff should have power, on application, to order that third party to consign in court a sum representing the appraised value of the removed or destroyed goods or a sum representing the diminution in value caused by the damage. The sum consigned in court should, on completion of the diligence in respect of the remainder of the goods, be paid to the creditor in satisfaction of the debt, any surplus being paid to the debtor.
 - (5) Wilful removal, damage or destruction of articles in the knowledge that they were poinded should be liable to be dealt with as a contempt of court.
- (Paragraph 5.125; clauses 64 and 65.)
- 5.27 (1) Unless a warrant of sale has been applied for while the poinding remains effective, a poinding should cease to have effect on the expiry of a period of one year after the date of its execution. The sheriff should, however, have power on application by the creditor to extend the duration of the poinding by such period as appears reasonable to allow the debtor to pay off the debt by instalments or otherwise as agreed between the creditor and the debtor and to grant a further extension or extensions.
- (2) An application for extension of a poinding should be made before the expiry of the one-year period or the period of a previous extension, but the poinding should not cease to have effect pending the determination of such an application.
- (Paragraph 5.130; clause 62(1) and (2).)
- 5.28 (1) In order to prevent evasion of time limits on the duration

of poindings the present restriction on second poindings (incompetent in respect of goods on the same premises under the same extract decree except for goods brought onto the premises after the first poinding) should be set out in statute rather than Practice Notes of the sheriffs principal. The statutory rule should however be subject to the exceptions mentioned in paragraph 5.132.

- (2) The sheriff should have power, on application by the creditor, to make an order conjoining two poindings by the same creditor at any time before warrant of sale is granted in either poinding.

(Paragraph 5.134; clauses 50 and 69.)

- 5.29
- (1) A poinding should be capable of being recalled by the sheriff at any time before the creditor applies for a warrant of sale on the same grounds as the sheriff may refuse to grant a warrant of sale in terms of Recommendation 5.30.
 - (2) The sheriff may recall a poinding which is invalid or which has ceased to have effect without an application for recall being made by the debtor. Otherwise the power to recall should be exercised only on an application by the debtor. The debtor and creditor should be given an opportunity to make representations before an order for recall is made.

(Paragraph 5.137; clause 49(1) to (4).)

Selling the poinded goods

- 5.30
- (1) An application for warrant to sell poinded goods should be intimated by the creditor to the debtor along with a notice in prescribed form informing the debtor of the rights to redeem, to object to the granting of the application, and to make various applications to the court.
 - (2) The sheriff should have power to refuse to grant a warrant to sell on the grounds that:
 - (a) the poinding is invalid or has ceased to have effect; or
 - (b) the goods are in aggregate substantially undervalued; or
 - (c) the likely proceeds of sale would not exceed the likely expenses of sale; or
 - (d) it would be unduly harsh in the circumstances to grant a warrant.
 - (3) The sheriff should be entitled to exercise the powers in (a), (b) and (c) of paragraph (2) above on his or her own motion as well as on an objection being made by the debtor, but should only be able to refuse warrant on ground (d) on an objection being made by the debtor to this effect.
 - (4) Where the sheriff refuses to grant a warrant of sale and the poinding is thereby terminated, the sheriff clerk should be

under a duty to intimate this to the debtor (and possessor if a different person from the debtor).

(Paragraph 5.146; clause 52.)

- 5.31
- (1) On receiving intimation of an application for warrant of sale the debtor should be entitled to redeem some or all of the poinded goods on payment of their appraised values to the officer of court within a period of seven days after receipt of the intimation.
 - (2) The officer of court should be under a duty to give the debtor a receipt identifying the redeemed goods. The issue of a receipt should have the effect of releasing the specified goods from the poinding. The officer should be required to report the redemption forthwith to the court.

(Paragraph 5.150; clause 53(2), (3) and (5).)

- 5.32
- (1) A warrant of sale should not provide for sale in a dwellinghouse unless the debtor (and the occupier of the dwellinghouse if a different person) consents in writing to a sale being held there.
 - (2) Where the consent or consents required in paragraph (1) above are not given, the sale should normally be required to be held in an auction room specified in the warrant of sale. But if the expenses of removal to the nearest auction room would be likely to exceed the proceeds of sale of the goods there, the sheriff may direct that the sale be held in other premises made available by the creditor if such other premises appear suitable and the occupier of those premises consents in writing to their use, but if no other suitable premises are available the sheriff should refuse to grant a warrant of sale.
 - (3)* Where goods have been poinded in a dwellinghouse and the creditor is unable to find other suitable premises for holding a sale, assistance should be given by the Government, either by making Government premises available or by subsidising the removal of goods to the nearest auction room or other suitable premises.
 - (4) The sheriff should not grant a warrant of sale to sell poinded goods in premises (other than a dwellinghouse or an auction room) occupied by a third party unless the third party occupier consents in writing, provided that if the goods have been poinded in those premises and their nature is such that it would be unreasonable for them to be removed for sale, the sheriff should have power to direct that the sale be held in those premises notwithstanding the lack of consent by the third party occupier.

(Paragraph 5.161; clause 54(1)–(5).)

- 5.33 (1) Where the sale is to be held in an auction room or premises other than the debtor's premises, the public notice of the sale should not name the debtor or disclose that the goods consist of or include poinded goods.
- (2) Where the sale is to be held in premises occupied by a third party, then in addition to the prohibition in paragraph (1) above, the public notice should state that the goods are not those of the occupier.
- (3) The sheriff should continue to direct in the warrant of sale the form and timing of public notice to be given in any sale on premises other than an auction room.
- (4) Prescribed particulars of every sale should be displayed on the public notice board of the court which granted the warrant of sale.
- (Paragraph 5.166; clause 56(3)–(6).)

- 5.34 Instead of the warrant of sale specifying the time and date of the sale it should specify a period within which the sale must take place. The granting of the warrant should have the effect of extending the duration of the poinding until the sale is executed or the warrant expires unexecuted at the end of the specified period.
- (Paragraph 5.169; clauses 55(4) and 62(3).)

- 5.35 The warrant of sale should continue to appoint an officer of court to make arrangements for the sale to supervise or attend the sale, and to make a report to the court.
- (Paragraph 5.172; clauses 55(5), 59(1) and 61(1).)

- 5.36 (1) Provision should be made by statute rather than by Practice Notes regulating the appointment of persons to conduct warrant sales. Where the sale is to be held in premises other than an auction room:
- (a) if the goods are valued at more than £1,000 (or such other sum as may be prescribed by act of sederunt) the sheriff should appoint an auctioneer to conduct the sale, but if an auctioneer is not available an officer of court or other suitable person may be appointed;
- (b) if the goods are valued at or less than the above sum the sheriff may appoint either an officer of court or an auctioneer to conduct the sale.
- (2) If an officer of court is appointed to conduct the sale he or she should normally be the officer appointed to make arrangements for and supervise the sale, in which case a witness should be required to be in attendance at the sale.
- (Paragraph 5.178; clauses 55(6) and 59(2).)

- 5.37 (1) The officer of court appointed to arrange the sale should be under a duty to intimate the date of the sale as soon as it has been arranged to the debtor (and possessor if different), and not later than the date of that intimation, to serve a copy of the warrant of sale on the debtor (and possessor if different).
- (2) Where the goods are to be removed from the premises in which they are situated for sale the officer should give the debtor (and possessor if different) not less than seven days' notice of the date fixed for removal and the place to which the goods are to be removed for sale.
- (Paragraph 5.183; clause 56(1) and (2).)
- 5.38 The officer should either carry out or at least supervise the uplifting and removal of the poinded goods from the debtor's premises. For use, if necessary, in uplifting the goods, the warrant of sale should include a warrant authorising the officer to open shut and lockfast places.
- (Paragraph 5.185; clause 55(2) and (3).)
- 5.39 Where goods are to be removed for sale the officer should be entitled to uplift and remove only such part of the poinded goods as, according to their appraised values, would satisfy the outstanding balance of the debt, interest and expenses, and should withdraw the remaining goods from the poinding.
- (Paragraph 5.187; clause 53(1).)
- 5.40 (1) The creditor or officer should be entitled to alter within the terms of the warrant for sale the arrangements made for sale after intimation of those arrangements to the debtor, only if the alteration is necessary because of circumstances for which neither the creditor nor the officer is responsible.
- (2) The sheriff, on application by the creditor or officer, should have power to amend the warrant of sale if the original warrant cannot be executed in accordance with its terms due to circumstances for which neither the creditor nor the officer is responsible, and to make any necessary incidental and consequential orders.
- (3) An application for amendment of a warrant of sale should require to be made within the period for holding the sale specified in the warrant. The application should be intimated to the debtor. The sheriff, on a motion by the debtor or on his or her own motion, should refuse the application if the poinding was invalid or has ceased to have effect, or the amendment proposed is unsuitable.
- (4) The poinding should not lapse pending the determination of an application. Where the application is granted the poinding should continue to have effect until the sale is

held or the period specified for holding the sale elapses, whichever is the sooner. Where the application is refused the poinding should cease to have effect forthwith, unless the sheriff directs otherwise. The sheriff clerk should intimate any cessation of the poinding to the debtor (and possessor of the poinded goods if different).

(Paragraph 5.193; clauses 57 and 62(4).)

- 5.41
- (1) After the grant of warrant of sale the creditor should be entitled, on one occasion only, to cancel the arrangements for sale for the purpose of allowing time for an agreement for payment of the debt to have effect.
 - (2) It should not be competent to cancel under paragraph (1) above after the goods have been removed for sale.
 - (3) A report of the agreement should be lodged in court forthwith by the creditor or officer, whereupon the duration of the poinding would be extended for a period of six months from the lodging of the report.
 - (4) On breakdown of an agreement the creditor should be entitled to sell the goods without further application to the court, provided the sale takes place within the six months' extension and the warrant can otherwise be implemented according to its terms. In other cases, the creditor should have to apply to the sheriff for an amendment of the warrant as in Recommendation 5.40 or a direction that the sale be held in the same premises notwithstanding that the required consents no longer subsist.

(Paragraph 5.197; clauses 58 and 62(5).)

- 5.42
- The appraised value of a poinded article should be treated in the subsequent sale as a reserve price which need not be disclosed to bidders.

(Paragraph 5.199; clause 59(3).)

- 5.43
- (1) The ownership of goods which are not sold should pass to the creditor but the creditor should be permitted to instruct the auctioneer to sell an article to the highest bidder even if the bid is less than the appraised value. The debtor should however still be credited with the appraised value.
 - (2) Where goods are put up for sale on the debtor's premises and remain unsold, the ownership passing to the creditor by virtue of paragraph (1) above should revert to the debtor on the expiry of the times mentioned below unless:
 - (a) where the sale was held in the debtor's dwellinghouse the creditor uplifts them by 8 p.m. or such time as may be prescribed on the day of sale;
 - (b) where the sale was held in other premises belonging

to the debtor the creditor uplifts them by 8 p.m. or such time as may be prescribed on the third day after the sale.

- (3) The officer of court should be entitled to remain on or re-enter the premises to enable the creditor to uplift the goods.

(Paragraph 5.203; clause 59(3), (5), (6) and (8).)

- 5.44 The report of sale (which should be in a form prescribed by act of sederunt) should be made to the sheriff within 14 days after the date of the sale.

(Paragraph 5.207; clause 61(1) and (3).)

- 5.45 (1) The present procedure for auditing and checking reports of sale should be embodied in statute.

- (2) Where the officer refuses or delays without reasonable cause to lodge a report of sale, the sheriff should have power to report the officer to the appropriate disciplinary authority (Court of Session or sheriff principal) and to find the officer liable for all or part of the expenses of the diligence, but should not have power to refuse to receive the report.

- (3) If there has been a substantial irregularity in the diligence the sheriff should have power to declare the diligence null. Nullity of the diligence should not affect the title of any third party purchasing the goods in good faith at the sale or subsequently.

- (4) The sheriff clerk should send the debtor a copy of the report of sale as approved or intimate the sheriff's order nullifying the diligence.

(Paragraph 5.210; clause 61(2), (4), (5), (9) and (10).)

- 5.46 No change should be made in the present law and practice whereby the proceeds of a warrant sale are consigned in court by the officer only if the sheriff so directs. The officer should be under a duty to pay any surplus to the debtor or the debtor's agent, or to consign the surplus in court if the debtor or agent cannot be found.

(Paragraph 5.214; clause 60.)

Inclusion in poindings of the goods of third parties.

- 5.47 (1) The powers and duties of officers in connection with the poinding of goods in the debtor's premises should be regulated by statute rather than the present mixture of common law and Practice Notes of the sheriffs principal. The statute should make provision on the following lines:
- (a) The officer should be entitled to presume that an article

in the possession of the debtor is owned by the debtor either solely or in common with a third party.

- (b) An officer should be bound to make enquiries of any person present at the poinding about the ownership of articles proposed to be poinded. It should cease to be competent for an officer to examine a person on oath as to ownership of such articles. Any claim made should be noted in the report of poinding.
 - (c) An officer should not be entitled to rely on the above presumption if he or she knows or ought to know (whether as a result of the enquiries or otherwise) that the article does not belong to the debtor.
 - (d) An officer may still rely on the above presumption even though the article is such as is commonly hired or purchased on hire purchase or conditional sale agreement or an assertion is made unsupported by other evidence that the article does not belong to the debtor.
- (2)* The entitlement of officers of court to charge fees for poinding goods which do not belong to the debtor should be regulated by act of sederunt.

(Paragraph 5.223; clause 46(1)(a)(iii), (3) and (4).)

5.48

- (1) An officer of court should be entitled to release goods from the poinding if a third party produces satisfactory evidence of ownership unless the debtor disputes the third party's ownership.
- (2) The officer should report any release of goods to the court in the report of poinding, application for warrant of sale or report of sale depending on the stage at which the goods are released. Where goods are released while an application for warrant of sale is pending the officer should forthwith report the release to the court.
- (3)* It should be provided by act of sederunt that, without prejudice to any other remedy, a claim of ownership of poinded goods by a third party should be capable of being made by a minute lodged in the poinding process even after warrant of sale has been granted.
- (4) Where any article has been released by the officer or the sheriff on the ground that it belongs to a third party, the creditor should be entitled to poind further articles in the debtor's premises.
- (5) No change should be made in the law relating to the remedies available to a third party whose goods have been sold at a warrant sale or delivered to the poinding creditor in default of sale.

(Paragraph 5.229; clause 66.)

- 5.49
- (1) It should become competent to poind and sell goods owned in common by the debtor and a third party or parties to enforce a debt due by the debtor.
 - (2) To protect the interests of co-owners, the officer should be entitled to release co-owned goods from the poinding if a third party co-owner tenders the debtor's share of the appraised value, unless the debtor denies the third party's claim to co-ownership.
 - (3) The sheriff should have power, on application by a third party co-owner, to order release of any goods if satisfied that they are co-owned and the applicant pays the debtor's share of their appraised value to the creditor.
 - (4) The sheriff should also have power to order release of co-owned goods if satisfied that their continued poinding or sale is in the circumstances unduly harsh to the third party co-owner.
 - (5) In order to restore the value of the poinding where co-owned goods have been released by the officer or the sheriff, the creditor should, on release, automatically become entitled to carry out a poinding of further articles in the debtor's premises.
 - (6) Where co-owned goods are sold or delivered to the creditor in default of sale, the creditor should be liable to pay to the co-owner a sum representing that co-owner's share of the proceeds of sale of the goods, or their appraised value in the case of unsold goods.
- (Paragraph 5.235; clause 67.)

Miscellaneous

- 5.50
- The diligence of poinding should not be available in security of debts payable in the future, nor should it be automatically available on the dependence of a court action. We make no recommendation as to whether the Court of Session should have power to make an order securing moveable property on the dependence of an action in that court.
- (Paragraph 5.238.)
- 5.51
- (1) The exemptions from poinding set out in Recommendations 5.9 to 5.11 (clothes, tools of trade, household goods) should apply to arrestment of the debtor's goods in the hands of a third party.
 - (2) Where household goods are situated in premises in which a person other than the debtor is living, the same exemptions from arrestment and poinding should apply as would apply if that person were the debtor.
 - (3) The court should have power, on application by the bankrupt, to sist sequestration proceedings in connection

with a mobile home which is the only or principal residence of the bankrupt.

- (4) The exemptions from diligence, the time when diligence is competent, the officer's powers and duties in connection with entry to dwellinghouses, the sheriff's powers to sist proceedings in connection with a mobile home, and the sheriff's powers to release articles on grounds of undue harshness should apply to sequestrations for rent or feuduty as they do to poindings.

(Paragraph 5.244; clauses 43(2)(b) and 124; Schedule 7, paragraph 35.)

- 5.52 The diligence for attaching ships and other vessels in Scotland under specific statutory provisions should be arrestment and sale rather than poinding and sale.

(Paragraph 5.246; Bill, Schedule 7, paragraphs, 3, 11, 14, 16 and 32.)

ARRESTMENT OF EARNINGS

Introduction of continuous diligence against earnings

- 6.1
- (1) A new system of continuous diligence against earnings (called earnings arrestments) should be introduced and arrestments in their present form should cease to be available as a diligence against earnings.
 - (2) An earnings arrestment would require the debtor's employer to deduct sums calculated in accordance with legal rules from the debtor's net earnings on each pay day occurring after service of the earnings arrestment.
 - (3) An earnings arrestment would require the employer, without the need for a decree of furthcoming or mandate from the debtor, to pay the sums deducted under paragraph (2) above forthwith to the arresting creditor, subject to a procedure allowing the debtor and the employer to contest an earnings arrestment on the grounds that it is invalid or has ceased to have effect.

(Paragraph 6.30; clauses 72(1) and (2)(a), 75(1), and 78(1).)

Earnings arrestments

- 6.2
- (1) An earnings arrestment should attach a certain amount (calculated in accordance with our recommendations below) of the debtor's earnings payable on each pay day after the date when the earnings arrestment takes effect until the debt for which the arrestment is served is satisfied or the arrestment otherwise ceases to have effect.
 - (2) Earnings for this purpose should be defined to mean any sums payable to the debtor by way of wages or salary

(including any fees, bonus, commission, overtime pay, or other emoluments payable in addition to wages or salary or payable under a contract of service).

- (3) Sums not attachable by earnings arrestment due by the employer to the employee should be attachable by an ordinary arrestment.

(Paragraph 6.39; clauses 72(1), 73(1) and 75(2).)

- 6.3
- (1) Pensions (including annuities for past services and periodic payments by way of compensation for loss of office or employment) should be attachable by earnings arrestments.
 - (2) Pensions or allowances payable in respect of disablement or disability, however, should not be attachable by earnings arrestments.
 - (3) Provided the amount deductible under an earnings arrestment is fixed in accordance with our recommendations below, a pension which is alimentary at common law should be attachable by earnings arrestment notwithstanding the common law exemption.
 - (4)* The competent authorities should consider whether the various enactments regulating specific public sector occupational pension schemes should be amended to enable creditors to attach such pensions by earnings arrestments.
 - (5) The foregoing recommendations are not intended to allow attachment of pensions, allowances and benefit payable under social security legislation.
 - (6) We make no recommendation to change the law on the arrestment of liferents or annuities (other than annuities for past services).

(Paragraph 6.45; clause 73(1)(c), (2)(a), (d), (e) and (f).)

- 6.4
- No changes should be made to the recently revised rules on the exemptions from arrestment of merchant seamen's pay, or the rules whereby the pay of members of the armed forces and women's services administered by the Defence Council is exempt from diligence.

(Paragraph 6.48; clause 73(2)(b) and (c).)

- 6.5
- It should be incompetent to use an earnings arrestment to enforce a debt which is not due at the date of execution of the arrestment.

(Paragraph 6.51; clause 72(2)(a).)

- 6.6
- An earnings arrestment should attach (in addition to the principal sum and judicial expenses due under the decree) interest accrued up to the date of service of the earnings arrestment, but only if, and to the extent that, the amount of

interest is specified in the schedule of arrestment.
(Paragraph 6.54; clause 77(1)(a) and (b), and (2).)

- 6.7
- (1) An extract decree or other writ containing a warrant for diligence should authorise an earnings arrestment without the need for a further application to the court.
 - (2) The service of a charge should be an essential preliminary to the service of an earnings arrestment. However, it should continue to be competent to serve an arrestment against funds other than earnings without first serving a charge.
 - (3) It should be competent to serve an earnings arrestment to enforce more than one debt due by the debtor to the same creditor providing a prior charge has been served in respect of each debt.

(Paragraph 6.59; clauses 77(3) and 112(1)(i); Schedule 7, paragraphs 8 and 10.)

- 6.8
- Without prejudice to Recommendations 6.12(2) and 6.16(1) (recall and cessation of earnings arrestments) an earnings arrestment should have effect on each pay day after service of the schedule on the employer until the debt recoverable by the arrestment has been satisfied.

(Paragraph 6.66; clause 75(2).)

- 6.9
- (1) The amount deducted from a debtor's net earnings in pursuance of an earnings arrestment should be calculated in accordance with statutory tables based on the sliding scale model. Separate tables should be provided for weekly and monthly paid employees and employees paid at other regular intervals.
 - (2) Net earnings means the earnings which remain payable after deduction of income tax, social security contributions and superannuation scheme contributions.
 - (3) Overtime, bonus, commission and other payments paid in addition to the debtor's regular earnings should:
 - (a) if paid on the same day as the regular earnings, be aggregated with the regular earnings for the purpose of calculating the amount to be deducted;
 - (b) if paid separately, be subject to a deduction of 20%.
 - (4) The statutory tables and percentage specified in paragraph (3)(b) above should be capable of being varied by regulations made by the Secretary of State by statutory instrument subject to negative resolution. The varied tables and percentage should apply to an earnings arrestment executed after the coming into force of the regulations and to a subsisting earnings arrestment where either the creditor or the debtor has intimated in prescribed form the regulations to the employer. An employer should be entitled, but not

bound, to give effect to the regulations in connection with a subsisting arrestment of becoming aware of their existence otherwise than by intimation in prescribed form.

(Paragraph 6.76; clauses 73(3), 76 and 95; Schedule 3.)

- 6.10 Without prejudice to any other remedy open to the debtor, the courts should not retain their common law powers to order lower deductions from arrestments of earnings than the deductions laid down by statute. The courts should not have a special statutory power to vary the deduction levels in earnings arrestments.

(Paragraph 6.79; clause 72(3).)

- 6.11 The normal rules on deductions from earnings set out in Recommendation 6.10 above should apply to earnings arrestments for the recovery of arrears of maintenance, rates and taxes.

(Paragraph 6.82; clause 76.)

- 6.12 (1) An earnings arrestment should not only (as under existing law) require the employer to make a deduction from the debtor's earnings on each pay day while it is in force, but also require the employer to pay forthwith the arrested sums to the creditor.
- (2) The employer and the debtor (and the creditor in the case of determination of a dispute) should be entitled to apply to the court for an order recalling the earnings arrestment or determining any dispute as to the manner of its operation. The court in determining a dispute should have power to order payment to be made by one party to another, with interest from a date to be specified at the rate normally applicable to decrees.
- (3) A claim by a creditor or debtor against the employer in respect of deductions made, or which should have been made, under an earnings arrestment should be incompetent after one year from the date when the deduction was made or should have been made.

(Paragraph 6.91; clauses 75(1), 78(1) and (2), and 95(4).)

- 6.13 (1) An employer should be bound to give effect to an earnings arrestment schedule on any pay day occurring seven days or more after the date of service of the schedule.
- (2) An employer should be entitled, but not bound, to give effect to an earnings arrestment schedule on any pay day occurring within seven days after the date of service of the schedule.
- (3) An employer who does not give effect to an earnings arrestment until a pay day occurring after the expiry of

the seven day period should not be required to make any deduction in respect of a pay day which fell within the seven day period.

(Paragraph 6.97; clauses 75(1) and (2)(a), and 95(2) and (3).)

- 6.14 Failure by an employer to pay sums due to the arresting creditor under an earnings arrestment should render the employer liable to an action for payment of the sums without a right of recovery from the debtor.

(Paragraph 6.100; clause 75(3).)

- 6.15 The debtor's sequestration should render an earnings arrestment ineffectual in a question with the trustee so far as the arrestment relates to earnings payable after the date of sequestration, but it should not affect deductions made before that date.

(Paragraph 6.103; clause 98(2).)

- 6.16 (1) In addition to an earnings arrestment ceasing to have effect on the debtor's sequestration, it should cease to have effect as between debtor and creditor when:

- (a) the debt due has been satisfied; or
- (b) the debt due becomes unenforceable by diligence;
or
- (c) the creditor abandons the arrestment; or
- (d) the arrestment is recalled by the sheriff.

- (2) The clerk of the court should intimate in prescribed form to the employer, debtor and creditor the making of an order recalling an earnings arrestment.

- (3) The creditor should be under a duty of intimating in prescribed form to the employer as soon as reasonably practicable the fact that the debt has been satisfied or has become unenforceable by diligence. Sums received by the creditor after the debt has been satisfied or has become unenforceable by diligence should be recoverable by the debtor with interest at the rate normally applicable to decrees from the date of receipt to the date of payment.

- (4) The employer should be entitled, but not bound, to continue to operate an earnings arrestment until receiving intimation in prescribed form that the arrestment has ceased to have effect or until the debtor ceases to be employed.

- (5) Where the sheriff is satisfied, on an application by a debtor, that the creditor failed to intimate as soon as reasonably practicable satisfaction of the debt or its

unenforceability by diligence, the sheriff may order the creditor to pay the debtor a sum not exceeding twice that recoverable by the debtor in terms of paragraph (3) above.

(Paragraph 6.110; clauses 75(2), (5), (6) and (7), 78(1), and 95(5)(a).)

- 6.17 Section 22 of the Debtors (Scotland) Act 1838 (which deals with prescription of arrestments) should not apply to earnings arrestments.

(Paragraph 6.112; Bill, Schedule 7, paragraph 2.)

- 6.18 (1) The normal mode of service of all schedules of earnings arrestment should be by recorded delivery or registered letter (which at present is competent only in the case of arrestment on sheriff court summary cause decrees).
(2)* It should be provided by act of sederunt that the envelope containing a schedule of earnings arrestment should be clearly marked "Arrestment of earnings" in addition to the direction to the Post Office to return undelivered letters to the sender.
(3) Hand service of an earnings arrestment schedule should be used only if the registered or recorded delivery letter cannot be delivered.
(4) A witness should not be required to the service of an earnings arrestment schedule.
(5) Where an employer receives two or more schedules of earnings arrestment relating to the same debtor on the same date effect should be given to the schedule received first if the employer is aware of the different times of receipt, otherwise the employer may choose which schedule to give effect to.

(Paragraph 6.117; clauses 86(3) and 96(2).)

- 6.19 The officer of court serving an earnings arrestment schedule on the debtor's employer should, if reasonably practicable, at the same time serve a copy of the schedule on the debtor by registered or recorded delivery letter. Only if service cannot be effected by this means should hand service be used. Failure to serve a copy should not affect the validity of service of the arrestment schedule.

(Paragraph 6.119; clause 96(1) and (2).)

- 6.20* Modern forms of schedule of earnings arrestment and the officer's certificate of service of the earnings arrestment should be prescribed by act of sederunt. The statutory deduction tables, together with such further information as

is considered appropriate for the guidance of employers, should be included in the prescribed form of schedule.

(Paragraph 6.122; clause 75(2)(a).)

6.21 An employer should be entitled to deduct a fee of 50p (or such other sum as may be prescribed) on each occasion on which a deduction is made from the debtor's pay in pursuance of an earnings arrestment. The fee should be deducted from the exempt earnings payable to the debtor rather than from the arrested sum payable to the creditor. The employer should give the debtor a statement of the fee deducted along with the statement showing deduction of the arrested sum. (Paragraph 6.125; clause 97.)

- 6.22
- (1) Sums deducted from the debtor's earnings by an employer in pursuance of an earnings arrestment should be paid forthwith direct to the arresting creditor and not through a court collection department.
 - (2) Without prejudice to any other mode of payment which may be agreed between the employer and the creditor who has laid an earnings arrestment, the employer should be entitled to remit the arrested sums to the creditor or other person specified in the arrestment schedule (a) by postal letter enclosing a crossed cheque payable to the creditor bearing on it the words "not negotiable; a/c payee" together with a written statement of the pay period to which the payment relates, or (b) by such other method as may be prescribed.
 - (3) If a cheque in terms of paragraph (2) above is dishonoured the creditor should be entitled to demand payment of that remittance and subsequent remittances in cash.

(Paragraph 6.130; clause 75(1) and (4).)

Current maintenance arrestments

- 6.23
- (1) A new form of continuous arrestment of earnings (called a current maintenance arrestment) should be introduced to facilitate the recovery of current maintenance (aliment and periodical allowance and analogous orders) as it falls due.
 - (2) Accordingly, a current maintenance arrestment, which should normally have effect until the obligation to pay maintenance ceases, should require the employer of a maintenance debtor, on every pay day, to deduct from the debtor's net earnings the whole of the maintenance due for the period since the last pay day and to pay it forthwith to the maintenance creditor, except to the

extent that the earnings are exempt as recommended in Recommendation 6.27 below.

(Paragraph 6.148; clauses 72(2)(b), and 79(1) and (2).)

- 6.24 A current maintenance arrestment should be competent to enforce decrees for aliment and periodical allowance, alimentary bonds and agreements registered for execution, decrees and orders for periodical payments for the recovery of the cost of supplementary benefit or the cost of maintaining children in the care of local authorities and comparable non-Scottish maintenance orders registered in Scotland for enforcement. It should not however be competent to enforce by way of a current maintenance arrestment expenses awarded in connection with maintenance actions or other lump sums such as inlying expenses awarded in an affiliation decree, or decrees constituting claims at common law by third parties for reimbursement of the cost of aliment provided to maintenance debtors or their alimentary dependants in the past.

(Paragraph 6.151; clauses 72(2)(b) and 74.)

- 6.25 (1) It should be competent to lay a current maintenance arrestment only if:
- (a) the debtor had received notification in prescribed form of the maintenance decree setting out the maintenance obligation; and
 - (b) at any time after four weeks from the date of notification at least three instalments of maintenance are due and unpaid.
- (2) The notification should warn the debtor of the consequences of default and should be made by, or on behalf of, the creditor rather than by the clerk of court.

(Paragraph 6.155; clause 82(1).)

- 6.26 (1) A current maintenance arrestment schedule should specify the rate of maintenance to be deducted by the employer from pay as a daily rate. The daily rate should be derived from the rate of maintenance expressed in the decree in accordance with rules set out in statute.
- (2) The employer should be required to deduct every time earnings are paid to the debtor while the current maintenance arrestment is in operation, the maintenance due for the period from the day on which earnings were last paid to the debtor to the day in question. The maintenance due would be the number of days in the period multiplied by the daily rate.

(Paragraph 6.161; clauses 79(4) and (5), and 81(1).)

- 6.27
- (1) The first £5 of a debtor's daily net earnings (as defined in Recommendation 6.9(2)) should be exempt from arrestment by a current maintenance arrestment, but no other exemption should apply.
 - (2) The sum mentioned above should be capable of being varied by regulations made by the Secretary of State by statutory instrument subject to negative resolution. The varied sum should apply to a current maintenance arrestment executed after the coming into force of the regulations and to a subsisting arrestment where either the creditor or the debtor has intimated in prescribed form the regulations to the employer. An employer should be entitled, but not bound, to give effect to the regulations in connection with a subsisting arrestment on becoming aware of their existence otherwise than by intimation in prescribed form.
- (Paragraph 6.166; clauses 68(1)(b), (3) and (4), and 95(1).)

- 6.28
- (1) Arrears of maintenance (whether arising before or after the execution of a current maintenance arrestment) should not be recoverable by a current maintenance arrestment, but the maintenance creditor may enforce payment of the arrears by other diligence, including an earnings arrestment operated concurrently against the same earnings.
 - (2) Interest should not run on any arrears of maintenance which may arise during the subsistence of a current maintenance arrestment.
- (Paragraph 6.176; clauses 72(2)(a), 79(7) and 85(1).)

- 6.29
- An employer operating a current maintenance arrestment should not be required to deduct tax from payments to the maintenance creditor notwithstanding that the maintenance payments secured by the current maintenance arrestment are not "small maintenance payments" for the purposes of the income tax code.
- (Paragraph 6.180; clause 79(5)(a).)

- 6.30
- The court should have the same powers to recall, or resolve a dispute about the operation of, a current maintenance arrestment and to make consequential orders for payment as it has in connection with an earnings arrestment in terms of Recommendation 6.12 above. In addition the court should, on application by the debtor, have power to recall a current maintenance arrestment if it is satisfied that the debtor is unlikely to default again in paying maintenance.
- (Paragraph 6.183; clause 83(1)–(3).)

- 6.31
- (1) A current maintenance arrestment should cease to have effect as between debtor and creditor when:
 - (a) the creditor abandons the arrestment; or
 - (b) the arrestment is recalled by an order of the court; or
 - (c) the debtor is sequestrated; or
 - (d) the obligation being enforced is varied, recalled, or superseded by a court order, ceases to be enforceable by diligence or otherwise ceases to be due, and where more than one obligation is being enforced by the current maintenance arrestment by the variation, recall, supersession, unenforceability, or cessation of any one of the obligations.
 - (2) The clerk of the court should intimate in prescribed form to the employer, debtor and creditor the making of an order recalling a current maintenance arrestment.
 - (3) An arresting creditor should be under a duty to intimate to the employer in prescribed form as soon as is reasonably practicable that the arrestment has ceased to have effect by virtue of a variation, recall, supersession, cessation of enforceability by diligence, or cessation of the obligation or one of the obligations being enforced by the arrestment. Any sum received by the creditor under the arrestment after the arrestment had ceased to have effect should be recoverable by the debtor with interest at the rate normally applicable to decrees from the date of receipt to the date of repayment.
 - (4) The employer should be entitled, but not bound, to continue to operate the current maintenance arrestment until notification in prescribed form that the arrestment has ceased to have effect is received or until the debtor ceases employment.
 - (5) Where the sheriff is satisfied, on an application by a debtor, that the creditor failed to intimate as soon as reasonably practicable that the arrestment had ceased to have effect by virtue of any of the circumstances in paragraph (3) above, the sheriff should have power to order the creditor to pay to the debtor a sum not exceeding twice the sum recoverable by the debtor from the creditor under paragraph (3) above.
- (Paragraph 6.189; clauses 83(1), (4), (5), (6), (7) and (8); 95(5) and 98(2).)

- 6.32
- (1)* It should be provided by act of sederunt that in any action in which an application for aliment or periodical allowance is made, and in any application for variation of a decree for aliment or periodical allowance, the

applicant should be required to furnish the court with such particulars within his or her knowledge as may be prescribed as to any existing maintenance decree against the other party to the application, and any existing current maintenance arrestment or earnings arrestment enforcing that decree.

- (2) Where a maintenance decree, which was being enforced by a current maintenance arrestment, is varied, or superseded by a new maintenance decree, then:
 - (a) further default should not be a necessary prelude to enforcement, by a current maintenance arrestment, of the new decree within three months after the current maintenance arrestment enforcing the original decree had ceased to operate;
and
 - (b) the court should have an express statutory power to delay the coming into operation of the new decree to allow time for intimation to the employer of the cessation of the original decree and service of a new current maintenance arrestment enforcing the varied or new decree. Where, however, a decree for aliment in favour of a spouse is superseded by an award of periodical allowance on divorce in favour of that spouse, the court should not postpone the coming into operation of the decree for periodical allowance.
- (3) Where a maintenance decree, which was being enforced by a current maintenance arrestment, ceases to be effective in part, further default should not be a necessary prelude to enforcement, by a new current maintenance arrestment, of the remaining obligation or obligations in the decree within three months after the current maintenance arrestment enforcing the whole decree ceased to have effect.
- (4) Where a new current maintenance arrestment is served under a new maintenance order or a varied order before the date specified in that order, the employer should apply the new maintenance rate specified in the schedule as from the first pay day following that date. But the employer should not be liable for failing to comply with a current maintenance arrestment within a period of seven days after the date of the service of the arrestment schedule.

(Paragraph 6.198; clauses 82(3), 84 and 95(2).)

- 6.33 (1) A maintenance creditor in receipt of supplementary benefit and current maintenance under a current maintenance arrestment or a conjoined arrestment order may authorise

in writing the Department of Health and Social Security to receive sums payable under the arrestment or order. The Department should intimate the authorisation to the employer or the sheriff clerk as the case may be who should be bound thereafter to pay to the Department the sums due to the maintenance creditor.

- (2) The authorisation may be withdrawn by the maintenance creditor and should lapse on the maintenance creditor ceasing to be in receipt of supplementary benefit. The Department should forthwith intimate the withdrawal or lapse of the authorisation to the employer or sheriff clerk.
(Paragraph 6.200; clause 94.)

- 6.34 Recommendations 12(3), 13, 14, and 17 to 22 should apply to current maintenance arrestments as they apply to earnings arrestments.

(Paragraph 6.202; clauses 79(6), 86(3), 95(2)—(4), 96(1) and (2), and 97; Schedule 7, paragraph 2.)

- 6.35 A non-Scottish maintenance order (including an authentic instrument or court settlement within the meaning of the European Judgments Convention and an order in favour of a public authority for reimbursement of the cost of maintenance provided by it) registered in Scotland for enforcement should be enforceable by current maintenance arrestment only if it provides for periodical payments to be made by the maintenance debtor.

(Paragraph 6.207; clause 74.)

- 6.36 Where a certificate of arrears is produced to the registering court at the time of registration of the incoming maintenance order, it should be competent for the maintenance creditor to serve a current maintenance arrestment without the need to satisfy the requirements of notice and default proposed in Recommendation 6.25 above.

(Paragraph 6.209; clause 82(2).)

- 6.37* Provision should be made by act of sederunt that where a non-Scottish order is enforced by a current maintenance arrestment or an earnings arrestment, the schedule of arrestment served on the employer should specify the name and address of a person within the United Kingdom to whom deductions are to be remitted.

(Paragraph 6.211.)

- 6.38 Where a Scottish court grants an order varying a non-Scottish maintenance order registered for enforcement and the order is being enforced by a current maintenance arrestment, the court should have power to postpone the coming into operation

of the variation to allow the change from the old rate to the new rate to be made without a break in the continuity of deductions.

(Paragraph 6.214; clause 84.)

- 6.39 (1)* It should be provided by act of sederunt that where the registration of a non-Scottish maintenance order registered for enforcement in Scotland is cancelled because the debtor has ceased to reside in Scotland, the prescribed officer of the court in which the order is registered should so far as reasonably practicable intimate the cancellation in prescribed form:
- (a) if the cancelled order was being enforced by a current maintenance arrestment, to the employer operating that arrestment; or
 - (b) if the cancelled order was being enforced by a conjoined arrestment order, to the sheriff clerk of the court dealing with the conjoined arrestment order.
- (2) The creditor in the maintenance order whose registration was cancelled should be bound as soon as reasonably practicable to intimate in prescribed form the cancellation to the employer or the sheriff clerk as the case may be, and in the case of failure Recommendation 6.31(5) (imposition of a discretionary penalty) should apply.

(Paragraph 6.217; clause 83(6) and (8).)

Conjoined arrestment orders

- 6.40 Employers should not be required to operate more than one earnings arrestment against a debtor's pay at any one time and accordingly it should be provided by statute that an earnings arrestment served during the currency of another earnings arrestment against the same debtor's pay should be ineffectual.
- (Paragraph 6.222; clause 86(1).)

- 6.41 (1) A creditor whose earnings arrestment is, or would be, ineffectual by reason of an existing earnings arrestment by another creditor should be entitled to apply to the court for an order (called a "conjoined arrestment order") requiring the employer to pay the sums deducted on each pay day into court for disbursement to the original creditor and the applicant creditor.
- (2) Earnings arrestments should be expressly excluded from provisions in the bankruptcy legislation equalising poindings and arrestments executed within certain periods before or after notour bankruptcy or apparent insolvency.

(Paragraph 6.228; clauses 87(1) and 93; Schedule 7, paragraph 38.)

- 6.42
- (1) Where during the subsistence of an earnings arrestment a later earnings arrestment is served, the employer should be under a duty to disclose, as soon as reasonably practicable, to the later creditors:
 - (a) the name and address of the first arresting creditor;
 - (b) the total amount due to the first arresting creditor as at the date of service of that creditor's earnings arrestment; and
 - (c) the date of service and place of execution of the first creditor's earnings arrestment.
 - (2) A creditor should have a title to apply for a conjoined arrestment order if entitled to serve an earnings arrestment on the debtor's employer, whether or not the creditor has served an earnings arrestment which is ineffectual because of a subsisting earnings arrestment.
 - (3) Power to make a conjoined arrestment order should be conferred on the sheriff court rather than the Court of Session.
 - (4) The amount recoverable under a conjoined arrestment order by the later creditor who applies for an order should be the principal sum and judicial expenses due under the decree, interest accrued to the date of application, the expenses of the prior charge and the expenses of the application for the order but only if, and to the extent that, the sums are specified in the application.
 - (5)* It should be provided by act of sederunt that the creditor's application should contain sufficient information to enable the court to make an order without a hearing including:
 - (a) the applicant's name, address and amount of the debt due at the date of application;
 - (b) the first arresting creditor's name and address, the sum due to that creditor at the date of service of that creditor's earnings arrestment and the place of execution of that earnings arrestment; and
 - (c) the name and address of the debtor and of the employer.
 - (6)* It should be provided by act of sederunt that a conjoined arrestment order may, in the absence of objections or special circumstances, be made by a sheriff clerk instead of a sheriff.
 - (7) The sheriff clerk should serve in the prescribed manner a copy of the conjoined arrestment order on the employer, the debtor and the creditors.
 - (8) An earnings arrestment served during the currency of a conjoined arrestment order affecting the same debtor's earnings should be ineffectual. The employer should be under a duty to inform the arresting creditor which court

granted the order. A later creditor should be entitled to apply to that court to participate in the existing conjoined arrestment order.

- (9) If the employer fails without reasonable excuse to discharge the duty in paragraphs (1) or (8) above, the creditor should be entitled to apply to the sheriff court having jurisdiction over the employer for an order requiring the employer to disclose the required information.

(Paragraph 6.326; clauses 86(4) and (5), 87(1), (2), (6), (7), (9) and (11) and 88(1), (2), (4) and (5).)

6.43

- (1) An employer should be bound to give effect to a conjoined arrestment order on any pay day occurring seven days or more after the date of service of the order.
- (2) An employer should be entitled, but not bound, to give effect to a conjoined arrestment order on any pay day occurring within seven days after the date of service of the order.
- (3) The conjoined arrestment order should supersede the subsisting earnings arrestment as soon as the employer gives effect to the order. The conjoined arrestment order should direct the employer to deduct from the debtor's earnings on each pay day until further order, a sum calculated in accordance with the rules applicable to an earnings arrestment, and to remit such deductions forthwith to the court.
- (4) Recommendation 6.22 (payment by employer by cheque or otherwise) should apply to conjoined arrestment orders as it applies to earnings arrestments.
- (5) The employer should be entitled to deduct a fee of 50p (or such other sum as may be prescribed) on each occasion on which a deduction is made from the debtor's pay under a conjoined arrestment order. The fee should be deducted from the exempt earnings payable to the debtor and the employer should give the debtor a statement of the fee deducted along with the statement showing the deduction made under the conjoined arrestment order.
- (6) An employer who fails to comply with a conjoined arrestment order should be liable to pay the sheriff clerk the sums that would have been received if the order had been complied with, without a right of recovery from the debtor. In addition, a failure which is wilful and without reasonable excuse should be capable of being treated as a contempt of court.

(Paragraph 6.241; clauses 87(1), (3) and (13), 89(2) and (7), 95(2) and 97.)

6.44

- (1) The court should apportion between the creditors in a conjoined arrestment order rateably according to their debts, all sums received from the employer.

- (2) For the purpose of calculating the shares due to the creditors, the debt of the original arresting creditor should be taken to be the sums due at the date of service on the employer of that creditor's earnings arrestment schedule and specified in that schedule, and the debt of the creditor who applied for the conjoined arrestment order and any subsequent conjoined creditor should be taken to be the sums (debt, interest and expenses) due and specified in their application to the court.
- (3) There should be no preference for arrears of aliment, rates or taxes in a conjoined arrestment order.
- (4)* Provision should be made by act of sederunt regulating the disbursement by the court to the conjoined creditors of their share of the collected sums, including such matters as the frequency of payment, notification of the details of the ranking of the creditors, and an account of the court's intromissions on termination of the order.

(Paragraph 6.244; clause 90; Schedule 4.)

- 6.45 It should be competent to lay both a current maintenance arrestment and an earnings arrestment against the same earnings and if, in these circumstances, there is only one arrestment of each type, a conjoined arrestment order should be incompetent. The employer should operate both arrestments simultaneously and if there were insufficient earnings above the fixed sum threshold to satisfy both arrestments, the employer should give priority to the earnings arrestment.

(Paragraph 6.249; clauses 85 and 87(4).)

- 6.46
- (1) A second current maintenance arrestment served during the currency of an existing current maintenance arrestment should be ineffectual, and current maintenance arrestments should be expressly excluded from provisions in the bankruptcy legislation equalising poindings and arrestments executed within certain periods before or after notour bankruptcy or apparent insolvency. A creditor whose current maintenance arrestment is or would be ineffectual by reason of an existing current maintenance arrestment or conjoined arrestment order should be entitled to apply to the court for a conjoined arrestment order or to be included in the existing order, and the procedure in Recommendation 6.42 above should apply.
 - (2) The conjoined arrestment order should require the employer to deduct and pay to the court the maintenance at the specified rate (being the aggregate of the daily rates due to the original creditors) so far as there were net earnings above the fixed sum threshold of £5 per day. The court would disburse the sums received to the maintenance

creditors. In the event of there being insufficient net earnings to satisfy both maintenance creditors, the court would divide the amount deducted in proportion to the daily rates of current maintenance payable to each.

- (3) It should be incompetent for a maintenance creditor to enforce by way of a conjoined arrestment order two or more maintenance obligations which he or she could enforce by single current maintenance arrestment against the debtor's earnings.

(Paragraph 6.252; clauses 86(2), (4) and (5), 87, 88, 89(3), 90 and 93; Schedules 4 and 7, paragraph 38.)

- 6.47 In a conjoined arrestment order with three or more creditors and involving both ordinary creditors and maintenance creditors, the sum that would be deducted under an earnings arrestment should be paid to the ordinary creditor, or if more than one to the ordinary creditors as a class sharing rateably according to the amount of their debts. The maintenance creditor or creditors should receive their maintenance out of any balance above the fixed sum threshold, abating rateably between themselves according to the daily rates of current maintenance payable to each if there is more than one maintenance creditor and insufficient earnings to satisfy all.

(Paragraph 6.255; clauses 89(4) and 90; Schedule 4.)

- 6.48 For the purposes of Recommendation 6.46(1) (two or more maintenance creditors cannot use current maintenance arrestments simultaneously against the same debtor) and Recommendation 6.46(3) (a maintenance creditor not entitled to use conjoined arrestment order to enforce two or more obligations if current maintenance arrestment could be used) a maintenance creditor should be defined as the payee in a maintenance obligation whether the payee is an individual, an official or an authority.

(Paragraph 6.259; clause 80(1) and (3).)

- 6.49 (1) It should be competent for a conjoined arrestment order to enforce arrears of maintenance and current maintenance payable to the same creditor.
(2) No interest should run on arrears of maintenance arising during the operation of a conjoined arrestment order which is enforcing current maintenance.

(Paragraph 6.262; clause 87(8).)

- 6.50 (1) The employer should continue to operate a conjoined arrestment order until the debtor ceases employment or until intimation of the recall or variation of the order by the court is received.
(2) In addition to the court's power to recall a conjoined arrestment order following the granting of a time to pay

order or on the coming into force of a debt arrangement scheme, the court should, on application, recall a conjoined arrestment order if it is satisfied that the order is invalid or has ceased to have effect or if all the conjoined creditors (or the last remaining creditor) apply for recall.

- (3) A conjoined arrestment order should cease to have effect on the sequestration of the debtor, or on all the debts included in the order (or the last remaining debt in the order) being satisfied, ceasing, or becoming unenforceable by diligence.
- (4) The court should, on application, vary a conjoined arrestment order if:
 - (a) a debt due to a creditor is satisfied or becomes unenforceable by diligence; or
 - (b) a creditor no longer wishes to have the debt included; or
 - (c) in the case of maintenance the obligation to pay maintenance ceases, is recalled or varied, or becomes unenforceable by diligence.

(Paragraph 6.270; clauses 87(10), 92(1)–(4) and 98(2).)

- 6.51
- (1) A creditor whose debt is included in a conjoined arrestment order should be under a duty to inform the sheriff clerk when the debt is satisfied or ceases to be enforceable by diligence, and in the case of maintenance when the obligation to pay maintenance ceases. Sums received by a creditor after satisfaction of the debt, the debt becoming unenforceable by diligence or, in the case of maintenance, where the obligation to pay maintenance ceases, should be recoverable by the sheriff clerk with interest at the rate normally applicable to decrees from the date of receipt to the date of payment. The sheriff clerk should distribute the sums recovered among the remaining creditors as if the repaying creditor had ceased to be conjoined in the order.
 - (2) Where the sheriff is satisfied, on an application by the debtor, that the creditor failed to intimate as required in paragraph (1) above, the sheriff may order the creditor to pay the debtor a sum not exceeding twice that recoverable by the sheriff clerk in terms of paragraph (1) above.
 - (3) An application for variation or recall of a conjoined arrestment order should be capable of being made by the debtor, a creditor, the employer, the sheriff clerk operating the order and the debtor's trustee in sequestration.
 - (4) The sheriff clerk should be under a duty to intimate the granting of an order varying or recalling a conjoined arrestment order to the debtor, the creditors, and the debtor's trustee in sequestration if the trustee's whereabouts

are known. Intimation should be made to the employer of any recall and any variation resulting in a change in the amount to be deducted from the debtor's earnings.

(Paragraph 6.276; clauses 91(4)–(8), and 92(2) and (5).)

- 6.52 The court, on application by the debtor, the sheriff clerk, a creditor or the employer should have power to determine a dispute as to the manner of operation of a conjoined arrestment order. The court in disposing of the application should have power to order one of the parties to pay to another sums which had been deducted or retained in error with interest.

(Paragraph 6.278; clause 91(1) and (2).)

- 6.53 The sheriff clerk should be under a duty to intimate to an employer operating a conjoined arrestment order any variation in the statutory deduction tables applicable to earnings arrestments, or the level of exempt earnings applicable to current maintenance arrestments. The employer should be entitled, but not bound, to give effect to such a variation on any pay day occurring within seven days of the date of intimation, but should be bound to give effect to such a variation on any pay day occurring thereafter.

(Paragraph 6.280; clauses 89(6) and 95(2).)

Miscellaneous

- 6.54 (1) The sheriff courts should have exclusive jurisdiction to:
- (a) grant conjoined arrestment orders; and
 - (b) deal with applications for variation or recall of or disputes regarding the mode of operation of earnings arrestments, current maintenance arrestments and conjoined arrestment orders.
- (2) An application under paragraph (1)(a) above should be made to the sheriff court in whose jurisdiction the place of execution of the earnings or current maintenance arrestment is situated. An application under paragraph (1)(b) above should be made to the sheriff court that granted the conjoined arrestment order in question or in whose jurisdiction the place of execution of the earnings or current maintenance arrestment in question is situated.
- (3) It should also be competent to make an application under paragraph (1) above to a sheriff court in whose jurisdiction the debtor's employer has an established place of business.

(Paragraph 6.291; clause 99.)

DILIGENCES AND PRIORITIES ENFORCING RATES, TAXES AND CROWN DEBTS

Reform of diligence under summary warrants for rates and taxes

- 7.1 (1) It should be incompetent for a summary warrant to be granted for the recovery of arrears of rates or taxes due by a debtor if an action has already been raised for payment of those arrears.
- (2) The raising of an action against the debtor for payment of arrears of rates or taxes should render an existing summary warrant for those arrears ineffective as regards that debtor.
- (3) It should be incompetent to raise an action against the debtor for payment of arrears of rates or taxes once a poinding, arrestment or earnings arrestment has been executed for recovery of those arrears in pursuance of a summary warrant.
- (Paragraph 7.8; Bill, Schedule 5, paragraphs 1, 4, 6 and 7.)
- 7.2 A summary warrant should be granted only by a sheriff and diligence in execution of a summary warrant should be carried out only by sheriff officers.
- (Paragraph 7.11; clause 103(3); Schedule 5.)
- 7.3 A summary warrant for the recovery of rates or taxes should authorise an arrestment of the debtor's funds and property other than earnings, and an earnings arrestment (or where appropriate a conjoined arrestment order) against his earnings.
- (Paragraph 7.18; Bill, Schedule 5, paragraphs 1, 2, 6 and 7.)
- 7.4 Summary warrants for rates and taxes should continue to be enforceable by a special statutory poinding procedure rather than by poinding in common form.
- (Paragraph 7.20; Bill, Schedule 6.)
- 7.5 The special statutory poinding procedure should be the same for all summary warrants for rates and taxes.
- (Paragraph 7.22; Bill, Schedule 5, paragraphs 1, 2, 6 and 7; Schedule 6.)
- 7.6 (1) In summary warrant poinding procedure, the goods should be valued at their open market value at the time of poinding. The valuation should be carried out by the officer except in special cases where a specialist valuator should value the goods.
- (2) The debtor should have an opportunity and right to redeem any of his goods by payment to the officer of their appraised values within 14 days after the execution of the poinding and within seven days after notification to the debtor of the date of sale or removal and sale.

- (3) The debtor should be entitled to apply to the sheriff for recall of the poinding on the grounds that the goods were substantially undervalued, at any time up to the officer's intimation to him of the date arranged for the sale or removal of his goods for sale.
 - (4) In any auction of goods in pursuance of a summary warrant the appraised values of the goods should be treated as reserve prices. The creditor need not disclose the existence of a reserve price or its amount to bidders.
- (Paragraph 7.30; Bill, Schedule 6, paragraphs 5(1)(b) and (5), 7, 11(2), and 14(1).)

7.7 Where goods poinded under a summary warrant are exposed for sale, the appraised value should operate as a reserve price. The ownership of goods which are not sold because the highest bid fails to reach the reserve price should pass to the rating or tax authority, unless the authority authorises the auctioneer to sell the goods to the highest bidder. The debtor should be credited with the appraised value or the amount of the highest bid whichever is the greater.

(Paragraph 7.36; Bill, Schedule 6, paragraph 14(3)–(6).)

7.8 The sheriff should have power on an application by the debtor made within 14 days of the execution of the poinding to release an article from the poinding on the grounds that:

- (a) it is exempt from poinding; or
- (b) continuation of the poinding or the sale of the article would be unduly harsh.

(Paragraph 7.39; Bill, Schedule 6, paragraphs 1 and 6.)

7.9 The sheriff should have power, on application by the debtor or of his own accord at any time before the sale, to recall a summary warrant poinding on the ground that it is invalid or has ceased to have effect. The sheriff should also have power, on an application made by the debtor before intimation by the officer to the debtor of the arrangements made for the sale of the debtor's poinded goods or their removal for sale, to recall the poinding on the ground that a sale would be unduly harsh, the goods were in aggregate substantially undervalued, or that the likely proceeds of sale will not exceed the likely expenses of sale.

(Paragraph 7.42; Bill, Schedule 6, paragraph 7.)

7.10 (1) A summary warrant should be deemed to include a warrant to open shut and lockfast places in the debtor's occupancy for the purposes of executing a poinding and sale under the summary warrant.

- (2) It should not be competent for an officer to enter a dwellinghouse which is unoccupied or in which no person over 16 years of age is present in pursuance of a warrant to open shut and lockfast places unless the officer had previously intimated to the debtor (and in the case of occupation by children under 16 years, the social work department) his intention to enter or had obtained prior authority from the sheriff.

(Paragraph 7.45; Bill, Schedule 6, paragraphs 4 and 24.)

- 7.11 In line with the recommendation of the Keith Report, the duty of an auctioneer to intimate an auction of moveables imposed by section 63(9) and (10) of the Taxes Management Act 1970 should be abolished.

(Paragraph 7.48; Bill, Schedule 5, paragraph 2.)

- 7.12 (1) Section 249 of the Local Government (Scotland) Act 1947 (which provides for a summary procedure for the review of summary warrant proceedings on application by an aggrieved owner of the poinded goods) should be repealed.

- (2) Without prejudice to any other competent remedy:

- (a) the provisions allowing a debtor to apply for the recall of a poinding or the release of articles from a poinding which are recommended for ordinary poindings should be competent in summary warrant poindings subject to such modifications as are necessary in view of the different procedure;

- (b) the provisions allowing applications to be made for the recall of, and the resolution of disputes relating to, earnings arrestments proceeding on court decrees should be competent for earnings arrestments proceeding on summary warrants.

(Paragraph 7.53; clauses 78 and 92; Schedule 6, paragraphs 6, 7, 21 and 22; Schedule 9.)

- 7.13* The existing statutory surcharge due to a rating authority by the debtor on the granting of a summary warrant against him should be retained, but the level of the surcharge (presently 10%) should be reviewed. Surcharges should not be introduced for tax summary warrants.

(Paragraph 7.57; Bill, Schedule 5, paragraphs 1 and 2.)

- 7.14 (1) The statutory commission of 10% of the tax due payable to an officer executing a summary warrant should be abolished. Instead the creditor should be liable to the officer in the first instance for payment of the officer's diligence expenses charged in accordance with the table of fees prescribed by act of sederunt but with a right to recover

the expenses from the debtor as recommended in Recommendations 9.7 to 9.9.

- (2) The sheriff officer executing a summary warrant should be entitled to charge the rating or tax authority prescribed fees for collecting and accounting for sums paid to him by the defaulter in satisfaction of the sums due. The defaulter should not become liable for such fees.

(Paragraph 7.61; Bill, Schedule 5, paragraphs 1 and 2.)

- 7.15 Diligence on a summary warrant should be capable of being executed anywhere within Scotland without endorsement of a warrant of concurrence and in consequence section 251 of the Local Government (Scotland) Act 1947 should be repealed. (Paragraph 7.65; clause 116; Schedule 9.)

Betting, Gaming and Excise duties

- 7.16 The procedure for recovery of betting, gaming and excise duties should be called "taking possession" instead of "poinding". A warrant to take possession of articles and sell them by public auction should be granted only by a sheriff and should be executed only by sheriff officers.

(Paragraph 7.69; Bill, Schedule 7, paragraphs 29 and 31.)

Civil imprisonment for non-payment of rates, taxes, and fines and penalties due to the Crown.

- 7.17 (1) Civil imprisonment for failure to pay rates and fines and penalties due to the Crown, together with the procedure for civil imprisonment prescribed by the Debtors (Scotland) Act 1838 on the administrative *fiat* of a clerk of court and the corresponding procedure for imprisonment under the Exchequer Court (Scotland) Act 1856, sections 33 and 34, should be abolished, subject to the qualification mentioned in the following paragraph.

- (2)* The foregoing recommendation is not intended to remove the powers of the court to grant warrant for civil imprisonment on default in payment of a fine imposed by the court either:

- (a) for contempt of court in civil proceedings; or
- (b) for breach of an order for restoration of possession, or for specific performance of a statutory duty, under section 91 of the Court of Session Act 1868.

The competent authorities should, however, consider whether the powers of the court to grant such warrants, and the legal effect of such warrants, should be clarified and whether the courts should be empowered by statute to use the machinery for enforcement of criminal fines as a means of recovering fines for contempt in civil proceedings.

- (3) The proviso to section 4 of the Debtors (Scotland) Act 1880 (which limits the maximum period of civil imprisonment for debt to 12 months) should be repealed as inconsistent with the limits provided by section 15(2) of the Contempt of Court Act 1981 in relation to contempt of court.
 - (4)* The competent authorities should consider whether the maximum limits on fines and imprisonment for contempt in Court of Session proceedings provided by section 15(2) of the 1981 Act should apply to sentences of fines and imprisonment imposed by the Court of Session under section 91 of the Court of Session Act 1868.
- (Paragraph 7.80; clause 100(3); Schedule 7, paragraph 9; Schedule 9.)

Abolition of Exchequer diligence

- 7.18
- (1) The special diligences for the enforcement by the sheriff principal of Exchequer decrees should be abolished, and such decrees should be enforceable in the same manner as other decrees for payment.
 - (2) As regards Crown preferences acquired by virtue of Exchequer diligence:
 - (a) an arrestment under an Exchequer decree should no longer by itself confer on the Crown a special preference in a competition with an ordinary arrestment; and
 - (b) a charge or other diligence should no longer be deemed equivalent to the teste of a writ of extent and accordingly should no longer give the Crown a preference in a competition with diligences by other creditors over the debtor's moveable property, or in a competition with a trustee in a sequestration or liquidator of a company.
- (Paragraph 7.92; clause 100(5).)

Prior claims for rates or taxes against persons taking moveables by diligence or assignation

- 7.19
- The priorities for recovery by official collectors of one year's arrears of rates and taxes, where moveable goods and effects are taken by diligence or assignation in Scotland, should be abolished.
- (Paragraph 7.106; clause 100(4).)

Fugae warrants

- 7.20
- Fugae warrants* should be abolished.
- (Paragraph 7.108; Bill, Schedule 9 amendment of Debtors (Scotland) Act 1880, section 4.)

OFFICERS OF COURT

Retention of present system

- 8.1 The present system whereby citation and diligence is executed by independent contractor fee-paid officers of court should be retained (subject to various reforms) and should not be replaced by salaried officers employed within the Scottish Court Service or a central government department.
(Paragraph 8.10; clauses 101 to 111.)

Organisation and control of officers of court

- 8.2 The separate offices of messenger-at-arms and sheriff officer should be retained and should not be replaced by one service of court officers authorised to execute warrants of all courts within Scotland.
(Paragraph 8.16; clauses 103 and 130.)
- 8.3 Sheriff officers should not become a self-regulating and self-disciplining service. The functions of appointment, supervision and control of sheriff officers should continue to be exercised by sheriffs principal and should not be transferred to a new central authority having such functions in respect of sheriff officers and messengers-at-arms.
(Paragraph 8.20; clauses 104 to 107.)
- 8.4
- (1) The primary function of appointment, supervision, control and discipline of messengers-at-arms should be transferred from the Lyon King of Arms to the Court of Session. The Lord Lyon should, however, retain formal functions in connection with the appointment, suspension and deprivation of office of messengers-at-arms and the Lyon Clerk should continue to keep the Roll of Messengers-at-Arms.
 - (2) An application for appointment as messenger should be heard by a judge of the Court of Session who if satisfied that the applicant is suitable should pronounce an interlocutor containing a finding to this effect.
 - (3) The Lord Lyon on receiving the interlocutor of the Court of Session should, after interviewing the petitioner, administer the oath to perform a messenger's duty faithfully, present the petitioner with a commission as messenger-at-arms and insignia (blazon and baton) of office, and instruct the petitioner's name to be entered in the Roll of Messengers-at-Arms.
 - (4) A Court of Session interlocutor finding that a messenger should be suspended from practice or deprived of office should be transmitted to the Lord Lyon who should suspend or deprive (as the case may be) the messenger and instruct an appropriate amendment to be made to the Roll of Messengers-at-Arms.
- (Paragraph 8.28; clauses 103(1) and (5), and 104 to 107.)

- 8.5 (1) The Court of Session's existing powers to make rules regulating messengers-at-arms and prescribing fees for citation and diligence should be replaced by wider statutory powers to make rules regulating and controlling the service of officers of court.
- (2) A new standing body, which may be called the Advisory Council on Messengers-at-Arms and Sheriff Officers, should be established to advise the Court of Session on rules to be made under the foregoing powers and generally to keep under review all matters relating to officers of court.
- (3) The Advisory Council should consist of a judge of the Court of Session (who should act as chairman) appointed by the Lord President of the Court of Session, five other members also appointed by the Lord President (including two sheriffs principal, two officers of court and a solicitor), and one member appointed by the Secretary of State for Scotland. The Secretary of the Council should be a full-time clerk of session or sheriff clerk appointed by the Secretary of State.

(Paragraph 8.34; clauses 101 and 102.)

- 8.6 (1) Messengers-at-arms should not be authorised by their commissions as messengers to execute warrants of the sheriff courts (including writs registered for execution in any sheriff court books), without prejudice to their authority to execute warrants of a particular sheriff court by virtue of their commissions as sheriff officers.
- (2) Where a statute provides that a tribunal or inquiry order is enforceable "in like manner as a recorded decree arbitral" it should be amended to provide that the order is enforceable in like manner as an extract registered decree arbitral bearing a warrant of execution issued by the sheriff court of any sheriffdom in Scotland.

(Paragraph 8.40; clause 103(3); Schedule 7, General Amendment, paragraphs 17, 24, 25 and 30.)

- 8.7 A sheriff officer should not be entitled to enforce a warrant of any sheriff court anywhere in Scotland. The existing rules whereby a warrant for diligence granted by a sheriff court is executed either by an officer of the court which granted the warrant or an officer holding a commission for the place where the warrant is to be executed should be retained.

(Paragraph 8.43; clause 116.)

Appointment, supervision and discipline

- 8.8 (1)* In order to secure uniformity of training standards and qualifications throughout Scotland, the Court of Session, after consulting the Advisory Council on Messengers-at-Arms and Sheriff Officers recommended above, should

prescribe by act of sederunt rules governing the training and qualifications of sheriff officers and messengers-at-arms. The rules should regulate the apprenticeship of entrants to the sheriff officers' service, and require the holding of written examinations and the issue of certificates of competence to undertake the work of messenger-at-arms or sheriff officer.

- (2)* Consideration should be given by the competent authorities, after consulting the Society of Messengers-at-Arms and Sheriff Officers, to the introduction of a formal programme for the training of messengers-at-arms and sheriff officers using methods appropriate to the small numbers of persons who enter the service at any one time.
- (3)* The procedure to be followed in applications for a commission as messenger-at-arms or sheriff officer should be regulated by act of sederunt made by the Court of Session after consulting the Advisory Council on Messengers-at-Arms and Sheriff Officers. Such an application should not be competent unless the applicant holds the prescribed messenger's or sheriff officer's certificate of competence, as the case may be.
- (4) No change should be made in the existing powers of the sheriffs principal to grant a commission as sheriff officer having regard to the interests of the applicant, and to the public interest which should continue to be paramount. The Court of Session, in disposing of an application for appointment as messenger-at-arms, should have similar discretionary powers.
- (5) A person should be eligible to apply for and to hold a commission as messenger-at-arms only if he or she holds a commission as sheriff officer.

(Paragraph 8.56; clauses 101(1), and 103(2) and (4).)

- 8.9* Provision should be made by act of sederunt to make it clear that an officer of court may be employed under a contract of service by another officer of court or firm of officers to execute citation and diligence, and that officers of court are permitted to organise themselves in firms.

(Paragraph 8.61; clause 101(1)(a).)

- 8.10
- (1) A sheriff principal should have power, even in the absence of a complaint, to appoint a suitable person or persons to inspect the work of any sheriff officers in executing citation and diligence and to make enquiry as to paid extra-official activities and to report.
 - (2) Where an inspection would involve officers who are messengers-at-arms as well as sheriff officers, the sheriff principal should request the concurrence of the Court of

Session to the inspection so that the work of the officers in both capacities can be examined. The person conducting the inspection should submit the report to the Court of Session and to the sheriff principal.

- (3) The Court of Session should have power, even in the absence of a complaint, to direct a sheriff principal to appoint a suitable person or persons to inspect the work of any messengers in their capacity as messengers as well as sheriff officers and the work of sheriff officers associated in business with them. The person conducting the inspection should submit the report to the Court of Session and to the sheriff principal.
- (4) The expenses of an inspection and report should be chargeable to the Exchequer.

(Paragraph 8.66; clause 104.)

- 8.11
- (1)* Provision should be made by act of sederunt that the report of a poinding should state the fees, mileage charges and outlays incurred in serving the charge and executing the poinding. The auditor of the sheriff court should have power, in the absence of any request by the creditor or debtor or remit by the court, to audit and tax selected expenses. Unless the audit was requested by the debtor or creditor, the audit expenses should be chargeable to the Exchequer.
 - (2) Any fee chargeable by the auditor of court in connection with audit and taxation of reports of sales of poinded goods should be waived.
 - (3)* Provision should be made by act of sederunt that all diligence forms served on debtors should contain a detailed statement of the fees, mileage charges and outlays incurred in that step of the diligence.
 - (4)* The debtor or creditor should, as at present, have a right to have diligence expenses audited and taxed. It should be provided by act of sederunt that for sheriff court diligence and poindings proceeding on a Court of Session decree the audit should be carried out by the sheriff court auditor; for other Court of Session diligence the audit should be carried out by the Auditor of the Court of Session.
 - (5)* Provision should be made by act of sederunt that where diligence expenses are found on audit to be correctly stated or understated, the debtor or creditor requesting the audit should be liable for the auditor's fee. Where the diligence expenses are found on audit to be overcharged, the sheriff (or in the case of an arrestment proceeding on a Court of Session decree, the Lord Ordinary) should have power to adjust the diligence expenses, to order repayment of fees or other sums found to have been overcharged, and to

order the officer to pay the expenses of audit and subsequent procedure. The officer in question should also be liable to be reported to the appropriate disciplinary authority.

- (6) A person appointed in terms of Recommendation 8.10 should have power to check diligence expenses charged by officers of court and to report evidence of overcharging. Deliberate overcharging should render the officer concerned liable to disciplinary proceedings for misconduct.

(Paragraph 8.73; clauses 61(7) and 104(1).)

8.12

- (1) Where as a result of an inspection of the officer's work or a complaint or otherwise the sheriff principal has reason to believe that a sheriff officer may have been guilty of misconduct, the sheriff principal should have power to appoint a solicitor to investigate the matter, unless the officer admits the misconduct in writing or gives a satisfactory explanation of the matter. Misconduct should include conduct tending to bring the office of sheriff officer or messenger-at-arms into disrepute.
- (2) If, following the investigation, the solicitor is of the opinion that there is a probable case of misconduct and sufficient evidence to support it, disciplinary proceedings should be brought at the instance of the solicitor before the sheriff principal. In such proceedings, the sheriff officer should be given fair notice of the allegations of misconduct and a right to legal representation. If the solicitor is of the opinion that there is no probable case of misconduct, or insufficient evidence, a report to this effect should be made to the sheriff principal.
- (3) Similar powers to deal with allegations of misconduct involving messengers-at-arms should be conferred on the Court of Session.
- (4) The Court of Session or the sheriff principal should have power following a written admission of misconduct or a finding of misconduct as a result of disciplinary proceedings as mentioned in paragraph (2) above to:
- (a) deprive the officer of office;
 - (b) suspend the officer from practice;
 - (c) impose a fine of up to £2,500 or such other sum as may be prescribed by the Secretary of State;
 - (d) order repayment of fees, outlays and other sums overcharged; and
 - (e) censure the officer.
- (5) It should not be competent to deal with an officer of court in any of the ways set out in paragraph (4) above unless the officer admits misconduct in writing or is found guilty of misconduct in disciplinary proceedings.

- (6)* The Court of Session after consulting the Advisory Council on Messengers-at-Arms and Sheriff Officers should make rules by act of sederunt regulating disciplinary proceedings against officers of court.
 - (7) The expenses of an investigation and disciplinary proceedings should be borne in the first instance by the Exchequer, but the Court of Session or the sheriff principal should have power at the termination of disciplinary proceedings to award expenses against either party. The party bringing the proceedings against the officer should be deemed for this purpose to be the Secretary of State.
 - (8) Where the officer is in default in payment of a fine imposed under paragraph (4)(c) above the court should have power to suspend or dismiss the officer or grant warrant for recovery of the fine by diligence.
- (Paragraph 8.84; clauses 101(1)(h), 105 and 106(4)–(8).)

- 8.13*
- (1) Provision should be made by act of sederunt that where allegations of misconduct arise in relation to the execution of a warrant granted by a court situated within the officer's commission area outwith that area, or a warrant granted by a court situated outwith the officer's commission area within that area, the allegations should (as at present) be dealt with by the sheriff principal from whom the officer holds a commission. But the sheriff principal should have power to remit any part of the proceedings to the sheriff principal within whose sheriffdom the alleged misconduct occurred, and the latter sheriff principal should report back to the former sheriff principal.
 - (2) Provision should be made by act of sederunt empowering the Court of Session to remit any part of proceedings dealing with allegations against a messenger to the sheriff principal within whose sheriffdom the alleged misconduct arose. In addition, where an officer's alleged misconduct involves misconduct as a messenger-at-arms and as a sheriff officer, the Court of Session should have power to order that disciplinary proceedings be held by the sheriff principal from whom the officer holds a commission as sheriff officer, and the sheriff principal should have power to remit disciplinary proceedings to the Court of Session.
- (Paragraph 8.87; clause 101(1)(h).)

- 8.14
- The sheriff principal having disciplinary authority over a sheriff officer should have power to suspend the officer from practice or deprive the officer of office if the sheriff principal becomes aware that the officer has been convicted of any crime or offence unless the conviction was disclosed in the application by the officer for a commission or is spent in terms of the Rehabilitation

of Offenders Act 1974. Similar powers should be conferred on the Court of Session in relation to messengers-at-arms.

(Paragraph 8.89; clause 106(1)–(3).)

- 8.15 (1) Any penalty imposed by one disciplinary authority on an officer for misconduct which has been admitted in writing or established as a result of formal disciplinary proceedings should be intimated to all other authorities from whom the officer holds a commission.
- (2) Where a suspension from practice or deprivation of office is intimated to another authority it should be obliged to suspend the officer from practice or deprive the officer of the commission held from that authority.

(Paragraph 8.91; clause 107.)

Standards of conduct

- 8.16 (1) Any citation or diligence executed by an officer of court should be null where the subject matter of the diligence or proceedings is one in which the officer has an interest as an individual.
- (2) For the purposes of this recommendation and Recommendations 8.17 and 8.18 an officer who knowingly executes citation and diligence which is null should be liable to disciplinary proceedings for misconduct.

(Paragraph 8.96; clause 109(1)(a).)

- 8.17 (1) Any citation or diligence executed by an officer should be null where the debt sought to be enforced is due to a business associate or a relative of the officer.
- (2) In this recommendation and in Recommendation 8.18 “business associate” means a co-director, partner, employer, employee, agent or principal (other than the principal instructing the citation or diligence) and “relative” means wife or husband, and parent, grandparent, child, grandchild, brother or sister by blood or affinity.

(Paragraph 8.100; clause 109(1)(b), (2), (3) and (4).)

- 8.18 (1) Any citation or diligence executed by an officer should be null where the debt sought to be enforced is due to a company or firm and the officer:
- (a) has a pecuniary interest (however small) in that company or firm and the principal business of that company or firm is the purchase of debts for enforcement; or
- (b) is a director or partner of that company or firm or holds personally or along with a business associate or a relative a controlling interest.

- (2) Any citation or diligence executed by an officer should be null where the debt or obligation sought to be enforced is due to a company or firm and a business associate or a relative of the officer:
 - (a) is a director or partner of that company or firm or holds a controlling interest; or
 - (b) has a pecuniary interest (however small) in that company or firm and the principal business of the company or firm is the purchase of debts for enforcement.
- (Paragraph 8.104; clause 109(1)(b), (2), (3) and (4).)

- 8.19
- (1) The Court of Session should have power, after consulting the Advisory Council on Messengers-at-Arms and Sheriff Officers, to specify by act of sederunt in relation to officers of court:
 - (a) extra-official activities which are prohibited; or
 - (b) extra-official activities undertaken for remuneration which are allowed, or allowed subject to conditions specified in the act of sederunt.
 - (2) An officer of court should be prohibited from undertaking for remuneration any extra-official activity (other than those specified in terms of paragraph (1)(a) or (b) above) unless the sheriff principal on application by the officer grants authority in respect of the activity in question. The sheriff principal should be required to grant such authority unless it appears that the activity would be incompatible with the nature and functions of the office of officer of court, and such authority may be granted subject to such conditions as the sheriff principal thinks fit.
 - (3)* Records should be kept by sheriff clerks of authorised extra-official activities in respect of each officer.
 - (4) The performance of prohibited or unauthorised extra-official activities should render the officer concerned liable to disciplinary proceedings for misconduct and the penalty should be within the discretion of the sheriff principal.
 - (5) If, as we propose at Recommendation 8.8(5), all messengers-at-arms are required to be sheriff officers, it would be unnecessary to provide for separate authorisations by the Court of Session of the extra-official activities of messengers-at-arms.

(Paragraph 8.110; clause 101(1)(e) and (f), (2) and (3).)

- 8.20*
- An act of sederunt should be made expressly prohibiting officers of court from purporting to act in that capacity when collecting debts before the debts have been constituted by decree.

(Paragraph 8.113; clause 101(1)(e).)

- 8.21* An act of sederunt should be made to the following effect.
- (a) Officers of court should be entitled to collect debts not constituted by decree provided they have obtained prior written authorisation from the sheriff principal. An officer should be required to disclose any personal interest or any interest held by a member of his or her family or by a business associate in an organisation when applying for authority to collect debts on behalf of that organisation, and any subsequent acquisition of an interest.
 - (b) Sheriff clerks should keep in respect of each officer a register of authorisations granted and the disclosed interests of officers, members of their family and their business associates in organisations whose debts the officers are authorised to collect.
 - (c) An officer who collects debts without authorisation by the sheriff principal, or who demands payment from the debtor of a collection charge which is not legally enforceable, should be liable to disciplinary proceedings for misconduct.
- (Paragraph 8.121; clause 101(1)(f), (2) and (3).)

- 8.22* An act of sederunt should be made:
- (a) providing that the collection of debts which have been constituted by decree or are enforceable under a summary warrant for rates or taxes should form part of the official functions of officers of court, and the officer's bond of caution should be extended to cover the collection of such debts as well as diligence. In the absence of contrary instructions, instructions to an officer to execute diligence should be deemed to include a mandate to receive payment of, or on account of, the debt. Charges for collecting such debts should not, however, be recoverable by the creditor from the debtor and should not be regulated by act of sederunt; and
 - (b) requiring officers of court to keep accounts of money collected on behalf of creditors and to have these accounts audited periodically.
- (Paragraph 8.125; clause 101(1)(d), (i), (j) and (k).)

- 8.23* (1) New rules of conduct should be made by act of sederunt applying to both messengers-at-arms and sheriff officers, requiring them to execute citation and diligence when instructed, but entitling an officer to refuse to act if:
- (a) the prescribed expenses, or a reasonable estimate thereof, are not tendered or secured by or on behalf of the person instructing him; or
 - (b) disqualified from acting in terms of Recommendations 8.16 to 8.18 above; or

(c) it is not reasonably practicable for the officer to carry out the instructions because of pressure of other business or for other reasonable cause and the officer intimates this forthwith to the solicitor or person instructing him.

(2) Without prejudice to the existing civil liability of an officer to persons instructing him, breach of the rules in paragraph (1) above should render the officer liable to disciplinary proceedings for misconduct.

(Paragraph 8.130; clause 101(1)(c).)

8.24* (1) An act of sederunt should be made prohibiting an officer of court:

(a) from purchasing personally, or through an agent, goods sold by virtue of diligence in which the officer has acted; and

(b) from sharing with the creditor any goods (or their proceeds of sale) adjudged to the creditor by virtue of diligence in which the officer has acted; and

(c) from sharing with the purchaser any profit the purchaser makes in re-selling goods bought at a sale carried out by virtue of the diligence in which the officer has acted.

(2) Any breach of the above rules should render the officer concerned liable to disciplinary proceedings for misconduct.

(Paragraph 8.135; clause 101(1)(c).)

8.25 The Court of Session should have power to make regulations controlling advertising and soliciting for business by officers of court.

(Paragraph 8.137; clause 101(1)(c).)

Miscellaneous

8.26 Any rule of law whereby damages recoverable from an officer for failure or delay in the execution of diligence are determined solely by the amount of the debt should be expressly abolished.

(Paragraph 8.141; clause 110.)

8.27 (1) Sheriff officers should be provided with an official identity card which they should be bound to exhibit on request when performing their official functions.

(2) Messengers-at-arms should be provided with an official identity card in addition to a wand and blazon, and they should be bound to exhibit on request the identity card when performing their official functions.

(Paragraph 8.145; clause 111.)

- 8.28 (1) The Civil Judicial Statistics for Scotland should include statistical information on all the main steps of diligences. The Judicial Statistics (Scotland) Act 1869 should therefore be amended to enable the competent authorities to require officers of court to make annual returns of the steps of diligence executed by them.
- (2)* The cost of the work involved in making the returns should be borne by the Exchequer and the administrative machinery for making the returns from officers of court should preserve confidentiality as to the nature and volume of business executed by each officer or firm and as to the parties involved in the diligence process.
- (Paragraph 8.148; Schedule 7, paragraph 7.)

- 8.29* The competent authorities should review the provisions relating to payment of dues by messengers-at-arms and should consider making similar provisions in relation to sheriff officers.
- (Paragraph 8.152.)

MISCELLANEOUS

Warrants for diligence

- 9.1 (1)* A single form of warrant for diligence in execution of a decree of a civil court, an extract registered writ, or an order of a criminal court should be prescribed by act of sederunt or act of adjournal.
- (2) The diligences authorised by the prescribed form of warrant should be laid down in statute.
- (Paragraph 9.7; clause 112(1); Schedule 7, paragraphs 8, 10 and 23.)

Letters of horning and poinding

- 9.2 (1) The granting of letters of horning, letters of poinding, letters of horning and poinding, and letters of caption should cease to be competent.
- (2) A simple administrative procedure should be available enabling creditors acquiring from another person a right to a decree (including a writ registered for execution), whether before or after extract, to obtain a warrant for diligence in their own name on production of the extract decree and their title to it to a clerk of court. This procedure should also be available to a creditor in a deed registrable for execution where a subsidiary document is needed to quantify the obligation in the deed or identify the creditor.

- (3) An extract decree of poinding of the ground should contain a warrant in prescribed form authorising officers of court to poind the ground.

(Paragraph 9.12; clauses 112(2), 113 and 114; Schedule 7, paragraphs 1 and 6; Schedule 9.)

Registration of certificates of execution of charges

- 9.3 It should cease to be competent to register a certificate of execution of a charge for payment, that has expired without payment having been made, in any register of hornings.

(Paragraph 9.15; clause 115(6).)

Obligations ad factum praestandum

- 9.4 (1) An obligation *ad factum praestandum* contained in an extract of a writ registered for execution in the Books of Council and Session or sheriff court books should cease to be enforceable by imprisonment by virtue of registration. A creditor who wishes to enforce an obligation *ad factum praestandum* contained in a registered writ should be required to constitute the obligation by decree.

- (2) To clarify the law it should be declared to be incompetent to charge a debtor to perform an obligation *ad factum praestandum*.

(Paragraph 9.22; clause 125.)

Execution outwith sheriffdom

- 9.5 (1) Diligence on a warrant inserted in an extract of a writ registered for execution in sheriff court books or contained in any decree of a sheriff should be capable of being executed anywhere in Scotland without endorsement of a warrant of concurrence.

- (2) Any such diligence in pursuance of a warrant in a decree, summary warrant or extract registered writ may be executed either by an officer of the court which granted the decree or warrant (or from whose books the extract was issued), or by an officer of the sheriff court district in which the warrant is to be executed.

(Paragraph 9.26; clause 116.)

Encouraging debtors to use the courts

- 9.6 (1) Sheriff clerks should be under a statutory duty to provide debtors with information as to the procedures available and assist them, if requested, to complete any form required in connection with proceedings under our recommendations. But a sheriff clerk should not be liable to the debtor for any failure in the performance of these duties.

- (2)* An act of sederunt should be made permitting a party to proceedings in the sheriff courts under our recommendations to be represented by a person who is neither an advocate nor a solicitor.
 - (3)* Diligence documents served on the debtor, whose form is to be prescribed by an act of sederunt, should contain information as to the applications which the debtor may make to the courts.
 - (4)* The forms prescribed by act of sederunt for use in connection with proceedings under our recommendations should be drafted so as to be capable of being used by unrepresented persons.
 - (5) No court dues should be payable by debtors in connection with any application under our recommendations.
- (Paragraph 9.31; clauses 121 and 122.)

Expenses

- 9.7
- (1) The expenses chargeable against the debtor in connection with:
 - (a) an earnings arrestment, should consist of the expenses of serving a charge to pay on the debtor and a schedule of arrestment on the debtor's employer;
 - (b) a current maintenance arrestment, should consist of the expenses of serving a schedule of arrestment on the debtor's employer.
 - (2) Provision should be made for the expenses of poinding and sale along the following lines.

The expenses detailed in the list below should be chargeable against the debtor:

- (a) in serving one charge;
- (b) in serving a notice and a copy thereof before entering a dwellinghouse for the purpose of executing a poinding;
- (c) in executing a poinding;
- (d) in making a report of the redemption by the debtor of any poinded article;
- (e) in granting a receipt for payment for redemption;
- (f) in making a report of the execution of a poinding, but not in applying for an extension of time for the making of such a report;
- (g) in making intimation, serving a copy of the warrant of sale and giving public notice of the sale;
- (h) in removing any articles for sale in pursuance of a warrant of sale;

- (i) in making arrangements for, conducting and supervising the sale;
- (j) in granting a receipt for payment for, or in making a report of, the release or redemption of poidned articles;
- (k) in making a report of a payment agreement entered into after warrant of sale;
- (l) in making a report of sale;
- (m) in granting a receipt for payment for the release from a poidning of any article which is owned in common;
- (n) in making a report of the release of any such article;
- (o) in opening shut and lockfast places in the execution of the diligence.

This list should be capable of being altered by the Secretary of State by statutory instrument subject to affirmative resolution procedure.

- (3) The debtor's liability for the expenses of executing an order made by the court in connection with the removal, damage or destruction of poidned articles, or their security or immediate disposal, should be at the discretion of the sheriff.
- (4) Where new arrangements for sale have to be made but an amendment to the warrant of sale is unnecessary, the debtor should be liable for the expenses of the new arrangements but not for the expenses of the cancelled arrangements.

(Paragraph 9.36; clauses 77(1)(c) and 79(3); Schedule 1, paragraphs 1, 3, 6 and 7(b).)

- 9.8
- (1) No expenses should be awarded against a debtor in favour of a creditor, or against a creditor in favour of a debtor, by a court in connection with any applications to the court under our recommendations. But where a party acts on grounds which appear to the sheriff to be frivolous, the sheriff should have power to award expenses of up to £25 (or such other sum as may be prescribed) against the party so acting. The prescribed sum should be capable of being altered by the Secretary of State by statutory instrument in order to reflect changes in the value of money. This rule should be subject to the exceptions in the following paragraphs.
 - (2) The rule in paragraph (1) should not apply to appeals from decisions made on application under our recommendations, to applications involving third parties, or to an application for a time to pay decree. In these cases expenses should be awarded according to the normal rules.

- (3) The expenses of an application made by a creditor in connection with the diligence of poinding and sale should be at the discretion of the sheriff, except where the application is for warrant of sale or amendment of the warrant of sale. Where the sheriff awards expenses against the debtor, these expenses should be calculated as if the application had been unopposed (whether or not the debtor opposed the application), but if the debtor in the opinion of the sheriff opposed on frivolous grounds, the sheriff should have power to award additional expenses of up to £25 (or such other sum as may be prescribed) against the debtor.
- (4) The debtor should be liable for the creditor's expenses in connection with an application for warrant of sale. However, where a warrant of sale is amended by the sheriff on application by the creditor, the debtor should be liable for the creditor's expenses in applying for and executing the amended warrant but should cease to be liable for the creditor's expenses in connection with the original warrant (except any additional expenses the sheriff had awarded against the debtor on the ground of frivolous opposition to the original warrant).
- (5) The debtor should be liable for the creditor's expenses in connection with an application for a conjoined arrestment order or for inclusion in an existing conjoined arrestment order, but should be relieved from liability for that creditor's expenses in serving a prior schedule of arrestment where applicable.

(Paragraph 9.44; clauses 87(6), 88(5) and 117; Schedule 1, paragraphs 1, 2, 4 and 7 to 10.)

9.9

- (1) The expenses of a poinding and sale, an earnings arrestment and a conjoined arrestment order should be recoverable by, and only by, that diligence, and any expenses outstanding after the diligence has ceased to have effect should cease to be chargeable against the debtor. For this purpose the expenses of a conjoined arrestment order should include only the expenses of an application for, or for inclusion in, an order.
- (2) The expenses chargeable against the debtor in connection with the diligence of arrestment and furthcoming should be recoverable out of the arrested funds, but the court should on granting decree of furthcoming grant a decree in favour of the creditor for the expenses of diligence so far as not recovered from the arrested funds.
- (3) The expenses of executing a current maintenance arrestment should not be recoverable by that arrestment, but may be recovered by other diligence under the same warrant.

- (4) A poinding and sale, arrestment and furthcoming and an earnings arrestment should cease to have effect on payment of the full amount of the debt, interest and expenses due, or if a tender of such payment is made, on it not being accepted within a reasonable time. A similar rule should apply to ordinary debts included in a conjoined arrestment order. The present rule that payment or tender of the sum in the decree alone will stop diligence should be expressly abolished.
 - (5) Where a diligence is recalled on making a time to pay order or a conjoined arrestment order, or rendered ineffectual by a sequestration or a debt arrangement scheme, or rendered unenforceable by the creditor's accession to a trust deed for creditors or the subsistence of a protected trust deed, before the expenses recoverable by that diligence have been fully recovered, the outstanding balance of such expenses should be recoverable by further diligence if and when the creditor's right to do diligence subsequently revives unless the debtor's liability for the expenses has been discharged.
 - (6) In awarding expenses against the debtor in connection with an application made in the course of a poinding or an arrestment of earnings, the sheriff should grant a decree in favour of the creditor for such expenses, so entitling the creditor to recover them by further diligence. This rule, however, should not apply to the expenses of an application, (a) for warrant of sale which was unopposed or opposed on non-frivolous grounds, or (b) for, or for inclusion in, a conjoined arrestment order.
 - (7) Any sums recovered by a poinding and sale, arrestment and furthcoming, an earnings arrestment or a conjoined arrestment order in so far as it is enforcing an ordinary debt or debts (other than current maintenance), or paid to account while the diligence is in effect, should be ascribed first to the expenses recoverable by the diligence, thereafter to the interest accrued to the date of execution of the diligence, and finally to the debt and interest accrued since the date of execution.
 - (8)* The act of sederunt prescribing diligence forms should provide that forms served on the debtor which contain a statement of diligence expenses chargeable should advise the debtor that he or she may make a complaint to the sheriff clerk if dissatisfied with the amount of the expenses.
- (Paragraph 9.58; clauses 77(1)(d), 87(6) and 118 to 120.)

Legal aid

- 9.10 (1) Creditors and debtors should be ineligible for legal aid in connection with any proceedings at first instance under

our recommendations, except in so far as such proceedings are covered by an existing legal aid certificate or consist of an application for a time to pay direction in the Court of Session or the sheriff's ordinary court.

- (2) A legal aid certificate granted for proceedings leading to a decree for payment should remain effective for the purposes of applying for or opposing a time to pay direction in relation to the decree. Where a certificate is granted for, or is effective for, the purposes of a time to pay direction it should remain effective for the purposes of proceedings for variation or revocation of that direction.
- (3) A legal aid certificate which is effective for the purposes of diligence to enforce payment of maintenance should be effective for any proceedings under our recommendations in connection with a poinding and sale or an arrestment of earnings which are necessary in the circumstances for the completion of the diligence.
- (4)* The Legal Aid fund should have no right of recovery from property preserved or recovered for an assisted person as a result of proceedings (including appeals) under our recommendations and accordingly regulations for that purpose should be made under the powers contained in sections 3 and 15 of the Legal Aid (Scotland) Act 1967 and sections 5 and 6 of the Legal Advice and Assistance Act 1972.

(Paragraph 9.64; clause 123.)

Appeals

- 9.11
- (1) It should be competent to appeal from a decision by the Lord Ordinary or sheriff in relation to any application under our recommendations but such an appeal should be on a point of law only and require the leave of the Lord Ordinary or sheriff.
 - (2) An appeal from the sheriff should lie to the sheriff principal and thence to the Court of Session without further leave, or directly to the Court of Session. A further appeal should lie without further leave from the Court of Session to the House of Lords.
 - (3) An appeal from the Lord Ordinary should lie to the Inner House of the Court of Session and thence without further leave to the House of Lords.
 - (4) Where the application relates to an administrative direction, an urgent matter or where the original position could not be restored if the decision were to be reversed, no appeal should be competent.

(5) The existing time limits for appeals should apply to an appeal in relation to an application under our recommendations.

(6)* An act of sederunt should be made providing a simple method of appeal where only the grant or refusal of a time to pay direction attached to a decree is challenged.

(Paragraph 9.70; clause 128(1)–(3).)

9.12 (1) Subject to paragraph (5) below, the sheriff's decision on an application under our recommendations should have immediate effect and remain in effect unless and until it is reversed on final appeal. Any reversal should not have retrospective effect.

(2) The time between the initial decision and the final determination of an appeal should not count for the purposes of any time limit in diligence, where the effect of taking an appeal is to prevent further proceedings.

(3) While an appeal in connection with poinded goods is pending it should be incompetent for a warrant for their sale to be granted or for them to be removed for sale or sold.

(4) An appeal court should have power pending the determination of an appeal to grant interim orders, and on determination of the appeal power to make such incidental and consequential orders as seem just and reasonable.

(5) Where to give immediate effect to the sheriff's decision would render an appeal pointless, the decision should not come into effect unless and until the sheriff refuses leave to appeal, or the period allowed for appeal elapses without an appeal being taken, or if an appeal is taken until it is upheld on a final determination.

(Paragraph 9.74; clauses 68 and 128(4)–(7).)

Application to the Crown

9.13 Subject to the provisions of the Crown Proceedings Act 1947, the recommendations contained in this report should bind the Crown in its capacity as creditor or employer.

(Paragraph 9.77; clause 129.)

Diligence on extract registered writs

9.14 The Court of Session should have power by act of sederunt to regulate the procedure, and to prescribe forms, used in connection with diligence proceeding on an extract of a writ registered for execution in the Books of Council and Session or in sheriff court books, or an order enforceable as if it were an extract of a registered writ.

(Paragraph 9.79, clause 127.)

APPENDIX C

List of those who submitted written comments on Consultative Memoranda Nos. 47-51.

Committee of Scottish Clearing Bankers
Court of Session Judges
Department of Employment
Department of Trade
Sheriff Principal J. A. Dick
Faculty of Advocates
Faculty of Law, University of Aberdeen
Finance Houses Association
Sheriff Principal G. S. Gimson
J. G. Gray, Esq., S.S.C.
H.M. Customs and Excise, V.A.T. Control Division
Incorporated Society of Valuers and Auctioneers (Scottish Branch)
Labour Party Scottish Council
Law Society of Scotland
Legal and Trade Protection Agency
Lord Lyon King of Arms
National Coal Board
Scottish Association of Citizens Advice Bureaux
Scottish Consumer Council
Scottish Council for Civil Liberties
Scottish Law Agents Society
Scottish Trades Union Congress
Sheriffs' Association
Sheriff's Principal
Society of Messengers-at-Arms and Sheriff Officers
Solicitor of Inland Revenue (Scotland)
Sheriff Principal R. R. Taylor
Sheriff N. E. D. Thomson
Tory Reform Group in Scotland

APPENDIX D

THE RESEARCH PROGRAMME ON THE NATURE, SCALE AND SOCIAL ASPECTS OF DILIGENCE AND DEBT RECOVERY

For each of the research reports, the information is presented as follows:

- (1) title of report
- (2) abbreviation by which the report is cited
- (3) author
- (4) year and details of publication
- (5) abstract.

1. THE NATURE AND SCALE OF DILIGENCE

"C.R.U. Diligence Survey".

Mrs. B. Doig, Central Research Unit, Scottish Office.

Research Report for the Scottish Law Commission, No. 1. Central Research Unit Papers 1980.

This study examines the nature and scale of the use of diligence over a period in 1978; all debt decrees passed to sheriff officers in Scotland for enforcement over three months were included in the survey and they were followed through for a further three months. The study identifies what happened to cases such as the mode of diligence used (e.g. arrestment or the poinding of goods) and the stage in the procedure reached at the end of the survey period; and the type of creditor and debtor, the amount of the principal sum and the sheriffdom.

2. CHARACTERISTICS OF WARRANT SALES

"C.R.U. Warrant Sales Report".

Mrs. A. Connor, Central Research Unit, Scottish Office.

Research Report for the Scottish Law Commission, No. 2. Central Research Unit Papers 1980.

This report presents the results of an investigation into warrant sales (other than sales under summary warrants) executed in Scotland in 1977 for which reports of sale were available (140 out of 285). The investigation identifies characteristics of warrant sales, e.g. the incidence of "personal" and "commercial" sales; the pursuer groups instructing sales; the amounts of principal sum and expenses involved; and the amounts realised at sales.

3. DEBT RECOVERY THROUGH THE SCOTTISH SHERIFF COURTS

"C.R.U. Court Survey".

Mrs. B. Doig, Central Research Unit, Scottish Office.

Research Report for the Scottish Law Commission, No. 3. Central Research Unit Papers 1980.

This study describes the characteristics of a sample of about 8,000 summary cause and ordinary actions disposed of in the sheriff court, (for the recovery of debts or property in Scotland) over the six month period, September 1977–February 1978: e.g. the types of pursuer, the amounts of principal sums, offers to pay by instalments, the court's decision.

4. ARRESTMENTS OF WAGES AND SALARIES—A REVIEW OF EMPLOYERS' INVOLVEMENT

"C.R.U. Arrestment Survey".

Mrs. A. Connor, Central Research Unit, Scottish Office.

Research Report for the Scottish Law Commission, No. 4. Central Research Unit Papers 1980.

This study identifies the different ways in which a small sample of employers handled the arrestment of wages and salaries, their policies towards employees who had debt and diligence problems, and the administrative and processing problems which arose from the present arrestment system.

5. THE ORIGINS AND CONSEQUENCES OF DEFAULT—AN EXAMINATION OF THE IMPACT OF DILIGENCE

"Edinburgh University Debtors Survey".

Mr. M. Adler and Mr. E. Wozniak, Department of Social Administration, Edinburgh University.

Research Report for the Scottish Law Commission, No. 5. Central Research Unit Papers 1981.

This study examines the characteristics and experiences of about 100 persons whose property, funds, or earnings were subjected to diligence, the circumstances in which the debt arose, and the help given by various agencies.

6. SURVEY OF DEFENDERS IN DEBT ACTIONS IN SCOTLAND

"O.P.C.S. Defenders Survey".

Mrs. J. Gregory and Mrs. J. Monk, Social Survey Division, Office of Population Censuses and Surveys.

Research Report for the Scottish Law Commission, No. 6, H.M.S.O. 1981.

This study of about 1,500 defenders is complementary to the more detailed survey of persons subjected to diligence (see 5 above). It identifies the social characteristics and circumstances of persons who experienced the first stages of legal action (but who did not necessarily experience the later stage of diligence against them), the nature of the debt and the procedures taken for its recovery.

7. DEBT COUNSELLING—AN ASSESSMENT OF THE SERVICES AND FACILITIES AVAILABLE TO CONSUMER DEBTORS IN SCOTLAND

“C.R.U. Debt Counselling Survey”.

Mrs. A. Millar, Central Research Unit, Scottish Office.

Research Report for the Scottish Law Commission, No. 7. Central Research Unit Papers 1980.

Key personnel in a sample of Government Departments and voluntary organisations were interviewed on the debt counselling and related services and facilities which they provided for consumer debtors. A quantitative survey of the nature and scale of debt and diligence problems dealt with by the different types of organisation was also conducted, e.g. the amount of money involved, the pursuer, and the stage in the debt recovery proceedings when help was sought.

8. DEBT RECOVERY—A REVIEW OF CREDITORS' PRACTICES AND POLICIES

“C.R.U. Creditors Survey”.

Mrs. B. Doig and Mrs. A. Millar, Central Research Unit, Scottish Office.

Research Report for the Scottish Law Commission, No. 8. Central Research Unit Papers 1981.

The study examines the practices and policies of a range of about 80 creditors (e.g. public agencies, finance houses, banks, mail order and retail firms) on debt recovery including: the nature of their credit arrangements; the factors influencing the decisions to grant credit; the informal debt recovery procedure used and their use of debt collection agencies and solicitors; the scale of court actions relative to earlier informal recovery arrangements; and their policies towards the raising of court action and the use of diligence.

Copies of Items 1–5 and 7–8 are available as Central Research Unit Papers and can be obtained from Central Research Unit, Scottish Office, New St Andrew's House, Edinburgh EH1 3SZ. Telephone 031–556 8400.

Research Report for the Scottish Law Commission No. 6 by the Social Survey Division of the Office of Population Censuses and Surveys is published by H.M.S.O. 1981.