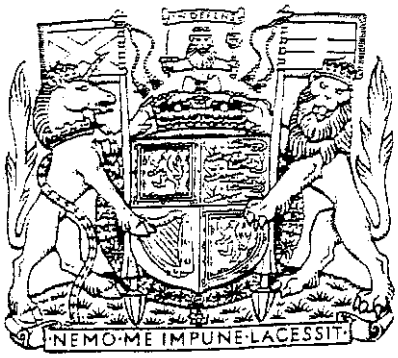

SCOTTISH LAW COMMISSION

MEMORANDUM NO . 47

FIRST MEMORANDUM ON DILIGENCE : GENERAL ISSUES AND INTRODUCTION

VOL 2 ; Parts IV – V & Appendices

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PART IV: SALARIED OFFICERS OF COURT?

Preliminary

4.1 We referred at para. 1.21 above to criticisms that the status of officers of court as independent contractors adversely affects their independence and impartiality. We also observed at para. 1.79 that one solution to this problem would be to replace the present system of independent contractor officers by a system of salaried officers of court employed within the Scottish Court Service. A clause to a similar effect was included in the recent Sheriff Officers and Warrant Sales (Scotland) Bill (1980) introduced by Mr Dennis Canavan, MP.[1] (The main difference between such a system and the Court Enforcement Office system would be that, in the former system, diligence would continue to be controlled by the creditor whereas, in a Court Enforcement Office system, diligence would be controlled by the Office.)

4.2 This question can be considered from the standpoint of administrative necessity and from the standpoint of principle. As regards administrative necessity, it is possible to conceive of changes to the law on the procedural and organisational aspects of diligence which might have an adverse effect on the viability of firms of officers and on recruitment to the service,[2] so that the introduction of salaried officers within the Scottish Court Service would become essential in order to maintain a viable service. As at present advised, however, we do not think that the reforms which we have proposed would have this drastic effect. This is a matter on which our Memoranda may elicit more information and evidence.

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[1] [Bill 125] (ordered to be printed on 22 January 1980). Clause 3 of that Bill provided: "Sheriff Officers shall henceforth be employees of the Sheriff Court for the area in which they operate."

[2] For example, the introduction of the mandatory postal service of arrestments and charges in lieu of hand service; the introduction of earnings transfer orders as the sole mode of diligence against earnings; reforms restricting the volume of poindings of household goods; and restrictions on officers undertaking debt collection.

4.3 We are primarily concerned here with the question whether, as a matter of principle rather than administrative necessity, the system of fee-paid, independent contractors should not be reformed along the lines discussed at paras. 1.80 and 1.81 above and in Memorandum No. 51, but, instead, should be replaced by a system of salaried officers within the Scottish Court Service. The introduction of salaried officers was considered by the Second Ashmore Report in 1925,[1] and by the McKechnie Report in 1958,[2] both of which recommended against the proposal.

(2) How would a system of salaried officers operate?

4.4 In a system of officers employed in the Scottish Court Service, the salaries, pensions, travelling expenses and outlays of officers of court would be paid by the Treasury. The prescribed scale fees for enforcement would be paid by creditors to the court and accounted for to the Treasury. Presumably the fees would be paid immediately before each step in diligence was taken. The court pronouncing decree would issue its extract containing a warrant for arrestment or poinding and any other competent mode of diligence to the creditor who would then send the extract, together with a request or instructions for enforcement by specified modes and steps in diligence, to the enforcement department of the court in question. An officer in the department would then enforce the decree by diligence in broadly the same way as fee-paid officers act under the present system. As already mentioned,[3] the extract court decree would include a warrant to recover from the debtor the expenses of any diligence to follow thereon. There would be little point in introducing separate applications to court for special warrants to execute a specific mode of diligence.

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[1] Further Report of the Departmental Committee on Messengers-at-Arms and Sheriff Officers (1925) H.M.S.O., Edinburgh: Chairman, Lord Ashmore.

[2] Op.cit., paras. 197-202.

[3] See para. 3.14.

4.5 If salaried officers were to be as widely available as independent contractor officers, then it can be anticipated that enforcement departments would be required in at least two-thirds or thereby of the fifty sheriff courts; thus some enforcement departments might act for two or more courts in order to minimise expense. Since all the messengers-at-arms (of whom there were 74 at the end of 1979) are also sheriff officers and depend for the bulk of their diligence fees on sheriff court diligence, it would be necessary, in our view, to introduce salaried enforcement officers for the execution of Court of Session decrees in place of the independent contractor messengers-at-arms. Thus, Court of Session decrees would generally speaking be enforced by officers operating in the sheriff court district of the place of execution. It is likely that there would be insufficient fee-revenue from citation to support a system of independent contractor officers of court whose sole function was citation and accordingly the salaried officers would be required to assume the citation functions presently undertaken by messengers-at-arms and sheriff officers as well as their diligence functions.

4.6 If the present case load were to continue, then it seems likely that at least as many enforcement officers (including supervisory grades) would be needed as there are sheriff officers (viz. about 110 or 120)[1] and it might well be found by experience that such a number of salaried officers would not be enough. In addition, it is likely that two or three times that number of supporting staff would be needed to act as witnesses

[1] At the end of 1979, of 126 officers of court holding commissions, 109 officers of court worked full-time on citation and diligence, 10 worked part-time and two acted as consultants to firms in which they had previously worked. The remaining officers had retired but not resigned their commissions.

in diligence, and to provide clerical and typing assistance since diligence generates a great deal of clerical work, including for example the preparation of forms, maintenance of records of diligence executed, correspondence with creditors or their agents and with debtors and the keeping of accounts of fees and money recovered in response to diligence.

4.7 We do not think that the case has been made out for introducing official collection departments in the courts to collect ordinary decree debts.[1] While payments would, therefore, continue to be made direct to the creditor, (except possibly where an earnings transfer order was made such as we discuss in Memorandum No. 49) the officers executing diligence would require to have authority to receive payments from debtors, for example, where tendered in response to steps in diligence. The enforcement department would require to account for these payments to the creditor.

4.8 It would be for consideration whether salaried enforcement officers would be personally liable in delict to debtors or creditors for wrongful diligence or delay or other fault in the performance of their functions, or whether the only sanction against such officers would be disciplinary measures. Probably the State should be vicariously liable for the actings of officers executing diligence and creditors should cease to have vicarious liability, if only because creditors would no longer be able to choose the officers whom they instructed. On the other hand, creditors should nevertheless still be held liable for their own actings. (At present, the creditor is always liable for the officer's actings or jointly and severally liable with the officer or agent for wrongful diligence, but has a right of relief against the officer or agent.)

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[1] Aliment and periodical allowance on divorce merit separate consideration: see Part V below.

(3) Arguments for and against salaried officers

4.9 We now turn to consider the case for salaried officers employed in the Scottish Court Service. First, there is a view that the status of officers of court as fee-paid independent contractors is inconsistent with their status as independent and impartial public officers executing decrees of court. This view was not considered by the Ashmore or McKechnie Committees.

4.10 The supporting arguments seem to be that the direct remuneration of officers by creditors makes the officers dependent on those creditors; that it reflects adversely in the public eye on the officer's impartiality as between debtor and creditor; and that it creates a risk that excessive diligence may be executed since the officer has a financial interest in the fees payable to him which prima facie gives him an interest to advise the creditor to prosecute diligence through its successive stages. Officers who receive their salaries irrespective of the volume of diligence undertaken by them would have no interest in giving creditors such advice. On this view, the system of independent contractor officers stems from a period when far more rigorous attitudes to debtors applied than are appropriate in modern times.

4.11 As at present advised, we do not find these arguments convincing. It seems justifiable to assume that if appropriate and fair exemptions from diligence were prescribed and other restraints placed on creditors' rights to use diligence on the lines which we have proposed, then there would be sufficient safeguards against excessive diligence. Though sheriff officers have a financial interest in the fees payable to them, the same is true of advocates and solicitors engaged in litigation. Like lawyers, sheriff officers have an interest to advise creditors not to incur expenses which might prove irrecoverable. A sheriff officer who consistently advised creditors to throw good money after bad would 'lose business' to his competitors.

While the independent contractor system is of ancient origin, that in itself is not a condemnation provided the system works well. The system of independent contractors is not unique; orders of the High Court (but not the county court) in England and Wales and all civil court orders in France, Belgium and certain other countries are enforced by fee-paid independent contractors.[1]

4.12 A second argument is that a system of salaried officers might make it easier to make better provision of enforcement officers in the remote areas than is possible under the system of independent contractors. We think that this argument has some substance but, in consonance with the views of the McKechnie Report,[2] we think that the system of organisation of officers of court should be based on what is best for the populous areas of Scotland where the bulk of diligence is executed.

4.13 Third, it has also been represented to us that salaried officers would be more under the close supervision and control of the sheriffs principal and the sheriffs of the courts which they served. In theory, this may be so. But our proposals for the reform of diligence and the organisational reforms described in Part II would increase judicial control. Moreover, it may paradoxically be true that sheriffs principal and sheriffs would then have more control over independent contractors with no security of tenure and removable at the pleasure of the sheriff principal or Court of Session than over salaried officers employed within the Scottish Court Service. We would expect such officers to be a branch of the Scottish Court Service (separate from the sheriff clerks and other staff) and having senior enforcement officers in supervisory grades who would superintend the work of the enforcement officers working 'in the field'. Control by the sheriffs principal and sheriffs might well be remote. Again we do not think that this argument is decisive.

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[1] E.g. the sheriff's officers of the High Court and in France, the 'huissiers de justice'.

[2] Op.cit., para. 197.

4.14 Fourth, while a system of salaried officers would make it unnecessary to enact detailed provisions for regulating the service of officers of court[1] this again is not an important consideration.

4.15 Fifth, it has been strongly represented to us that independent contractor officers are likely to be more speedy and efficient in the execution of citation and diligence, and more ready to undertake the difficult jobs, than salaried officers would be. Independent contractors are subject to the pressures of competition as well as to sanctions for negligence or delay, and have incentives which motivate them to work hard. It has been argued that salaried officers in the Scottish Court Service would not have the same incentives and motivation. (In parenthesis, we would observe that it is scarcely possible to extrapolate to Scotland from a comparison between the functional efficiency of the fee-paid sheriff's officers in England, and of the salaried county court bailiffs because of the great differences between High Court debt and county court debt.) We would not venture to predict that a fall in standards of efficiency would necessarily occur, but it can at least be said that there is no guarantee that the present standards would be maintained.

4.16 Sixth, the system of independent contractors remunerated by scale fees runs at minimal direct cost to public funds,[2] though as a result of our proposals, such costs might be increased.[3]

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[1] See paras. 1.80 and 1.81 above and Memorandum No. 51.

[2] The only costs to public funds at present seem to be the costs of the work of sheriffs and sheriff clerks in scrutinising reports of poindings and of warrant sales, and also legal aid.

[3] The main increase would occur if a subsidy for steps in diligence were introduced: see paras. 3.19 to 3.52 above. Other proposals might have minor manpower implications: viz. the sheriff clerks would assume certain functions of intimating steps in process in connection with poindings, and of scrutinising reports of proceedings following warrant of sale (Memorandum No. 48, paras. 1.29 and 5.59); and also random checks on the work of officers (Memorandum No. 51, para. 3.31). Some of these functions and new functions in connection with earnings transfer orders and debt arrangement schemes would be assumed whether sheriff officers became salaried officers or remained independent contractors.

A system of salaried officers, on the other hand, would be a direct charge on the Exchequer. It would probably require the employment of between 300 and 400 additional staff (including at least 120 salaried officers, the remainder being ancillary staff)[1] which would represent an increase to the Scottish Court Service of between 40% and 53%.[2] It seems doubtful whether the prescribed scale fees could be set at a level which would finance a system of salaried officers which would be likely to be considerably more expensive than a reformed system of independent contractor officers.

(4) Our provisional conclusion

4.17 We invite views on these arguments. At present, our own view is that the real choice lies between the regulation of the present system of fee-paid officers, and the introduction of a Court Enforcement Office (and, of these two options, we prefer the former). We do not consider that the present system of independent contractor officers of court should be replaced by a system of salaried officers of court employed within the Scottish Court Service. We suggest, however, that provision should be made for the improved regulation of the present system of independent contractor officers of court along the lines described briefly at paras. 1.80 and 1.81 above and in more detail in Memorandum No. 51.

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[1] See para. 4.6 above.

[2] As at 1 September 1980, 748 persons were employed within the Scottish Court Service (comprising clerks of the Supreme Courts and sheriff courts and ancillary staff).

PART V: OTHER REFORMS

Preliminary

5.1 The decisions taken on arrestments of earnings, poindings and warrant sales and the administration of diligence will largely determine the future pattern of the system of diligence and we have therefore given these matters priority. Our terms of reference require us, however, to examine the whole law of diligence and, in this Part, we briefly describe the ambit of our further work.

A. Collection and enforcement of aliment and periodical allowance on divorce

5.2 In the context of the collection and enforcement of aliment and periodical allowance, the main focus of concern changes from protecting default debtors to assisting a particular class of creditors, namely wives and unmarried mothers seeking to enforce decrees awarding aliment for themselves or their children, and ex-wives seeking to enforce periodical allowance for themselves and aliment for children after divorce.

5.3 The problem of the collection of alimentary debt has been considered by a number of official reports which have supported the need for official arrangements for the collection of private law 'maintenance' debts in Scotland.[1]

5.4 No official report, however, has firmly recommended that sheriff clerks, or some other official agency, should have enforcement functions.[2] Such a proposal would be likely to

[1] Report of the Royal Commission on Marriage and Divorce 1951-55 (1956) Cmd. 9678, (the Morton Report) paras. 980-984; McKechnie Report (op.cit.) paras. 258-298 and Recommendation 83; Report of the Departmental Committee on The Sheriff Court (1967) Cmnd. 3248, para. 642.

[2] We do not construe recommendation 69 of the Morton Report as a firm recommendation, and its meaning is in any event not very clear. The McKechnie Report, recommendation 86 (paras. 286-288, and 292) proposed that sheriff court collecting officers should be introduced but that they should not have enforcement functions.

prove controversial: for example, if enforcement functions were entrusted to sheriff clerks, this might reflect adversely on their impartiality. Moreover, doubts may be entertained of the desirability of imprisoning maintenance defaulters.[1] It seems necessary therefore not to take steps, without full consultation, which might encourage imprisonment of maintenance debts when civil imprisonment itself has attracted criticism.[2] We therefore intend to consult on the subject of enforcement of aliment and periodical allowance in a future memorandum.

5.5 We had at one time considered submitting a report on the collection (as opposed to the enforcement) of aliment and periodical allowance in view of the fact that the matter has already been debated in previous reports. The present restrictions on government expenditure, the close connections between collection and enforcement, and the possibility that views and circumstances may have changed since the time of the McKechnie and Grant Reports, all combine to suggest, however, that both the collection and the enforcement of maintenance debts should be considered together in one Memorandum.

B. Miscellaneous Topics

5.6 We have made a preliminary review of the other modes of diligence, and in our final Memorandum in the series, we shall make provisional proposals for reform of these and of other matters not dealt with in the preceding Memoranda. At this stage, we merely refer briefly to some of the more important issues which may require consideration.

(1) Arrestment and Furthcoming (of property and funds other than earnings)

5.7 Perhaps the main reform of arrestments on the dependence to be considered is the proposal of the McKechnie Report[3] that

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[1] See Payne Report (op.cit.) paras.1088-1100 and Report of the Departmental Committee on One Parent Families (Cmnd. 5629; 1974) para.4.163.

[2] If officials were entitled to apply for warrants to imprison maintenance defaulters, the numbers of applications and warrants might increase.

[3] Op.cit., para.44.

the amount arrested by an arrestment on the dependence of an action should be limited to the sum claimed in the action, together with a reasonable estimate of the expenses. Arrestments on the dependence ought in our view to be retained, but they can prejudice commercial credit and should not have effect against more funds than is necessary to secure the principal sum claimed and the probable expenses. Other issues include the question whether the defender in a sheriff court action should be entitled to arrest on the dependence of a counter-claim.

5.8 Most arrestments in execution are laid against earnings (about 95%) but arrestments of other goods and funds nevertheless represent an important use of the diligence. A major question to be discussed will be the mode of service (whether by post or 'hand service'): the considerations may not be the same as in the case of arrestments of earnings. Other miscellaneous issues include the question whether the exemptions from diligence of funds in National Savings Banks should be continued; and whether the competence of arresting funds in National Savings Certificates and Giro accounts should be clarified by legislation and if so in what sense.

5.9 We agree with the McKechnie Report's conclusions that actions of furthcoming should be retained. We intend, however, to seek views on the Clyde Report's proposal that funds arrested on the dependence of an action should be made furthcoming by an incidental application in the action rather than by a separate action of furthcoming.[1]

(2) Arrestment and sale

5.10 We propose to seek views on the question whether the scope of the diligence of arrestment and sale of ships, (which is a diligence sui generis having in some respects the character of

[1] Report of the Royal Commission on the Court of Session (1927; Cmd. 2801) pp. 102-4.

a poinding as well as an arrestment but also having distinctive features) should be extended to aircraft, hovercraft and floating oilrigs.

(3) Sequestration for rent under landlord's hypothec

5.11 The number of actions for sequestration for rent under the landlord's hypothec over the last decade or thereby have declined dramatically, apparently because in the early 1970s Scottish local authorities ceased to use the process.[1] Probably most sequestration actions are raised in connection with commercial leases. In another context, we received submissions that sequestration for rent should not attach the goods of third parties in the debtor's possession.[2] This however might often render the landlord's hypothec almost valueless,[3] unless the landlord had insisted on the tenant plenishing the subjects with his own goods to secure the rent. In our Memorandum on miscellaneous topics we shall consider whether the diligence should be retained or abolished.

(4) Decrees ordering specific implement of obligations

5.12 While our primary concern is with the enforcement of debt decrees, we have also had regard to the enforcement of those court orders which are technically known as decrees ad factum praestandum, that is to say, decrees ordering a person to fulfil an obligation other than the payment of money, such as the delivery of goods or the performance of a contract or other obligation.

5.13 The primary remedy against failure to obey a decree ad factum praestandum is an application for civil imprisonment under the Law Reform (Miscellaneous Provisions)(Scotland) Act 1940, section 1. In such an application, the court may recall the decree ad factum praestandum and substitute another

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[1] See Appendix B, para. 49.

[2] Submissions on our Memorandum No. 27 on Protection of the Onerous Bona Fide Acquirer of Another's Property (1976) Proposal 15 (para. 49).

[3] Cf. Fourteenth Report of the Law Reform Committee for Scotland (1964) Cmnd. 2343 (minority dissent).

order, including an order for payment of a specified sum; or, where the decree was an order for delivery of moveables, a warrant to officers of court to search for and recover the moveables; or such other order as appears just. We note that there are conflicting decisions as to whether the court may, when making a delivery order, grant warrant to officers of court to search for and recover the moveables.[1] Further, where the defender is a body corporate or unincorporate, an application for civil imprisonment, while possibly competent,[2] appears inappropriate. Moreover, the Maxwell Committee represented to us that the 1940 Act may be unsuitable as the means of giving effect, under the European Judgments Convention, to judgments ad factum praestandum by the Courts of EEC Member States ordering the specific implement of obligations within Scotland.[3]

(5) Civil imprisonment

5.14 We shall consider civil imprisonment in the context of enforcement of decrees awarding aliment and periodical allowance on divorce, and in the context of decrees of specific implement. Our terms of reference require us, however, to review its use in connection with other civil proceedings eg breach of poinding and arrestment, lawburrows, breach of interdict, and non-payment of rates and taxes.

(6) Adjudication for debt

5.15 Although adjudication is the principal diligence by which heritable property may be attached for debt, and is the residual

[1] See United Dominions Trust (Commercial) Ltd v. Hayes 1966 S.L.T. (Sh.Ct.) 101 (warrant held not competent); Merchants Facilities (Glasgow) Ltd v. Keenan 1967 S.L.T. (Sh.Ct.) 65 (held the contrary).

[2] See Ford v. Bell Chancler 1977 S.L.T. (Sh.Ct.) 90.

[3] The Committee proposed that such EEC judgments should be re-pronounced by the Court of Session and become enforceable under the 1940 Act as Court of Session decrees: see Report of the Scottish Committee on Jurisdiction and Enforcement (1980) H.M.S.O., Edinburgh, para. 6.64.

diligence applicable where no other form of diligence is competent, decrees of adjudication for debt are rare in modern practice. Probably all adjudications relate to heritable property. A major reason for the rarity of the diligence is its archaic form and procedure. It takes the form of an action in the Court of Session founded on a decree for payment or liquid grounds of debt. The decree in the action vests the property in the adjudging creditor subject to the debtor's right to redeem it, within a period of ten years known as "the legal", or subsequently until the debtor's right is excluded either by a declarator of expiry of the legal or by the creditor acquiring, following the expiry of the legal, a prescriptive title to the property.

5.16 The creditor has therefore to wait at least ten years before he can sell or become owner of the adjudged property. During that period, he can enter into possession but would usually greatly prefer payment of his debt. Conversely the debtor may both lose his property and be denied any reversionary right to the difference between its value and the amount of the debt.

5.17 It has long been recognised that the existing procedure (which has not changed fundamentally since 1672[1]) is archaic, complex and inconvenient and requires reform.[2] The McKechnie Report recommended that the procedure before the land was adjudged should be much simplified,[3] but did not expressly consider the concept of "the legal" following the adjudication (which has been alleged to stem from the reluctance of the Scottish Parliament of 1672 to allow land to be sold for debt). In our Mememorandum, we propose therefore to examine the basis of the action - including the question whether it should continue

[1] Adjudications Act 1672.

[2] See for example the Report of the Royal Commission on the Law of Scotland 1834-36, Second Report, paras. 20-22.

[3] Op.cit., para. 184.

to take the form of a procedure for acquiring a redeemable security or whether it should be replaced by a procedure (akin to a poinding of moveables) whereby the property may be sold to satisfy the debt.

(7) Inhibitions

5.18 Our Memorandum will also deal with the reform of inhibitions (a preventive diligence by which a creditor may ensure that the debtor is prohibited from voluntarily disposing of or burdening his heritable property to the prejudice of the creditor). We intend to consider a number of proposals made to us, including proposals that it should be competent for warrants for inhibition to be included in extract decrees; and that the sheriff courts should have powers to grant such warrants,[1] including inhibitions on the dependence.

(8) Other matters

5.19 Other possible issues which may be discussed in the final Memorandum include the equalisation of diligences outwith sequestration, problems on competitions between diligences, or between diligences and other legal acts or processes, and problems on delictual liability for wrongful diligence. As mentioned in recent Annual Reports[2] we have initiated a separate research project into the law of ejection and removing and it is expected that this will deal with the functions of messengers-at-arms and sheriff officers in executing decrees of ejection and removal.

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[1] Cf. McKechnie Report, op.cit., para. 191.

[2] See in particular our Twelfth Annual Report 1976-77 (Scot. Law Com. No. 47) para. 81.

PART VI: SUMMARY OF PROVISIONAL CONCLUSIONS AND PROPOSALS ON WHICH COMMENTS ARE INVITED

References

Reform of present system or Court Enforcement Office?

1. It is suggested that in selecting the general approach to reform, the choice lies between two main options, namely, either:- Paras. 1.60 to 1.74; 1.82 to 1.86 and Memoranda Nos. 48 to 50.

(a) that the existing system of enforcing debts by court action and diligence should be retained but that a series of reforms should be made to the system along the lines described in the synopsis at paras. 1.60 to 1.74 and in more detail in Memoranda Nos. 48 to 50 issued with this Memorandum; or

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

For the reasons given at paras. 1.82 to 1.86 above, we suggest that the reforms proposed to the present system would be preferable to the establishment of a Court Enforcement Office.

References

EXTENDING CREDIT, DEBT COLLECTION, DEBT COUNSELLING AND DEBT ACTIONS

Enquiries into debtor's creditworthiness

2. It would not be appropriate to impose a legal restriction on a creditor's right to use diligence on the ground that the creditor had omitted to make enquiries into the debtor's creditworthiness at the time when credit was extended. paras. 2.3 to 2.11.

Jurisdiction in "admitted debts"

3. The reform of diligence should proceed on the view that the ordinary courts should retain their present jurisdiction to entertain debt actions. paras. 2.12 to 2.16.

Register of decrees, debt collection, debt counselling and debt actions

4. Research has identified a number of possible measures on the margin of our terms of reference which might prevent cases reaching the stage of diligence or otherwise benefit debtors or creditors. We have stated our provisional conclusions on these matters at para. 2.38 so that they may be considered by the competent authorities. para. 2.38

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

Debtors' exemption rights

5. (1) Apart from the reforms of the exemptions from poindings and arrestments of earnings discussed in Memoranda Nos. 48 and 49, and subject to sub-paragraph (2), it is suggested that the law on debtors' exemption rights does not require material alteration. In particular, the debtor's family home should not be exempt from diligence and social security should not be attachable for debt. para. 3.6 paras. 3.7 to 3.10

References

(2) In fixing the level of alimentary income (other than earnings) exempt from arrestment, the court should have regard to the statutory level of subsistence (supplementary benefit scale rates) rather than the debtor's social position. para. 3.5

Recovery of diligence expenses

6. (1) An extract decree should contain an award of the expenses of an arrestment, (including an extended arrestment such as we propose in Memorandum No. 49), charge, poinding or warrant sale used to enforce the decree. Payment or tender by the debtor of the outstanding balance of the principal sum, interest and judicial expenses should not interrupt the diligence unless the expenses of diligence already executed are also tendered. para. 3.14

(2) An arrestment in execution, (including an extended arrestment such as we propose in Memorandum No. 49), should attach a sum equivalent to the expenses of the arrestment in addition to the outstanding balance of the principal sum, interest and judicial expenses.

(3) It is for consideration whether one diligence should recover the expenses not only of that diligence but also of a previous diligence of the same or a different type executed under the same decree.

The cost of diligence: debts of small amount

7. (1) Views are invited on whether special provision is needed to reduce the expenses incurred by creditors and ultimately debtors for diligence in respect of debts of small amount. para. 3.34

References

(2) Should provision be made excluding enforcement by poinding and warrant sale (but not arrestment or other diligence) in the case of debts not exceeding a small amount (say £10) to be prescribed by statutory instrument?

(3) If it is thought that provision is needed to reduce the liability of the debtor or creditor for the expenses of diligence, then should such provision take the form of -

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

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

The cost of diligence: the remote areas

8. (1) In addition to postal service of arrestments (proposed in Memorandum No. 49) it is suggested that the Execution of Diligence (Scotland) Act 1926, section 2(2)(b) (which provides for recorded delivery service on summary cause decrees where the place of execution is in the islands, or 12 miles from the court granting decree etc) should be extended to Court of Session and sheriff court ordinary action decrees. para. 3.52

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

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

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

Diligence-related instalment settlements

9. Views are invited on the following questions:-

(1) Should it be an implied term of any agreement or promise by a creditor to accept payment of a debt by instalments that the creditor waives the right to proceed with diligence for so long as the instalments are paid? para. 3.57

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

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

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

ORGANISATION OF OFFICERS OF COURT

10. (1) We do not consider that the present system of independent contractor officers of court (messengers-at-arms and sheriff officers) should be replaced by a system of salaried officers of court employed within the Scottish Court Service. Part IV

References

(2) We suggest, however, that provision should be made for the improved regulation of the present system of independent contractor officers of court along the lines described briefly at paras. 1.80 and 1.81 above and in more detail in Memorandum No. 51.

paras. 1.80 and 1.81; Memorandum No. 51.

APPENDIX A THE RESEARCH PROGRAMME

BACKGROUND

Late in 1976 the Scottish Courts Administration, on behalf of the Scottish Law Commission, approached the Central Research Unit of the Scottish Office for assistance on studying the social aspects of diligence. The Central Research Unit conducted a preliminary investigation of the issues, problems and the way in which social research could assist the Scottish Law Commission, and the conclusions and recommendations were contained in "The Social Aspects of Diligence An Interim Report of Investigations" Central Research Unit, May 1977.

The report identified a programme of work and this was agreed with Scottish Courts Administration and the Scottish Law Commission in the summer of 1977. Since then at the request of the Scottish Law Commission some additional items have been incorporated into the programme of work (items 2 and 4 below). The results of the individual projects are set out in separate reports and these are listed below; for each report the information is presented as follows:-

(1) title

(2) abbreviation by which the report is cited

(3) author

(4) date and details of publication

(5) abstract.

1. (1) THE NATURE AND SCALE OF DILIGENCE

(2) "CRU Diligence Survey"

(3) Mrs B Doig, Central Research Unit, Scottish Office

(4) Research Report for the Scottish Law Commission, No. 1. Central Research Unit Papers 1980.

(5) 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 3 months were included in the survey and they were followed through for a further 3 months. The study identifies what happened to cases such as the mode of diligence used (eg 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. (1) CHARACTERISTICS OF WARRANT SALES

(2) "CRU Warrant Sales Report"

(3) Mrs A Connor, Central Research Unit, Scottish Office

(4) Research Report for the Scottish Law Commission, No. 2. Central Research Unit Papers 1980.

(5) 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, eg 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. (1) DEBT RECOVERY THROUGH THE SCOTTISH SHERIFF COURTS

(2) "CRU Court Survey"

(3) Mrs B Doig, Central Research Unit, Scottish Office

(4) Research Report for the Scottish Law Commission, No. 3. Central Research Unit Papers 1980.

(5) 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:- eg the types of pursuer, the amounts of principal sums, offers to pay by instalments, the court's decision.

4. (1) ARRESTMENTS OF WAGES AND SALARIES - A REVIEW OF EMPLOYERS INVOLVEMENT

(2) "CRU Arrestment Survey"

(3) Mrs A Connor, Central Research Unit, Scottish Office

(4) Research Report for the Scottish Law Commission, No.4. Central Research Unit Papers 1980.

(5) 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. (1) THE ORIGINS AND CONSEQUENCES OF DEFAULT - AN EXAMINATION OF THE IMPACT OF DILIGENCE

(2) "Debtors Survey"

(3) Mr M Adler and Mr E Wozniak, Department of Social Administration, Edinburgh University

(4) Research Report for the Scottish Law Commission, No.5. Central Research Unit Papers 1980

(5) 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. (1) SURVEY OF DEFENDERS IN DEBT ACTIONS IN SCOTLAND

(2) "OPCS Defenders Survey"

(3) Mrs J Gregory and Mrs J Monk, Social Survey Division, Office of Population Censuses and Surveys

(4) Research Report for the Scottish Law Commission, No.6. HMSO 1980

(5) 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. (1) DEBT COUNSELLING - AN ASSESSMENT OF THE SERVICES AND FACILITIES AVAILABLE TO CONSUMER DEBTORS IN SCOTLAND

(2) "CRU Debt Counselling Survey"

(3) Mrs A Millar, Central Research Unit, Scottish Office

(4) Research Report for the Scottish Law Commission, No.7. Central Research Unit Papers 1980

(5) 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 eg the amount of money involved, the pursuer, stage in the debt recovery proceedings when help was sought.

8. (1) DEBT RECOVERY - A REVIEW OF CREDITORS PRACTICES AND POLICIES

(2) "CRU Creditors Survey"

(3) Mrs B Doig and Mrs A Millar, Central Research Unit, Scottish Office

(4) Research Report for the Scottish Law Commission, No.8. Central Research Unit Papers 1980

(5) The study examines the practices and policies of a range of about 80 creditors (eg 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 Mr G McDonald, Central Research Unit, Room 5/72, New St Andrew's House, Edinburgh EH1 3SZ. Telephone 031-556 8400, Ext: 4440.

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 HMSO 1980.

Para.

APPENDIX B: DEBT RECOVERY AND DILIGENCE

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APPENDIX B: DEBT RECOVERY AND DILIGENCE

(1) Preliminary

1. In this Appendix, we attempt to describe in general terms the scale and main features of debt recovery and diligence in Scotland, using where appropriate the results of the studies in the research programme outlined in Appendix A.[1] Much of the information is also referred to in the text of this Memorandum and in other Memoranda, but we thought it might be useful, at the risk of repetition, to provide a description of the process of debt recovery and diligence in narrative form as an introduction to the subject.

(2) The classification of debts

2. Debts can beclassified in various ways, and many refinements are possible, but the following classification may illustrate the relevant distinctions. The debt or obligation to pay a sum of money may -

(a) arise from the debtor's consent, viz from a contract or agreement to pay (or less commonly a unilateral promise); or

(b) be imposed by (i) operation of law such as a statute (eg imposing liability for rates or taxes) (ii) or a decree of court (eg imposing an obligation to pay periodical allowance on divorce, or transforming the 'natural' obligation to aliment a spouse or children into an obligation to pay pecuniary aliment)[2]; or

(c) arise from some act or failure of the debtor, which amounts to a breach of contract or to a civil wrong (such as personal injury or damage to property) giving rise to a claim for damages.

As this classification shows, debts have many different sources. Most debts, however, arise from contracts involving the extension of credit eg loans, leases, and contracts for the supply of commercial or consumer goods and services.

3. Credit is an indispensable feature not only of trade and commerce but also of the economy of ordinary families. "Debt", in the broadest sense, is what one person owes another: in that sense, therefore, almost every adult person is in debt.

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[1] At the time of writing (September 1980) four of the eight research reports had been completed; drafts or preliminary results from the remaining studies had also been made available to us and are relied on in this Appendix.

[2] Most court decrees, however, do not impose obligations but merely "constitute" an obligation already incumbent on the debtor.

About 54% of Scotland's households live in public sector housing where rent is generally paid one or several weeks in arrear. Most owner-occupiers finance the purchase of their homes by loans repayable over a long period out of income. Gas and electricity bills are submitted in arrears. There are many different methods of financing the purchase of consumer goods and services, other than an instant cash transaction - eg hire purchase, conditional sale, credit sale, charge accounts or budget accounts with the seller, credit cards, vouchers, check trading arrangements and loans from banks, finance companies and other institutions.[1]

(3) General rule: the need for a court action prior to enforcement of default debt by diligence

4. "Debt" in the narrower and more usual sense, however, denotes "default debt". As a general rule, a default debt cannot be enforced by diligence until the court (Court of Session or sheriff court) has pronounced a decree constituting the debt, that is to say, determining whether the defender in the action is liable to pay the debt and quantifying the amount payable.

(4) Exceptional cases: summary warrants, summary diligence, and diligence on the dependence of court actions

5. To this general rule, there are three exceptions. First, the official collectors of rates and taxes may obtain from the courts, on production of a certificate as to the liability of the rates or tax defaulters, a summary warrant authorising the collector to instruct officers of court to execute diligence without the need for a prior court action.[2]

6. Second, certain documents of debt may be enforced by 'summary diligence', namely bills of exchange and promissory notes,[3] and contracts containing clauses of consent to registration for execution.[4] In such cases, diligence may be executed without the necessity of an action to constitute the debt. Summary diligence seems rarely to be used against consumer debtors.

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[1] See Crowther Report, op.cit., Part II.

[2] Summary warrant diligence is considered in Memorandum No. 48 Part VII: and see para. 44 below. Poinding and sale procedures under summary warrants differ from the ordinary procedure of charge, poinding and warrant sale.

[3] Summary diligence is competent where the bill or note is dishonoured by non-acceptance or non-payment and after a procedure known as 'protesting' the bill or note and registration of the protest in the Books of Council and Session or the books of a sheriff court.

[4] If such a contract is registered in the Books of Council and Session or the books of a sheriff court, any sum due under the contract may on default be enforced by diligence.

7. Third, arrestment of goods and funds (other than earnings) and inhibitions (prohibiting the sale of heritable property) can be used 'on the dependence' of a court action for payment in order to obtain security for the debt. The attached assets are 'frozen' pending disposal of the action and on decree being pronounced, the diligence is converted into an arrestment or inhibition in execution of the decree. Arrestments on the dependence are competent in payment actions in the Court of Session and sheriff court.[1]

(5) Consumer debts: the three stages in debt recovery

8. We are mainly concerned, however, with the recovery of debts, especially consumer debts, by the normal process, which may be conveniently divided into three stages:-

(a) the stage at which the creditor or an agent acting on his behalf make 'informal' attempts at collection (referred to here as the pre-litigation stage);

(b) the stage of a court action for payment, which in the case of most consumer debts involves a summary cause action in the sheriff court (referred to here as the court stage); and

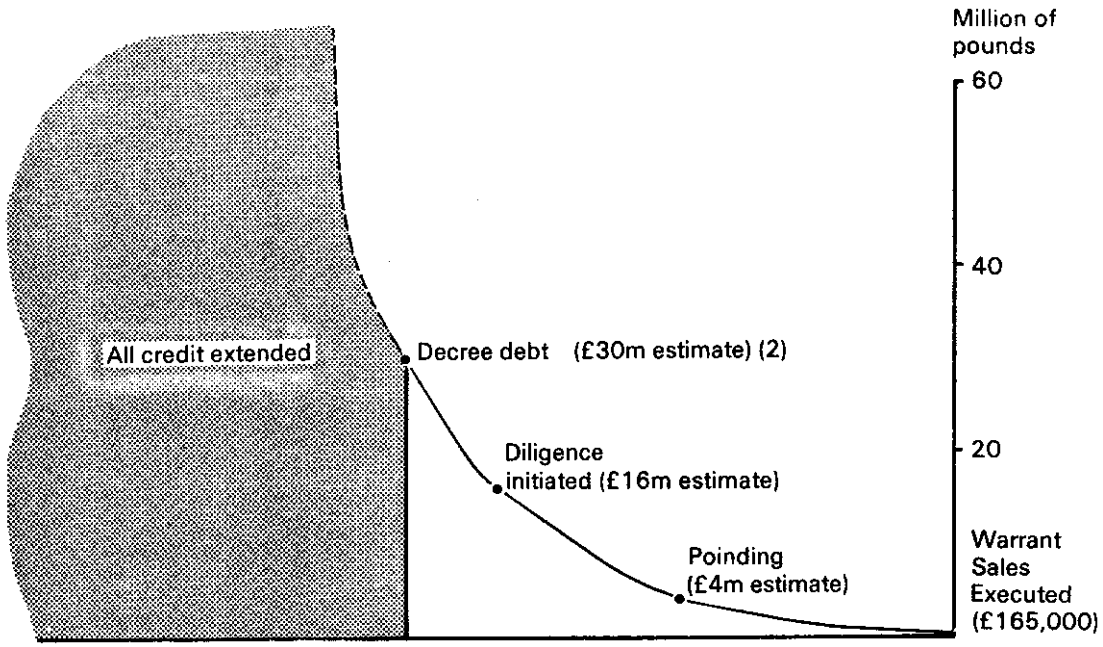
(c) the stage when the court decree is followed by further attempts at collection or the enforcement by sheriff officers of the decree by diligence.

9. The various steps which may be taken at each of these three stages and the kind of timescale involved are illustrated by the flow-chart at Figure 1a. Figure 1b shows the procedure involved in a summary cause action for payment. Both Figures show that the formal stages of sheriff court summary cause proceedings (the most frequently used procedure in debt claims) and enforcement of the decree by diligence are somewhat complicated. The research into debtors' circumstances discloses that debtors find it difficult to understand the terminology of the legal documents, the nature of the procedure and its possible impact on them, though this research was conducted before the the introduction of the new form of summons or service document in summary causes.

[1] In the case of inhibitions, the warrant for inhibition on the dependence of the action is granted by the Court of Session whether the action is in that Court or the sheriff court. Inhibition on the dependence of small debt actions was specifically excluded by the Small Debt Acts but this exclusion has not been re-enacted in relation to the summary cause.

A SUMMARY OF DEBT RECOVERY PROCEDURES [1]

(1) Assuming debt enforced by a court action
(2) All estimates exclude Fiscal debts on summary warrants
(3) Renewable by service of fresh charge
(4) No legal or formal time limit



Debt procedures may be halted if the creditor abandons pursuit or the debtor makes payment.

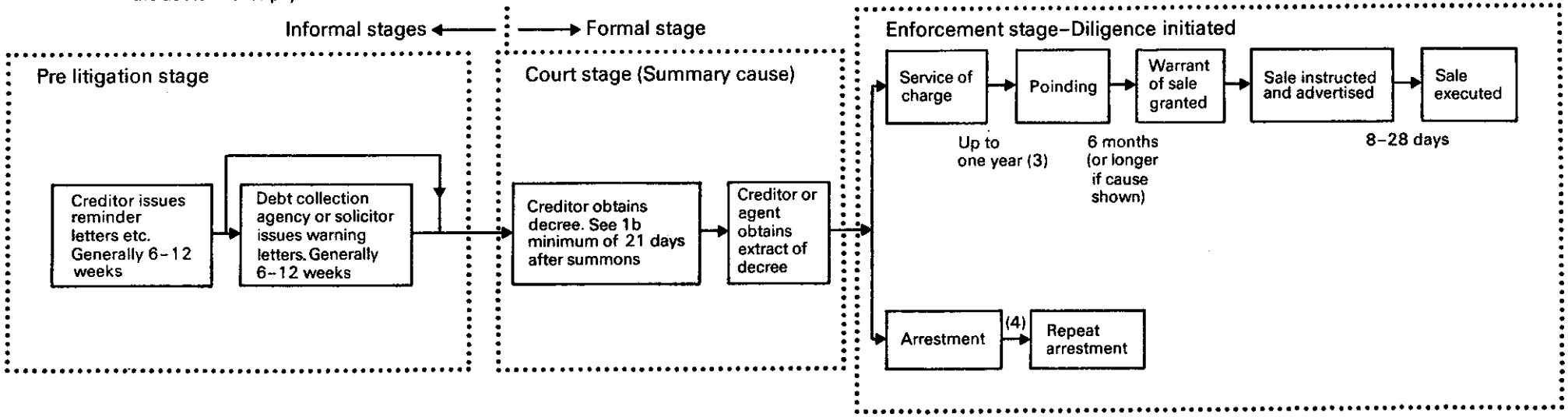
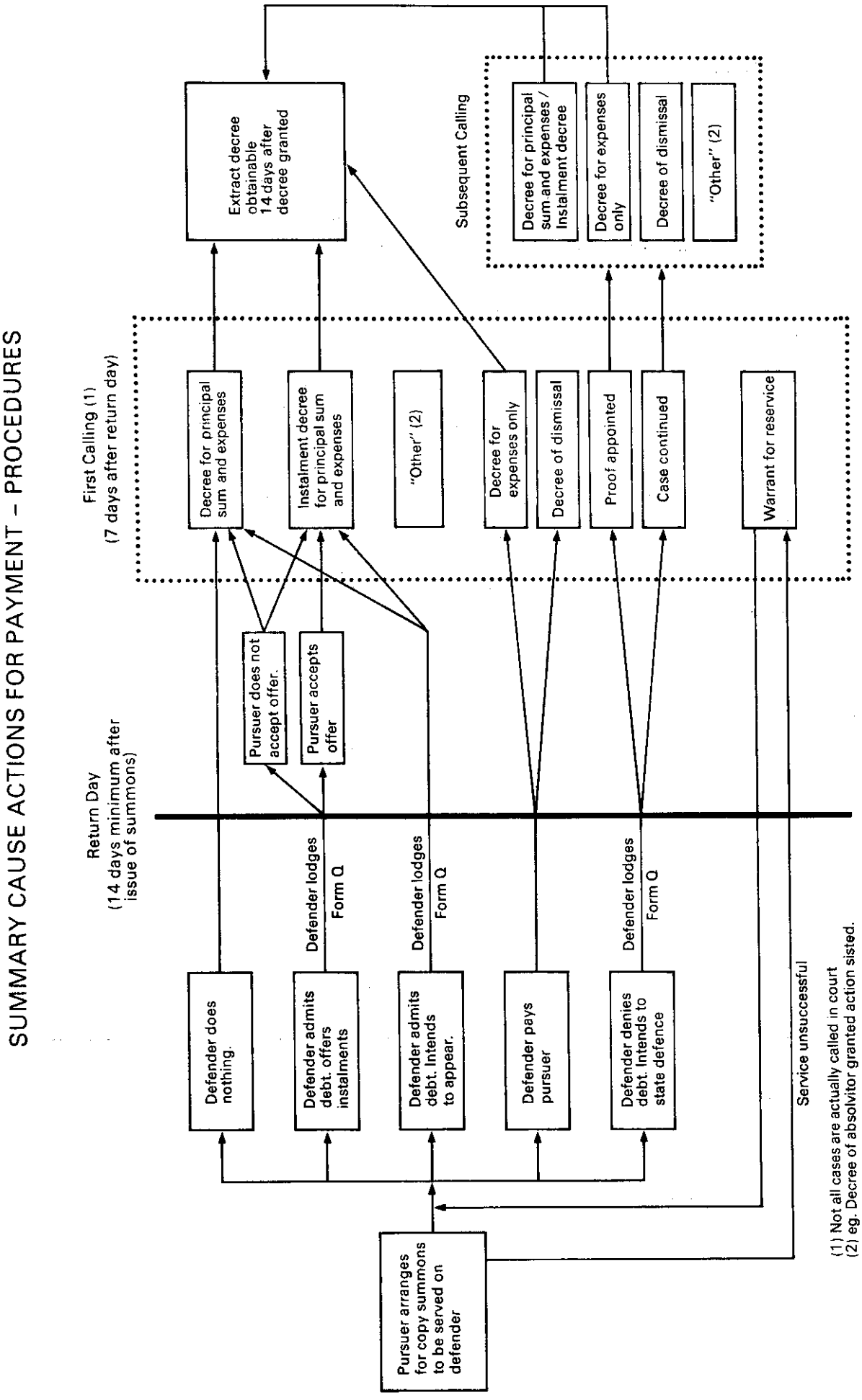


Figure 1a

Figure 1b


SUMMARY CAUSE ACTIONS FOR PAYMENT – PROCEDURES
Pursuer arranges for copy summons to be served on defender
Service unsuccessful
Return Day
(14 days minimum after issue of summons)
Defender does nothing.
Defender admits debt. offers instalments
Defender admits debt. Intends to appear.
Defender pays pursuer
Defender denies debt. Intends to state defence
Defender lodges Form Q
Defender lodges Form Q
Defender lodges Form Q
Pursuer does not accept offer.
Pursuer accepts offer
First Calling (1)
(7 days after return day)
Decree for principal sum and expenses
Instalment decree for principal sum and expenses
"Other" (2)
Decree for expenses only
Decree of dismissal
Proof appointed
Case continued
Warrant for reservice
Extract decree obtainable 14 days after decree granted
Subsequent Calling
Decree for principal sum and expenses / Instalment decree
Decree for expenses only
Decree of dismissal
"Other" (2)
(1) Not all cases are actually called in court
(2) eg. Decree of absolvitor granted action sisted.

The time-scale

10. The flow-chart at Figure 1a also shows that the whole process of debt recovery is protracted, and the time-scale varies at different stages. At the pre-litigation stage it depends on the policies and practices of the creditor, eg on the number and type of communications with the debtor. Preliminary results from the CRU Creditors Survey suggest that there is generally a considerable delay, often as long as nine to twelve months, between the debtor's default and the commencement of a court action. The summary cause action is regulated by a strict time schedule as one might expect in court proceedings and the period involved is a minimum of three weeks. Once a decree for payment has been granted to the creditor, however, the creditor has a discretion whether and when to enforce the decree by arrestment, or by charge and poinding, (or by both modes of diligence) and there will be at least an interval of two weeks before an extract of the decree is issued. Thereafter often at least a month elapses before the creditor instructs his agent on enforcement proceedings. An arrestment of wages or salary, unless it is repeated, is a 'quick' diligence in practice since it only attaches the earnings due at the next pay day and the arrested earnings are normally paid to the creditor then or soon after. By contrast, the diligence of charge, poinding and warrant sale is likely to take at least several months to complete since in most cases each stage operates as a spur to an instalment settlement.

Aspects of the debt recovery process

11. At each stage of the debt recovery process, there are fewer cases than at the previous stage. This reduction in numbers results from the settlement of the debt or the creditor's decision to abandon pursuit, generally because he considers that no payment will be secured by continuing to the next stage. The graph at Figure 1a shows that only a very small proportion of default debt reaches the stage of diligence.[1]

12. The inter-related nature of the various stages in the debt recovery process, emphasised in our Memorandum, is explained and illustrated more fully in the following paragraphs.

(a) Pre-litigation stage: collection by creditor or his agent

13. Preliminary results from the CRU Creditors Survey yield information on the collection practices of small, medium and large-sized creditor organisations: the following description is, we think, fairly typical of those practices.

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[1] See also Table A, at page 22 above.

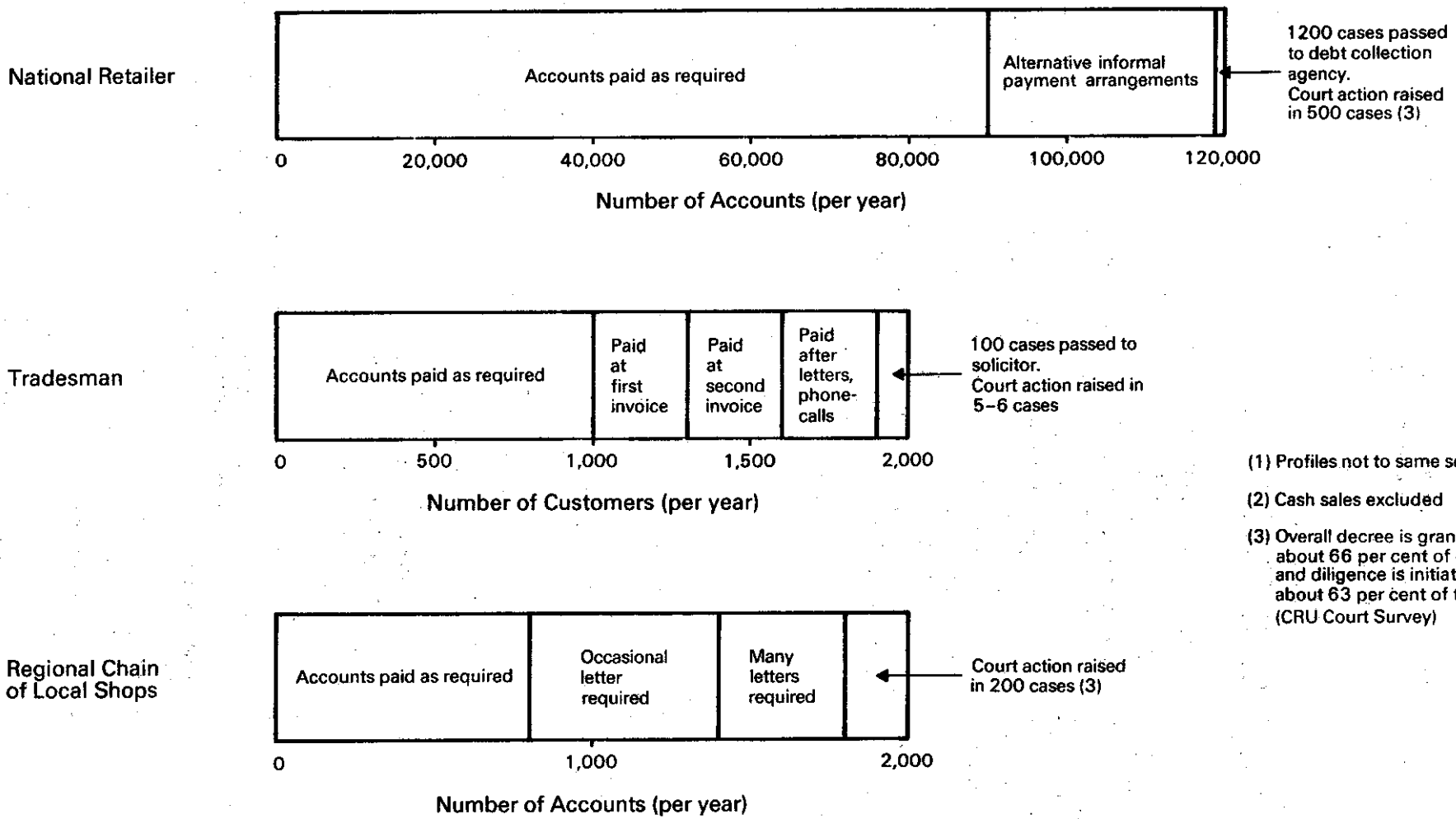
14. When default in payment of a debt occurs, the creditor usually pursues its recovery by means of "informal" techniques such as reminders or letters threatening legal proceedings. In the early stages, the creditor normally has an interest in retaining the debtor as a customer and will usually be anxious not to dissipate goodwill, at least until more information becomes available on the nature of the default and the debtor's intentions or ability to pay.

15. Creditors adopt different policies towards the pursuit of default debts: for example, in relation to the amount of debt incurred before positive steps are taken, the "tone" of letters and their frequency. Usually, at least two or three letters are issued commencing with a relatively gently worded reminder and increasing in severity to a letter threatening legal action. This stage in the procedure can take several weeks and more often six months or thereby. These relatively informal methods of debt recovery result in the payment of the great majority of outstanding bills, with only a very small proportion going on to the next stage of the procedure. Figure 2 illustrates procedures used by some creditors in Scotland to recover debts and the numbers at each stage. Certain creditors have additional sanctions at their disposal apart from diligence, such as the secured creditor's right to repossess articles on hire purchase or conditional sale, and the disconnection of services such as gas and electricity supplies[1] and telephone services. These, however, fall outwith our terms of reference.

16. If no payment is made as a result of these steps, most outstanding debt cases are then passed for collection to a solicitor, or more usually to a debt collection agency (including sometimes a sheriff officer acting in his unofficial capacity as the creditor's agent). The system followed by debt collection agencies is generally that, on receipt of the account from the creditor, the agency checks whether the debtor has been pursued by the agency previously; this may yield information on the debtor's previous record in making payment and the likelihood of recovery. The agency then issues a first letter. This could be one of several different types eg (a) showing appreciation of the debtor's difficulties and suggesting arrangements for payment by instalments; (b) suggesting a partial payment immediately and instalment arrangements for the balance; or (c) requesting settlement in full immediately. There is generally a delay of about fourteen days between the first letter and the second letter which adopts a more curt tone, perhaps threatening legal proceedings. The agency may send a representative to the debtor's house in order to establish whether liability is disputed, to ascertain whether the debtor is in residence, to assess the likelihood of recovering the debt and perhaps to attempt to make arrangements for payment by instalments.

[1] The Code of Practice issued by the Electricity and Gas Industries states that the fuel boards will not cut off supply if the defaulting customer agrees to make regular payments and to pay off the debt by instalments in a reasonable period, or if there is real hardship and it is safe and practical to instal a slot meter.

DEBT RECOVERY PROFILES[1] OF SELECTED CREDITORS[2]



(1) Profiles not to same scale

(2) Cash sales excluded

(3) Overall decree is granted in about 66 per cent of court cases, and diligence is initiated in about 63 per cent of these cases. (CRU Court Survey)

Figure 2

17. This pre-litigation stage results in the settlement of the great majority of default debts. Consequently the proportion of cases handled by creditors and debt collection agencies which are passed on to solicitors for court action is small. Preliminary results from the CRU Creditors Survey suggest that while varying proportions of debts owed to creditors reach the stage of a court action, the proportion is generally well under 10% in value and often less than 1%. Some debts are written off at this stage because of the comparatively high cost of solicitors' fees and litigation, relative to the amount of the debt, or because of the debtor's disappearance. Nevertheless, the Central Research Unit Interim Report of 1977 stated that of every debt of £100 passed to a debt collection agency, about £70 is recovered at this stage or at subsequent stages.

(b) Court stage: the debt action

18. Where the debtor continues to delay or refuse payment, and the creditor does not write off the debt, the next step is that the creditor raises an action for payment in the Court of Session or more usually, the sheriff court.

19. The main sources of statistical information on this stage are the Civil Judicial Statistics for Scotland,[1] and the CRU Court Survey which studied sheriff court summary cause actions for payment, sheriff court ordinary actions for payment, actions for recovery of possession of heritable property and actions for delivery of goods.[2] Actions to recover heritable property are usually brought for non-payment of rent, and actions for delivery are usually brought where there has been default in payment of an instalment due under a hire purchase, conditional sale or hire agreement. These are property actions rather than debt actions, but usually they arise out of indebtedness, and the decrees are used as a spur to payment, and may be combined with a decree for payment. In this Appendix, we are mainly concerned with debt actions in the narrow sense, ie actions for payment, decrees in which are generally enforced only by arrestment or charge, poinding and warrant sale, and which account for the bulk of such diligences.

(i) The courts and procedures involved

20. The majority of debt actions are for less than £500 and are brought as summary cause payment actions in the sheriff court. Actions for more than £500 are brought as ordinary actions in the sheriff court or in the Court of Session.[3]

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[1] See Table A at page 22.

[2] In addition, the OPCS Defenders Survey gives information on the characteristics of defenders in these "debt-related" actions.

[3] The numbers of actions are described in Table A at page 22 above.

(ii) Pursuers and defenders

21. The CRU Court Survey illustrates how far consumer debt preponderates in debt actions.[1] The defenders sued were categorised as "personal" (ie named individuals or married couples) in 81% of summary cause payment actions and in 19% were commercial or trading organisations: only 4% of pursuers were 'personal'. The main pursuers in summary cause payment actions were a miscellaneous group of commercial organisations (25%) followed by the fuel boards (21%), local shops including co-operative societies (9%), finance houses (6%), garages (6%), professional services (6%), national retailers (5%), local authorities (4%), 'personal' pursuers (4%) and mail order firms (4%). Public sector pursuers[2] accounted for 32% of actions and retail outlets[3] for 19%.

22. By contrast, in ordinary court payment actions, about one half of the defenders were personal and one half commercial (52% and 48% respectively) and only 8% of pursuers were 'personal'.[4]

(iii) Principal sums

23. The average principal sum sued for in summary cause payment actions was £102 (nearly two thirds being for amounts under £100) and in ordinary court payment actions was £1,800.[5] It is estimated that in 1978, the total principal sums involved in debt actions ended by final judgment in the sheriff courts was about £28 million, made up of £10.3 million under summary cause procedures and £17.3 million under ordinary court procedures.[6]

(iv) Purpose of action for payment and disposal of the action

24. The purpose of an action for payment is threefold; first it gives the defender who has a defence an opportunity to dispute liability for the debt; second in a summary cause action, it also gives him the opportunity to apply to the court for an instalment decree; and, third, subject to these safeguards for the debtor, it enables the creditor to obtain a decree containing a warrant for enforcement of the debt by diligence. Except when

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[1] CRU Court Survey, paras. 3.2-3.4.

[2] Fuel authorities, local authorities, the Post Office, central government departments.

[3] National and local retailers, T.V. rental firms and mail order firms.

[4] CRU Court Survey, para. 4.13.

[5] CRU Court Survey, para. 6.3 and Table 6B.

[6] Ibid., para. 6.4.

considering whether to grant an instalment decree, the court is not concerned to assess whether the defender can afford to pay what he owes or what the effect will be on him if decree is granted and enforcement proceedings begin.

25. The raising of the court action itself can result in payment of the debt when the debtor receives the summons. It is estimated that in 1978 about 30% of summary cause payment actions disposed of by the sheriff courts were dismissed, and in the majority of these cases payment arrangements would have been made.[1] A further 7% of summary cause payment actions resulted in decrees being granted for expenses only, again suggesting that payment arrangements for the original debt had been made.[2]

26. In most cases the debtor admits liability for the debt. Only a very small proportion of cases go to proof (less than 1% [0.9%] of summary cause payment actions), or are continued for several callings (4% of summary cause payment actions continued at first calling)[3] thereby indicating some element of dispute about liability or delay in coming to an arrangement for payment for some reason or other. In 1978, 104,375 summary cause actions of all types were disposed of by decree in the pursuer's favour and of these 100,715 were decrees in absence (viz. undefended on the merits) and 3,660 decrees "in foro" (viz. defended on the merits).[4]

(v) Representation of defenders

27. The great majority of actions therefore are largely "administrative" in character. This is shown by the low proportion of defenders who were represented at the court hearing viz. 3% of defenders in summary cause payment actions,[5] and 11% of defenders in ordinary court payment actions.[6]

(vi) Instalment decrees

28. In summary cause payment actions, there is a procedure whereby the defender may obtain an instalment decree instead of an "open" decree requiring him to pay the whole debt in one

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[1] Ibid., para. 3.10 and Table 3F.

[2] Idem. In ordinary court payment actions, only 4% of the actions were dismissed; and in 5% of such actions decree for expenses only was granted: ibid., para. 4.18.

[3] Ibid., para. 3.10.

[4] Table A at page 22 above. A higher proportion of ordinary actions are defended: see that Table.

[5] CRU Court Survey.

[6] Ibid., para. 4.19.

lump sum.[1] The defender may attend court to make oral representations about payment.[2] Alternatively he may make a written offer of instalment payments by notice lodged in court.[3] The notice procedure is much more commonly used since the defender does not have to appear. The notice is in a standard form served on the debtor along with the summons. The pursuer may accept the offer by lodging a written minute in court,[4] but even if he does not, the sheriff must consider the offer when the case calls.[5]

29. It is estimated that offers to pay by instalments are made in summary cause payment actions by approximately 1 in 7 defenders (16%) and three-quarters of these are offers of £5 per week or less.[6] Approximately 70% of offers are accepted (and are more often accepted when the offer is over £3 per week and/or when the principal sum is under £50).[7] Overall instalment decrees account for 1 in 5 of summary cause decrees granted for principal sum and expenses.[8]

(c) Enforcement stage: the use of diligence

30. Once the court has pronounced decree for payment in a summary cause action, there is a delay of two weeks (to allow time for an appeal) after which the court issues to the creditor "an extract" of the decree (viz. a document evidencing that decree has been granted). This requires the debtor to pay the principal sum sued for (in a lump sum or by instalments), interest at a specified rate, and the creditor's expenses of the court action. The extract also contains a warrant in common form authorising enforcement of the decree by arrestment, charge and poinding. The court does not inform the debtor of the granting of decree.

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[1] Sheriff Courts (Scotland) Act 1971, s.35(4). If one instalment of such a decree is in arrears at the time when the next instalment falls due, the whole balance due under the decree becomes payable. A decree for payment in a lump sum cannot be changed by the court to an instalment decree, (although in practice the creditor often accepts payment by instalments) and an instalment decree cannot be varied.

[2] Summary Cause Rules, rule 51.

[3] Ibid., rule 52, Form Q.

[4] Ibid., rule 53.

[5] Ibid., rule 55 (as amended).

[6] CRU Court Survey, paras. 3.27-33; para. 6.8.

[7] Ibid., para. 6.9.

[8] Idem.

31. Except where otherwise indicated, we confine this analysis to the common diligences of arrestment of earnings and furthcomings and of charge, poinding and warrant sale. The next step is that, perhaps following a further letter or letters requesting payment, the creditor or his agent sends the extract decree to the officer of court (messenger-at-arms or sheriff officer) with instructions to enforce the decree by diligence.

(i) Decrees passed to officers of court for diligence

32. Table A at page 22 above shows the numbers of decrees for payment granted, together with estimates of the number of cases in which diligence was executed. It is estimated that in 1978 about 53,000 decrees for payment were passed to officers of court for enforcement by poinding or arrestment, of which 43,700 were summary cause decrees, 7,600 were sheriff court ordinary action decrees and 1,600 were Court of Session decrees. The figures suggest that 63% of Sheriff Court decrees for payment are passed to officers of court for enforcement by poinding and arrestment.[1]

(ii) Scale of use of arrestments and furthcomings

33. It is estimated that in 1978 there were 6,900 first arrestments of wages, salaries or other property or funds of which approximately 6,000 were first arrestments of wages or salaries and 900 were arrestments of other assets such as bank accounts and moveable goods. Of the 6,000 first arrestments of wages or salaries nearly 30 per cent were repeated at least once.[2] Normally, a first arrestment will not clear the debt and the debtor will generally make arrangements to pay the balance by instalments over a period. An arrestment only has the effect of bringing the arrested funds (or property) within the control of the court so that the funds cannot be paid (or the property delivered) to the debtor or otherwise disposed of. The arrestee therefore can safely pay (or deliver) the arrested funds (or property) to the arresting creditor if the debtor authorises him to do so by a written or oral mandate. If, however, the debtor refuses to authorise payment, or the arrestee denies that he has any arrestable liability to account to the debtor, then the arresting creditor must raise an action of furthcoming to require the arrestee to pay him the arrested sum. Arrestment therefore is often described as "an inchoate diligence", requiring a furth-

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[1] See CRU Diligence Survey para. 5.4.

[2] The total number of arrestments in execution in 1978 is estimated at about 10,000 made up of 6,000 first arrestments of wages or salaries, 1,700 single repeat arrestments, and 1,000 multiple repeat arrestments (in the survey period from 2-13 the majority being two) and 900 arrestments of property or funds other than earnings. It is thought that there may be about 1,000 arrestments on the dependence every year (estimate based on a survey of 5½ month period in 1974/75); being arrestments of assets other than earnings.

coming for its completion. At first sight, therefore, it seems to be exceedingly cumbersome. In practice it is not in the debtor's interest to refuse to authorise the arrestee to pay the arrested funds to the creditor because normally the debtor admits liability for the debt and refusal to release the arrested funds to the creditor would merely render him liable for the much greater expense of an action of furthcoming. For this reason, actions of furthcoming are very rare.[1] In short, while in law an inchoate diligence, an arrestment in practice almost invariably operates as a completed diligence, especially when wages are arrested.

(iii) Scale of use of charge, poinding and warrant sale

34. A charge is a formal document, served by an officer of court (usually in person rather than by post), requiring the debtor to pay the debt, within a specified period (14 days in summary causes), and warning him that, failing payment within that period, his goods may be poinded. It is estimated that about 46,000 charges are served as the first step towards poinding and warrant sale. When serving the charge, the sheriff officer may have a chance to assess whether the debtor has poindable goods or may obtain information on the debtor's financial circumstances so that he can report to the creditor on the prospects of recovery. It is estimated that 20,000 poindings are executed every year, less than one-half of the number of charges which are served. This numerical decrease is not attributable entirely to payment of the debt: the creditor may decide to write off the debt on the basis that further steps in the diligence will not elicit payment and that the expenses incurred relative to the amount of the debt will not justify further pursuit, but it appears likely that the service a charge induces the majority of debtors to make payment arrangements.

35. Once the poinding has been executed and reported to the sheriff, the next step is for application to be made to the sheriff for warrant to sell the poinded goods. Until recently the warrant was granted automatically unless it appeared from the report of the poinding that the poinding had not been properly executed. Now the sheriff exercises a limited discretion to refuse warrant of sale.[2] A warrant to sell household goods normally provides for the sale to take place in the debtor's home with the effect that the statutory advertisement of the sale must specify the debtor's address, and it normally also specifies his name. The warrant of sale is intimated to the debtor.

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[1] The C.R.U. Court Survey identified [Table 2A, fn.(2) at page 8] 13 actions of furthcoming disposed of in a sample of 5.5% of all actions disposed of in the sheriff courts in 1978: on this basis there may have been 236 actions of furthcoming in the sheriff courts, perhaps 250 in all, in 1978.

[2] See para. 1.12 above.

36. The Edinburgh University Debtors Survey suggests that a key factor in achieving settlement of a debt may be the threat of the advertisement of sale rather than the threat of a sale. After a poinding, there is a marked decrease in the number of cases going on to the later stages of diligence as creditors obtain payment or abandon pursuit viz: of 20,000 poindings in 1978, about 6,000 went on to the stage of intimation of the warrant to the debtor, about 3,000 reached the stage of advertisement of the sale and under 300 cases reached the final stage of the sale. The great majority of sales advertised do not take place either because payment is made, or it is not financially worthwhile for the creditor to carry it out.

(iv) Debtors and creditors

37. The CRU Diligence Survey gives information on the numbers of decrees for payment and other debt-related decrees (viz. for recovery of heritable property and for delivery of moveables) which were passed to officers of court for enforcement in 1978. It is estimated that 90% of such decrees in summary cause actions passed to officers of court for enforcement by poinding, arrestment of earnings, ejection, or recovery of goods were against "personal" defenders (ie named individuals or married couples) and only 10% against commercial debtors.[1] This is about the same ratio as for debtors against whom a summary cause decree was pronounced.[2]

38. The Survey also shows that the diligence of charge, poinding and warrant sale is most often used against "personal" debtors rather than commercial debtors. About 85% of charges were served against personal debtors and 15% against commercial debtors: at subsequent stages, the ratio fell slightly, except at the stage of advertisement of sale: 77% of warrant sales were against personal debtors.[3]

39. Nearly all of the arrestments were against personal debtors (97%) as compared with 85% of the cases in which a charge was served.

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[1] CRU Diligence Survey, para. 5.6.

[2] Idem.

[3] Ibid., para. 4.1 and Table 1. The ratios were poindings 83 personal: 17 commercial; sale instructed (viz. intimation of warrant of sale) 81:19; sale advertised 84:16; sale executed 77:23.

40. The relative importance of the different types of debt enforced by diligence, is illustrated by the analysis in the CRU Diligence Survey of the pursuer groups involved in enforcing debt-related decrees (viz. payment, possession of heritable property and delivery of goods). The largest pursuer group was commercial organisations (19%) followed by national retailers (11%) finance houses (10%), local authorities (9%), Electricity Boards (9%) and Scottish Gas (6%).[1] Overall local authorities public utilities and central government departments account for 33% of the decrees enforced by 'ordinary' diligence.[2] Comparison with the CRU Court Survey discloses that the only pursuer group to show a marked fall in importance between decree granted and diligence stages was Local Authorities (as a result of the non-enforcement of warrants for ejection); a few pursuer groups (ie national retailers, finance houses and mail order firms), instructed relatively more diligence.

41. There are some striking differences between the use made by certain creditors of particular diligences. For example, the overall ratio of all first arrestments to charges was 1:7 but the ratios ranged from 1:81 (Scottish Gas), through 1:16 (SSEB) to 1:3 (local authorities and banks).[3]

(v) Amounts of principal sums

42. The CRU Diligence Survey shows that in 1978 33% of all diligence was used to enforce decrees granted for principal sums under £50, and 54% involves amounts under £100.[4] A further 19% was for amounts between £100 and £200, and 13% for amounts between £200 and £500. Some 12% of enforcement measures involved amounts over £500, but only very occasionally, (in less than 1% of cases) was the principal sum over £5,000. Arrestments were more frequently instructed when principal sums were relatively large and charge, poinding and warrant sale procedures when the sum was relatively small.

43. The average amount of the principal sums in summary cause decrees enforced by diligence was £109 and this compares with an average of £105 for summary cause decrees granted. This reflects the fact that for amounts up to £100 slightly

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[1] CRU Diligence Survey paras. 5.5 and 5.8 and Annex D, Tables 12-14.

[2] To this must be added the rates and tax arrears enforced by summary diligence: see para. 44 below.

[3] C.R.U. Diligence Survey, Table 3.

[4] C.R.U. Diligence Survey, paras. 4.9-4.10.

less diligence is used than might be expected from the relative importance of such amounts at "decree granted" stage, and for amounts over £100 diligence is more often initiated.[1]

(6) Diligence under summary warrants for recovery of rates and taxes

44. As noted above, diligence may be executed, without prior action, under summary warrants for the recovery of central government taxes (Inland Revenue taxes, VAT, and car tax) and local authority rates.[2] Poindings under summary warrants have a 'filter' effect similar to ordinary poinding procedures, as can be seen from the following Table:-

TABLE

SUMMARY WARRANT DILIGENCE IN SCOTLAND IN 1978

Rates or tax authority	Defaulters in respect of whom warrant granted	Poindings executed	Sales executed
Local authorities (regional and islands councils) (for rates)[3]	44,000 (est)[3]	4,000(est)	500 (est)
Inland Revenue (various taxes)	2,127	1,220	4
Customs and Excise (VAT)	3,745	2,037	under 10

It is understood that there were no warrants for the recovery of car tax.

Arrestment is a competent mode of enforcing summary warrants for recovery of rates, but not summary warrants for recovery of taxes. Diligence under summary warrants is reviewed in Memorandum No. 48, Part VII.

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[1] CRU Diligence Survey, para. 5.7.

[2] The Civil Judicial Statistics for Scotland for 1978, (Cmnd. 7762) Table 12A discloses that in 1978, the sheriff courts granted 4,954 summary warrants but the statistics do not show the numbers of rates or tax defaulters in respect of whom the warrants were granted: one warrant covers all the defaulters specified in a certificate lodged by the official collector of rates and taxes when applying for the warrant.

[3] These statistics on rates cases are rough estimates based on information obtained as to one sub-region in the central belt, which disclosed that summary warrants were granted in respect of 11,574 rates defaulters, resulting in 797 poindings, 99 sales and 5 removals of goods.

(7) Incidence of other forms of diligence

45. While arrestment and poinding and warrant sale are the most common modes of diligence, the other modes are of some importance.

46. The only diligences available to unsecured creditors other than poindings and arrestments are inhibitions and adjudications. Inhibitions are used to prevent the debtor from disposing of heritable property by property or security deed to the prejudice of the inhibiting creditor. In 1978, 1,398 inhibitions were registered in the Register of Inhibitions and Adjudications.[1]

47. Decrees of adjudication for debt give the adjudging creditor a title to heritable property, which is redeemable by the debtor until 10 years have expired, when the creditor may obtain an irredeemable title by further decree: (see paras. 5.15-5.17 above). The numbers of decrees for adjudication for debt pronounced every year are not known,[2] but it is understood that in 1978 approximately 15 decrees of adjudication for debt were pronounced.[3] The rarity of adjudications for debt is in part attributable to the cumbersome procedure.[4]

48. The remaining diligences are restricted to particular classes of debts or types of creditor. In 1978, there were 122 applications for warrants of imprisonment under the Civil Imprisonment (Scotland) Act 1882,[5] mainly against alimentary defaulters,[6] and only 15 persons were received into prison.[7] Civil imprisonment for debt is in practice restricted to aliment.

49. In 1978, 51 summary cause applications for sequestration for rent under the landlord's hypothec were disposed of:[8] it is not known how many such applications were made in the sheriff's

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[1] Information supplied by the Keeper of the Registers of Scotland. The Civil Judicial Statistics for Scotland give a misleading impression of the numbers of inhibitions since they include registration of Notices of Letters of Inhibition and Notices of Summonses of Inhibition where the letters of summonses themselves are later registered. Thus, the true figure of effective inhibitions is approximately one half of that shown in Table 23 of the Civil Judicial Statistics (hereafter "CJS") for 1978 (viz. 2,788).

[2] The decrees are registered in the Register of Sasines and accordingly Table 23 of CJS (which shows that none were registered in the Register of Inhibitions and Adjudications) gives a misleading impression when viewed in isolation.

[3] Information supplied by the General Department of the Court of Session.

[4] See para. 5.15.

[5] Civil Judicial Statistics for Scotland, Table 12A.

[6] A small number of applications may have been under the old remedy of lawburrows.

[7] Scottish Home and Health Department, Prisons in Scotland, 1978 Cmnd. 7749 Appendix No. 3.

[8] C.J.S., Table 11A.

ordinary court, but the numbers were probably about the same.[1] The numbers of sequestrations for rent have declined dramatically since the early 1970s, probably because of a change in enforcement practices by local housing authorities.[2]

50. In 1978, warrants for ejection intimated numbered about 3,200 and charges following delivery decrees numbered about 300.[3]

(8) The interests involved in diligence

51. Apart from creditors and debtors, who constitute the primary interests involved in debt recovery and diligence, a number of subsidiary interests are also involved. These interests are illustrated by the diagram at Figure 3 overleaf.

(a) The role of creditors' practices and policies

52. Given the wide powers of creditors to discriminate in extending credit and to control the process of debt recovery and diligence, the policies and practices of creditors are of central importance, and are the subject of a special study, the CRU Creditors Survey.

53. It may be observed that many public sector creditors do not possess the powers which private sector creditors have "to choose their debtors" by discriminating in the grant of credit, or to write off debts. Thus, rates, Inland Revenue taxes and VAT are liabilities imposed by statute rather than by a credit contract, and this forms one justification for the enactments giving the official collectors special procedures for recovering arrears of rates and taxes, as well as certain preferences in diligence and bankruptcy proceedings. Public utilities having a monopoly in the provision of services (gas, electricity and telephone services) must provide those services in return for charges to persons in their areas, except defaulters. The monopolistic position of public utilities makes the threat to withdraw supply a powerful inducement to payment. At the stage of debt recovery, public agencies often have limited authority to write off debts.

54. The practices and policies on credit granting, debt recovery and enforcement of a few large organisations (eg the nationalised industries and and nationwide organisations such as finance houses, mail order firms and chain store retailers) affect many people. In numerical terms, however, the majority of pursuers appear to be small organisations whose practices and policies affect perhaps only a handful of debtors.

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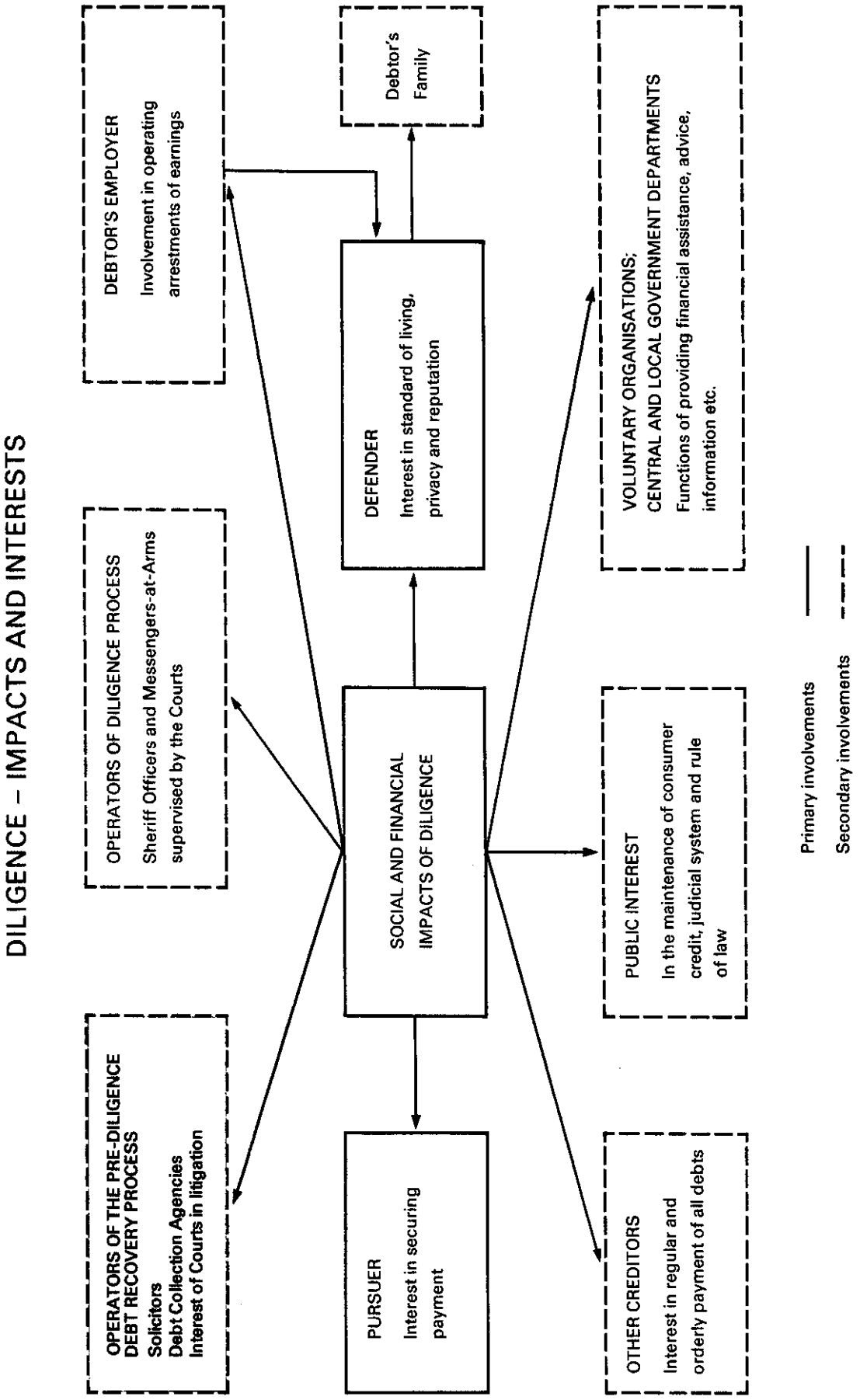
[1] This is suggested by research in Edinburgh and Glasgow sheriff court records.

[2] Small debt sequestrations for rent reached a peak of 10,938 in 1969, fell to 8,708 in 1971, 2,093 in 1972 and 282 in 1973: the numbers of decrees for summary ejection rose from 36,423 in 1971 to 40,686 in 1972.

[3] CRU Diligence Survey, para. 3.3.

Figure 3


DILIGENCE – IMPACTS AND INTERESTS
DEBTOR'S EMPLOYER
Involvement in operating arrestments of earnings
Debtor's Family
OPERATORS OF DILIGENCE PROCESS
Sheriff Officers and Messengers-at-Arms supervised by the Courts
DEFENDER
Interest in standard of living, privacy and reputation
VOLUNTARY ORGANISATIONS; CENTRAL AND LOCAL GOVERNMENT DEPARTMENTS
Functions of providing financial assistance, advice, information etc.
OPERATORS OF THE PRE-DILIGENCE DEBT RECOVERY PROCESS
Solicitors
Debt Collection Agencies
Interest of Courts in litigation
SOCIAL AND FINANCIAL IMPACTS OF DILIGENCE
PUBLIC INTEREST
In the maintenance of consumer credit, judicial system and rule of law
PURSUER
Interest in securing payment
OTHER CREDITORS
Interest in regular and orderly payment of all debts
Primary involvements
Secondary involvements

55. A wide range of different sizes and types of credit organisations employ debt collection agencies to recover debts on their behalf. In this way, the small or medium-sized creditors are provided with a complete recovery service. All necessary arrangements to obtain decrees and instruct diligence are made by the agency so that once an account has been passed to them for collection, responsibility for pursuit in practice rests completely with the agency. Creditors involved in large-scale debt recovery operations also employ independent debt collection agencies, but generally maintain close contact with their agents. Many of the largest creditors, and some creditors with special requirements, have established their own collection departments to recover debts due to them.

56. Creditors differ in the extent to which they have articulated policies on the use of diligence. As noted above, the majority of creditors with small or medium-sized debt recovery requirements leave the use of diligence to their agents. Relatively few creditor organisations keep a tight rein on the use of diligence on their behalf; those which do tend to be the larger organisations having the larger numbers of debtors. Of the creditors who do not delegate enforcement powers to agents, the majority are prepared to instruct diligence to the final stage of warrant sale but are very careful about the circumstances of each case. Often they rely on the advice of the sheriff officer as to the prospects of recovery. A minority, as a matter of policy, do not direct the execution of a warrant sale and have instructed their sheriff officers accordingly. For creditors who have no direct involvement with diligence, it is the policies and practices of their agents which determine the scale and type of diligence employed.

(b) Debtors' characteristics and circumstances

57. The OPCS Defenders Survey and the Edinburgh University Debtors Survey examine the social and financial characteristics and circumstances of debtors who have experienced court action and diligence. Some debtors appeared to be unfortunate or merely determined not to pay their debts. The broad picture is one of people who were in poor financial circumstances.

58. The OPCS Defenders Survey (the interviews for which were conducted in 1978) shows that, at the time of the summons, one third of defenders had gross weekly income from all sources of less than £30 per week and one half had incomes of less than £40 per week. One half (51%) of all defenders in debt-related actions[1] were not receiving income from employment either because they were unemployed (20% of all debtors, 25% of male debtors) or because they were economically inactive or absent from work through illness. This compares with the overall unemployment rate in Scotland at the time of the survey of 5% for men and women, and 7% for men. Unemployment was a comparatively long

[1] Viz. actions for payment, for recovery of heritable property and for delivery.

term feature of debtors' lives and one third of debtors who were unemployed or temporarily absent from work through sickness had been away from work for a year or more. Seven out of ten debtors were men and five out of ten debtors were under the age of 35. One in five debtors was married and under 30 and one in eight debtors were single parent families with dependent children.

59. The Edinburgh University Debtors Survey examines the impact of diligence on 100 debtors. This impact encompasses two broad areas: financial consequences and social consequences. As regards financial consequences, the sudden and instantaneous effect of an arrestment in stopping payment of wages or salary, together with the high proportion of the earnings arrested, generally worsened the debtor's financial position to such an extent that he could not pay other debts as and when they fall due. In certain cases, the arrestment did induce an instalment settlement, but because it can cause default in payments to other creditors without clearing the debt owed to the arresting creditor.

60. The Survey showed that the diligence of poinding and warrant sale was generally used against the unemployed who rely for their subsistence on social security. Debtors in this group appeared unable to maintain over a period of time regular instalment payments from a restricted income which was not intended to cope with more than minor occasional extra demands on it. Over-estimates by the debtor of the level of instalments which he could regularly pay, and in certain cases high demands by creditors, framed without knowledge of the debtor's circumstances, produced erratic payments. The addition of court and diligence expenses to the debt could compound the problem to a degree where the debtor could no longer pay a debt which was originally within his ability to pay.

61. The University survey also sheds light on some of the social consequences of diligence; for example, in several cases the debtor's health and marital relationship was adversely affected (factors which can themselves worsen debt problems). The major concern of debtors was focussed on the consequences of newspaper advertisement of a warrant sale publicising his or her indebtedness to the community. Debtors regarded the process of poinding and warrant sale as demeaning and humiliating.

62. While some debtors whose wages were arrested expressed concern about the inferences which employers and fellow employees might draw from the arrestment, the survey discloses little evidence that employers dismissed or otherwise penalised employees whose earnings were arrested.

(c) Interests subsidiary or indirectly involved in diligence

63. A wide variety of interests is affected by diligence. All consumers and businessmen for example have an indirect interest because changes to the law or practice of diligence would affect the availability of consumer and commercial credit.

64. The interests affected by diligence are illustrated by Figure 3 at page 148 above which we hope is self-explanatory. Some of these interests are the subject of Memoranda or research studies, eg the operatores of the diligence process are discussed in Memorandum No. 51; the interests of creditors generally in the orderly payment of debts by an insolvent multiple debtor is discussed in Memorandum No. 50; the employer's involvement in arrestments is examined in the CRU Arrestment Survey and in Memorandum No. 49; the role which voluntary organisations and central and local government departments assumes in providing financial assistance, advice and information to debtors is exercised in the CRU Debt Counselling Survey. Reference may be made to these publications for further information.

APPENDIX C: POSSIBLE SCHEME FOR COURT ENFORCEMENT OFFICE IN SCOTLAND

Contents

(1) Preliminary

1. In Part I (paras. 1.82-1.86) above we discussed the main features and possible advantages and disadvantages of a public enforcement agency (called a Court Enforcement Office) and provisionally concluded that such an institution should not be introduced in Scotland. The discussion however proceeded on a bare outline of a Court Enforcement Office system, and to provide a more adequate basis upon which to assess the system, we explain more fully in this Appendix how the system would or might operate if it were introduced in Scotland.

2. We have modelled our provisional legislative scheme mainly on the Enforcement of Judgments Office in Northern Ireland which was established by an Act of 1969[1] following the Anderson Report of 1965.[2] An Enforcement Office on similar lines was recommended

[1] Judgments (Enforcement) Act (Northern Ireland) 1969 as amended by inter alia the Judicature (Northern Ireland) Act 1978 and the Judgments Enforcement and Debts Recovery (Northern Ireland) Order 1979 (S.I. 1979/296).

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

for England and Wales in 1969 by the Payne Report,[1] which has also greatly assisted us in framing a possible Scheme.[2]

3. While specific provisions establishing an Enforcement Office would require much greater elaboration than is possible in this Appendix, provisions on the following lines would seem to cover the main points.

(2) Jurisdiction and enforcement functions of Office

4. As a general principle, the Enforcement Office would have universal and exclusive jurisdiction to entertain and dispose of applications for the enforcement of decrees for payment of money; to choose the mode or modes of diligence to be used; and thereafter to execute and control the use of the diligence. The Enforcement Office would therefore have sole jurisdiction to grant warrants of poinding (as well as sale) and arrestment in execution and therefore extract court decrees for payment would no longer contain warrants for these diligences.

5. The Office would also have exclusive jurisdiction to authorise other diligences enforcing payment of debt, including diligences, or steps in diligences, which at present take the form of court proceedings (eg actions of furthcoming following an arrestment; applications for warrants of inhibition in execution of decrees and actions of adjudication for debt of land or buildings or other property; actions for sequestration for rent; applications for civil imprisonment for failure to pay aliment and applications to restrict or recall arrestments or inhibitions[3]). Amendments would be required to some of these procedures, either because they require reform in any event (eg adjudication actions) or because, on further investigation, it might prove necessary or desirable to adapt or simplify them.

6. Diligence on the dependence of court actions would require special provision, for which the Northern Ireland Office system and Payne Report proposals do not afford any precedent. It is envisaged that warrants for arrestments on the dependence

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[1] Op.cit., Part III especially paras. 329, 442 and 485. In New South Wales, the Law Reform Commission of that State published a Draft Proposal relating to the Enforcement of Money Judgments (1975) containing provisional proposals based on the Northern Ireland system. We understand that that Commission are reconsidering and reviewing the proposals following consultation.

[2] We understand however that there are no immediate plans to implement the Payne Report recommendations for an Enforcement Office in England and Wales.

[3] It would however be for consideration whether applications to restrict or recall arrestments and inhibitions on the dependence of an action should be dealt with by the court seized of the action or by the Enforcement Office.

(whether granted before or during a court action) would continue to be granted by the Court of Session in respect of proceedings in that Court; it would be for consideration whether inhibitions on the dependence of sheriff court actions (presently within the exclusive jurisdiction of the Court of Session) should be granted by the sheriff court seiezed of the action (as the Grant Report envisaged[1]) rather than the Enforcement Office or the Court of Session. Where personal service of such warrants was required, the service would be effected by officers of the Enforcement Office who would undertake all citation functions. Applications for the restriction, loosing or recall of arrestments on the dependence, or the restriction or recall of inhibitions on the dependence, of an action would be dealt with by the court seized of the action. Where, however, the arrestment or inhibition on the dependence was converted by decree into a diligence in execution, further proceedings concerning that diligence (eg applications for loosing, restriction or recall, or furthcomings) would be dealt with by the Enforcement Office. The effect of these diligences would be to provide security pending disposal by the Office of the creditor's application for enforcement.

7. Provision would be needed on the question whether warrants for diligence to enforce obligations other than the payment of money would continue to be granted by the court which imposed or ordered implement of the obligation, or whether the warrants would be granted by the Enforcement Office. It is thought that court decrees for recovery of heritable property would grant warrant for ejection after service of the charge (by officers of the Enforcement Office). On production to the Enforcement Office of the decree and warrant, the pursuer would be entitled as of right to have the decree enforced by the Office in contrast to debt decrees where enforcement would be at the discretion of the Enforcement Office.

8. Court decrees ordering the delivery of moveable goods and other decrees ad factum praestandum would also (as at present) include warrant for service of a charge to implement the decree. In the event of failure to obey the decree, the creditor in the obligation can at present apply to the court for warrant for the obligant's imprisonment and the court has a discretion, in lieu of granting warrant for imprisonment, to recall the decree and pronounce another order, eg for payment or granting warrant to officers of court to take possession of the goods and deliver them to the creditor.[2] These powers would appear to be best exercised by the court which granted the decree rather than the Enforcement Office. Orders enforcing the delivery of a child to his or her lawful custodier (which include orders for imprisonment or sequestration of assets) would also be made by the court which granted the child delivery order.

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[1] Op.cit., para. 125.

[2] Law Reform (Miscellaneous Provisions)(Scotland) Act 1940,s.1.

9. If debt arrangement schemes such as we propose in Memorandum No. 50 were introduced, the Enforcement Office would have jurisdiction over the making and operation of such schemes and administrators of the schemes would be appointed from among officials of the office.[1]

10. It would be necessary to decide whether the ordinary courts or the Enforcement Office should be the proper forum for multiple-poinding actions or other proceedings for resolving competitions between diligences and other rights. The centralisation of enforcement in the Enforcement Office should prevent most competitions between diligences arising but there might be competitions between diligences used by the Office on the one hand, and arrestments on the dependence, liquidations, sequestrations, receiver orders, or voluntary deeds (eg assignations of moveables) on the other hand. These competitions should probably be resolved by the courts. We revert below to sequestration and liquidation proceedings.

11. Diligences presently requiring execution by messengers-at-arms and sheriff officers would be executed by enforcement officers employed within the Office. We think that since insufficient revenue would arise from the work involved in citation in civil proceedings to maintain a system of independent contractor officers solely for that purpose, officials of the Enforcement Office would require to execute citation as well as diligence.[2]

(3) Control of the modes of diligence

12. It is envisaged that once the creditor's application for enforcement was lodged, the Enforcement Office would decide whether, when, for how long and by what mode diligence should be used subject only to the creditor's right to abandon his application. This is the solution adopted in Northern Ireland[3] following the Anderson Report. We note, however, that the Payne Committee were equally divided on this question.[4] Six of the Committee argued that:

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[1] In Northern Ireland, the Enforcement of Judgments Office has had jurisdiction to make administration orders (modelled on the English county court orders) since 1979; see Judgments (Enforcement) Act (Northern Ireland) 1969, (as amended) ss. 77E to 77L.

[2] The Office might be named the "Court Enforcement and Citation Office".

[3] See eg Judgments (Enforcement) Act (Northern Ireland) 1969, s.13(2) which provides that "the method of enforcement of a money judgment shall be in the discretion of the Office and an applicant for enforcement may not require the use of any particular method."

[4] Op.cit., paras. 373-383; Notes of reservation cited in the next paragraph of this Appendix.

"a private debt does not cease to be private by being transformed into a judgment debt. The use of judicial institutions to convert a claim for a debt or damages into a judgment debt does not impose the duty of collecting the debt on the State. The creditor retains the initiative as to how he should proceed to enforce judgment."[1]

They therefore proposed that, after an application for enforcement, the Enforcement Office -

"should pursue the modes of enforcement authorised by the creditor in the application and covered by the information obtained from the creditor or creditors and the debtor but should obtain further authority from the creditor or creditors in the event of any new departure. In any event, the Enforcement Office must always have the authority of the creditor or creditors for any step taken."[2]

They recognised however that in many cases the creditor would apply for all available modes of enforcement and thereafter rely on the discretion of the Enforcement Office.[3]

13. On the other hand, the remaining six members of the Committee took the view that "step-by-step authorisation" should not be required and that the modes of enforcement should be within the discretion of the Enforcement Office.[4] One member (Mr Registrar Bryson) argued that a system depending for its activation upon haphazard applications by creditors would tend to create almost insuperable administrative difficulties.[5]

14. In Scotland, it would seem that, if the Enforcement Office were not to control diligence, then the main purpose of establishing an Office would be to prevent an unco-ordinated race of diligences against multiple debtors.[6] This seems an insufficient reason. In our view, the main justification for introducing an Enforcement Office in Scotland is that the Office would be an impartial and independent body controlling the use of diligence on the basis of an enquiry into the debtor's financial circumstances. Control by the Office rather than the creditor would be an essential feature of the system without which it would scarcely be worth introducing.

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[1] Op.cit., para. 380.

[2] Ibid., para. 381.

[3] Ibid., para. 382.

[4] See the notes of reservation at pages 388,392,395 and 400 of the Report.

[5] Op.cit., p.392.

[6] In England and Wales, the Payne Report's proposals for an Enforcement Office seem to have been inspired by the need to simplify the administration of enforcement which appears to be much more complicated than in Scotland.

15. The Enforcement Office would still communicate with the creditor from time to time, and this would be especially important if payments were in many cases made direct to the creditor and not through the Office. Thus, intimation to the creditor would be made of the results of means enquiries; and of provisional orders for enforcement or provisional declarators of unenforceability;[1] or where diligence was postponed. Reference would be made to the creditor where third parties' rights were involved (eg where an arrestee denied any liability to the debtor and a furthcoming or multiple poinding was needed); or where a creditor requested information about the progress of enforcement.

(4) Collection functions and "fair shares distribution" of collected debts?

16. The Payne Report proposed that the Enforcement Office would collect as well as enforce debts.[2] Since county court judgment debts and magistrates court debts must be paid to the court for disbursement to the creditors, this proposal presumably would not have innovated greatly on English practice.

17. It would be important to decide whether the Office itself would collect debts under decrees lodged for enforcement. The Payne Committee thought that payment into the Office was essential to enable the Office "to control the course of enforcement or to distribute the proceeds among several judgment creditors pro rata according to the priorities (if any) which are attached to their respective debts."[3] On the other hand in Northern Ireland, where the Office has more control of enforcement than was envisaged by the main text of the Payne Report, there is no general rule that judgment debts which are being enforced by the Office must be paid to the Office and this does not apparently unduly prejudice control by the Office of its enforcement functions.[4]

18. It must be conceded that if direct payments to the creditors were allowed, it would not be possible to introduce the Payne Report's proposals for "fair shares distribution" of recovered sums among the several creditors of a multiple debtor.[5] As in Northern Ireland,[6] the Office would probably require to deal

[1] See paras. 47-48 below.

[2] Op.cit., paras. 416-421.

[3] Op.cit., para. 416.

[4] It appears that the enforcement orders most commonly used in Northern Irealnd (viz. attachment of earnings orders and receiver orders) as well as administration orders require payment of the debt to the Enforcement of Judgments Office.

[5] Op.cit., paras. 416-421.

[6] Judgments (Enforcement) Act (Northern Ireland) 1969, s.20 (as amended).

with creditors' applications on a "first come first served" basis except where a debt arrangement scheme was made.[1] In any event fair shares distribution would cause administrative complications and would be expensive to operate.

19. Moreover, in the absence of comprehensive collection machinery, it would not always be possible for the Office automatically to update the register of decrees lodged for enforcement discussed at para. 22 below, and it might be difficult to monitor the success of its enforcement proceedings.

20. The need to minimise expense nevertheless suggests that there should be no rule requiring debtors to pay through the Enforcement Office, though in the case of earnings transfer orders and debt arrangement schemes at least, collection by the Office or administrator of the scheme would be an essential part of the diligence.[2] Moreover, the Office would be empowered to accept payments (for example where tendered in response to a particular step in diligence) and to account for them to the creditor.

21. To sum up, we think that the provisions discussed hereafter with respect to the register of decrees and the priority inter se of creditors' applications against multiple debtors would be based on the premise that there would not be compulsory and comprehensive provision for collection through an Enforcement Office of debts due under decrees which are being enforced by the Office.

(5) Register of decrees lodged for enforcement etc

22. The Enforcement Office would require to keep a central register of applications for enforcement whether priority of applications depended on a 'first come, first served' basis or whether a system of fair shares distribution of the proceeds of diligence among competing creditors was introduced.[3] The register would require to cover certain other proceedings or odrers such as awards of sequestration or liquidation and (in order to avoid conflicts of diligence) probably arrestments or inhibitions on the dependence: these would be intimated to the Enforcement Office.[4]

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[1] See paras. 36 and 49 below.

[2] Collection of aliment and periodical allowance on divorce would merit separate consideration from collection of other decree debts: see Part V above.

[3] In the former case, it would be necessary to have a record of applications and the time when they were made in order to fix the priority of the applications; in the latter case, it would be necessary to have a record of the creditors among whom the proceeds of diligence were to be distributed.

[4] See para. 34, fn. 4: debt arrangement schemes made by the Office would also be registered.

23. As a matter of preference though not of necessity, the register might be a public register in order to facilitate enquiries by persons wishing to extend credit.[1] It would be for consideration whether the Office would register the satisfaction of debts due under decrees in its register.[2] No doubt, it should do so on production of evidence of payment. In cases where payment was made through the Office (eg earnings transfer orders and debt arrangement schemes), the Office might monitor recovery and register the implement of the decree automatically when the debt and expenses were paid in full.

(6) Performance of functions, staffing and location of Enforcement Office

24. The Enforcement Office would exercise functions which are judicial, procedural and administrative as can be seen from the following list (which is not necessarily exhaustive) of possible functions:-

(1) making orders or issuing warrants for the execution of diligence;

(2) making orders for debt arrangement schemes;

(3) requiring the attendance of debtors, creditors, and third party witnesses as to the means of debtors;

(4) conducting examinations as to means;

(5) pronouncing declarators of unenforceability;

(6) making orders with respect to subsisting diligences, eg withdrawing goods of third parties from poindings, or recalling, restricting or loosing arrestments, or sisting diligence;

(7) substituting instalment decrees for open decrees;

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[1] It should be observed, however, that successive annual reports of the Master (Enforcement of Judgments) relating to the functions of the Northern Ireland Enforcement of Judgments Office stated that the register of judgments had been well kept but that it was remarkable that creditors and their advisers continually omitted to search against the debtor and applied for enforcement in cases where a search in the register would have disclosed that the debtor was hopelessly insolvent and had no assets amenable to enforcement proceedings.

[2] See paras. 2.18 to 2.22 above.

(8) accepting or dismissing applications for enforcement;

(9) in certain cases, receiving moneys due under decrees; and

(10) keeping a register of applications for enforcement and the relative decrees.

It would be necessary to ensure that decisions which are properly described as "judicial" are made by appropriately qualified persons.

25. In the Northern Ireland system, the more important decisions are made by legally qualified 'judicial officers', holding statutory offices, in fact appointed from among the High Court Masters.[1] The Chief Enforcement Officer, or other administrative officer, may make all types of enforcement orders (eg attachment of earnings orders) except orders for seizure of chattels or 'receiver orders'.[2] But in the first instance, orders made by the administrative officers are provisional only, and the parties are given an opportunity to object before the orders come into force. If a party objects, the hearing always takes place before a judicial officer.[3]

26. Within the Scottish Court Service, there are no 'judicial officers' with a status equivalent to High Court Masters. It seems probable that judicial decisions in a Scottish Enforcement Office would require to be taken by a person holding a special statutory appointment who might be either a sheriff seconded full-time or part-time to exercise the jurisdiction of the Office or an advocate or solicitor of a prescribed minimum years' standing acting full-time as a judicial officer.

27. It would be necessary, but not easy, to extrapolate from the Northern Ireland experience in deciding on the location of the branch offices, and on the staffing levels, of a Scottish Enforcement Office. Account would have to be taken of differences or possible differences in legal procedures which affect the respective case-loads, and differences in geographical area and in the size and distribution of the population: Northern Ireland is a relatively small jurisdiction (population approximately 1½ million; and total land area 5,206 square miles) and the Enforcement Office is located in premises in

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[1] The judicial officers are the Master (Enforcement of Judgments) and the Judicial Officer (Enforcement of Judgments) who are appointed by the Lord Chancellor and must be a barrister or solicitor of respectively 10 and 7 years standing at least. The Chief Enforcement Officer is a member of the Northern Ireland Court Service designated by the Lord Chancellor (1969 Act, section 3 as substituted).

[2] Judgment Enforcement Rules 1979 (S.I. 1979/87), especially rules 25 to 27.

[3] Ibid., rule 27(3).

Belfast. Scotland has about 3½ times the population (5¼ million) which is unevenly distributed and almost 6 times the land area (29,798 square miles). In Northern Ireland, applications for enforcement number only about 5,000 per annum whereas diligence in Scotland is initiated in about 56,000 cases per annum (including 53,000 cases of charge or arrestment in execution). There are other more imponderable factors such as the existing emergency in Northern Ireland and the fact that the Northern Ireland Enforcement Office is relatively new and its procedures are still being improved.

28. In Northern Ireland, the Enforcement Office has a staff of 75 of whom only a small number (15) are enforcement officers engaged in work in the field - viz making means reports on debtors, and carrying out seizures of goods or evictions. In contrast, at the end of 1979, Scotland had 109 officers of court working full-time and 10 working part-time in the field-work involved in citation and diligence or in a supervisory capacity. This does not include clerical and other supporting staff. There are many procedural and other differences between the two systems: for example, executions against household goods are the most common diligence in Scotland (as in England and Wales) whereas they are almost unknown in Northern Irealnd. If the procedures used in a Scottish Enforcement Office were modified to resemble the procedures used in Northern Ireland, and the scale of use of those procedures were similar, then the Enforcement Office in Scotland might require to employ about 60 to 80 or thereby enforcement officers working in the field (ie making reports on means, executing poindings and ejections, and serving citations arrestments and other writs by hand). In addition, on the Northern Ireland precedent, about 240 to 320 or thereby officials might be needed to perform the other functions of the Office.[1] The full complement might be between 300 and 400 which would represent a very substantial increase in manpower in the Scottish Court Service, viz an increase of between 40% and 53% or thereby.

29. If on the other hand, the scale of use of diligence corresponded to the present levels (viz. 46,000 charges and 20,000 poindings) or thereby, the manpower increase would be considerably greater.

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[1] E.g. maintaining the register of decrees lodged for enforcement; preparing and issuing enforcement warrants or orders and other orders and steps of process; conducting means examinations under oath; keeping accounts of fees and moneys collected by the Office; conducting correspondence with creditors and debtors; and possibly porviding witnesses for officers working in the field).

30. Because of the relatively small population and geographical area of Northern Ireland, it is possible to centralise all the operations of the Office in one office in Belfast. This greatly facilitates the administration of a centralised enforcement system and makes for consistency in decision-making. By contrast, for geographical and demographic reasons, a Scottish Enforcement Office would require to have several area offices, each serving its own 'enforcement area' (based on court districts). Area offices would probably be required at (say) Edinburgh, Glasgow, Aberdeen, Dundee and Dumfries, and perhaps at one or more towns in remoter areas, such as Inverness, Dunoon or Oban. The enforcement officers working in the field would be attached to a particular area office. They would reside in the area and would visit the area office at least (say) once a week to hand back files, to obtain new files and to discuss particular cases with their supervisors.

31. The dispersal of the Office into area offices would cause administrative complications which do not arise in Northern Ireland. If (as seems necessary) applications were dealt with by the Office by priority of time, and each application were allocated a serial number to determine its priority in a competition with applications by other creditors.[1] there would require to be one series of numbered applications covering all the enforcement areas. It would accordingly seem essential for the central register of decrees and the records of enforcement proceedings to be placed on a computer to which the area offices had immediate access, eg when checking applications, allocating serial numbers, and conducting searches.

32. It would be necessary to determine which area office would deal with a particular application, a problem not arising in Northern Ireland. Following the proposals of the Payne Report, the applications should probably be made to the office for the area in which the debtor resides or carries on business.[2] This would enable the rule to apply to sheriff court decrees, Court of Session decrees, deeds registered for execution in the books of court and non-Scottish orders registered for enforcement. In the case of two or more decrees emanating from different courts against a multiple debtor, it would be necessary for all the pending and sisted applications to be dealt with by the same area office, and administrative arrangements would be needed for transfer of the relevant applications to the appropriate office.

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[1] Cf. Judgments (Enforcement) Act (Northern Ireland) 1969, s.20.

[2] Op.cit., paras. 385-7.

33. We would emphasise that the foregoing estimates of staffing levels and our suggestions as to the location of offices are merely tentative and illustrative and depend on a number of imponderable factors and on assumptions which would require further research and examination if it were decided to establish an Enforcement Office.

(7) Applications for enforcement, means enquiries and interim diligence

34. Applications for enforcement of debt would be made by the creditor or his solicitor or possibly a collection agent who would lodge a prescribed form of application duly completed together with the extract decree, and the prescribed scale fee.[1] The form would also detail any subsisting arrestment or inhibition on the dependence served by the Office on the creditor's behalf. It would be for consideration whether, in the case of debt decrees, a preliminary 'notice of intent to apply' should be served on the debtor, on the Northern Ireland precedent.[2] The purpose of this notice procedure is to induce the debtor to settle the debt. Where the debt was more than a prescribed sum (say £500), the creditor should be entitled to obtain a preliminary report on the debtor's financial position in order to avoid the expense of a full application.[3] In a debt case, the creditor would apply for enforcement generally and would not be entitled to require the Office to use any particular mode of diligence or to attach any particular assets. The creditor would, however, refer in his application to any assets of the debtor of which he had knowledge. The creditor would be entitled to abandon his application but otherwise would not have control over the proceedings.

35. The Enforcement Office would vet the application carefully. A search would be made in the register of applications and decrees to ascertain whether the application was barred by a declarator of unenforceability as mentioned below; whether the debtor's estate was sequestrated or, in the case of a company, whether the company was in liquidation or a receiver had been appointed;[4] whether a debt arrangement scheme was in force with respect to the debtor; or whether enforcement of the debt was prima facie barred by the negative prescription or any statutory time limit.

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[1] For brevity, we leave aside applications for enforcement of non-money decrees which raise different considerations; eg warrants for ejection would be granted as of right without a means enquiry.

[2] Judgment Enforcement Rules 1979, rule 6.

[3] Judgments (Enforcement) Act (Northern Ireland) 1969, s.19.

[4] Provision would be needed to ensure that awards of sequestration and orders winding up a company, or appointing a receiver, were intimated by the clerks of court to the Enforcement Office.

36. On accepting the application, the Office would give it a serial number which would determine the priority of the application in a competition with other creditors. The search in the Office's registers would also disclose whether the application was postponed to any prior pending application having an earlier serial number.

37. Although it would be a general rule that no new diligence would be executed until a means enquiry had been carried out, the Office would require to have power to prevent the debtor disposing of funds or assets in order to evade diligence.[1] It would therefore be for consideration whether, on the creditor's application, the Office should have power to attach (but not realise) property, or such items thereof as it thought fit, by eg interim arrestments or inhibitions (ie pending disposal of the application for enforcement). In some cases, this would be unnecessary because an arrestment or inhibition on the dependence of the prior debt action would still be in force.

38. Apart from interim diligence the Office would not execute diligence until it had conducted, or attempted unsuccessfully to conduct, a means enquiry.[2] Following the Northern Ireland precedent, in the normal case, an enforcement officer would visit the debtor at his home, serve a charge in a prescribed form requiring the debtor to pay within a short prescribed period, and require the debtor to give detailed information as to his means. The debtor would be under a statutory duty to give the officer the information which the officer required. At this stage, the debtor would be entitled to make an offer to pay by instalments by completing a prescribed form. The officer would make a means report to the Office on a prescribed form, to which any instalment offer would be annexed.

39. Where the debtor did not answer the officer's questions satisfactorily or at all, or where the Enforcement Office had reason to suspect that the debtor was evading the service of the charge and the interview by the enforcement officer, the Office would have power to order the debtor to attend in person at the office for the area (or some other specified place) at a specified time for an examination on oath as to his means. A tender of travelling expenses (provided by the creditor[3]) would be made. At the same time the Office would have power to issue a conditional order for the debtor's arrest if he failed to comply and for his conveyance to the area office for examination.

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[1] Thus in the Northern Ireland system, service of a custody warrant "freezes" certain goods in the debtor's possession.

[2] Judgments (Enforcement) Act (Northern Ireland) 1969, ss.21(3) 22 and 25 (as substituted); Judgment Enforcement Rules, 1979, rules 13-24.

[3] But recoverable from the debtor as part of the expenses of enforcement.

40. Similar provision would also be made for the examination of third party witnesses (including for example the directors and employees of a debtor company) as to the debtor's means, and the Office would have power to issue warrants of commission and diligence for the recovery of documents.

41. Examinations on oath as to the debtor's means might be carried out by officers specially nominated for the purpose. Some officers might be engaged full-time on this task while others might combine it with thier other duties.

(8) Modes of enforcement, instalment decrees and declarators of unenforceability

42. Following the report on means or (as the case may be) the means examination, the Office would have power to do any of the following:-

(i) to make an order granting warrant for enforcement of the debt by one or more of the competent modes of diligence; or

(ii) to make an order or decree for payment by instalments; or

(iii) to make an order declaring that the whole or part of the debt is unenforceable (a declarator of unenforceability).

The order would in the first instance be provisional and following mutatis mutandis the Northern Ireland precedent, most orders might be made in the first instance by the chief area enforcement officer. If neither the creditor nor debtor objected, the order would cease to be provisional and would take effect on the expiry of a prescribed period. If an objection was made, the objection would be heard by a judicial officer, or the sheriff exercising the jurisdiction of the Office, who would have power to substitute a different order.[1]

43. Modifications might require to be made inter alia to the main diligences of arrestment of earnings and charge, poinding and warrant sale so that they were properly integrated into the new enforcement system.

Diligence against earnings

44. As mentioned at paras. 1.69 to 1.72 above, we have considered two alternative modes of continuing diligence against earnings - viz extended arrestments and earnings

[1] See para. 26 above.

transfer orders, and concluded that, against the background of the existing system, extended arrestments seem preferable, in our view, to earnings transfer orders because, as the English experience with attachment of earnings orders indicates, creditors would be likely to prefer poindings to earnings transfer orders.[1] In an Enforcement Office system, however, the Office not the creditor would choose the mode of diligence and, moreover, a means examination would be held so that the Office would be able to fix a protected earnings rate and a normal deduction rate. In these circumstances it would seem appropriate that earnings transfer orders should be the sole mode of diligence against earnings in an Enforcement Office system. Although the Office would not generally collect debts, sums deducted by the employer under an earnings transfer order would be paid through the Office, which would monitor payments and inform employers when deductions should cease.

Poinding and warrant sale

45. The diligence of charge, poinding and warrant sale might also be modified: for example, a separate application for warrant of sale would no longer be necessary or appropriate since the diligence would already be under the control of the Enforcement Office. The main steps in the revised poinding process might be (i) the execution of the poinding, the valuation of the goods (fixing an upset or reserve price) and the service on the debtor or possessor of a poinding schedule; (ii) in the case of household goods, the removal to a public saleroom of the goods, or, in the case of other goods, the advertisement and sale of the goods on the debtor's premises or at a saleroom or such other premises as the Office may direct; (iii) the sale (attended by an enforcement officer) and (v) payment by the Office of the debt out of the proceeds of sale or in default of sale the adjudication of the goods to the creditor at the appraised value.

46. In Northern Ireland, seizures of household goods are almost unknown partly because the Enforcement of Judgments Office adopts a liberal interpretation of the statutory exemption,[2] and partly because the Office must bear the loss if the proceeds of sale do not defray the expenses of valuation, removal and sale. The Office does not generally make a seizure order relating to domestic goods if their resale value would not justify a sale, and therefore it does not use seizure orders relating to household goods merely for the purpose of putting pressure on the debtor to pay. It would be of crucial importance to decide whether an Enforcement Office in Scotland would adopt a similar policy. If it did not, there would

[1] See also Memorandum No. 49, paras. 1.33 to 1.34.

[2] Judgments (Enforcement) Act (Northern Ireland) 1969, s.34(d) quoted in Memorandum No. 48, Appendix B, para. 2.

often be no other effective means of putting pressure on debtors to pay. Clearly, however, the Enforcement Office should not be required to prosecute a poinding to the stage of sale if the resale value of the goods was insufficient to justify the removal and sale.

Declarators of unenforceability

47. Following the Northern Ireland precedent of "certificates of unenforceability", the Office should have power to declare that a debt is wholly or partly unenforceable.[1] Thus, where it appeared to the Office that a debt decree could not be enforced, or where it appeared that the decree could only be partially enforced, within a reasonable time by any mode of diligence, then the Office would issue a provisional order declaring the debt to be unenforceable or, as the case may be, declaring that the portion of the debt which could not be enforced within a reasonable time, was unenforceable. The provisional order would be intimated to both parties who would have an opportunity to contest it at a hearing before the judicial officer or sheriff before it took effect. What would be "a reasonable time" should probably not be defined: two years might be a yardstick as in Northern Ireland: while three years would correspond with our suggestion for the normal duration of debt arrangement schemes.

48. A declarator of unenforceability would prevent further enforcement proceedings on the creditor's application in which it was granted and both it and a declarator of partial unenforceability would preclude the Office from accepting subsequent applications by the same creditor or other creditors.[2] Both types of declarator would render the debtor notour bankrupt, and thus inter alia liable to sequestration or liquidation. It would be competent for the creditor, or a subsequent creditor, to apply to the Office for recall of the declarator on a material change in circumstances, for example, where the debtor obtained employment with attachable earnings or acquired assets.

(9) Multiple debt and insolvency

49. If, for the reasons stated above, priority between the competing creditors of a multiple debtor were to follow priority in time of the lodging of the creditors' applications, (except in the case of debt arrangement schemes such as we propose in our Memorandum No. 50) then it would follow that creditors would not be conjoined in poindings and consolidated earnings transfer orders in favour of two or more creditors would not be competent (except in conjunction with a debt arrangement

[1] See Judgments (Enforcement) Act (Northern Ireland) 1969, ss. 15 to 17 (as amended): see also Memorandum No. 48, paras. 1.22 and 1.26.

[2] See 1969 Act, s.17 (as substituted).

scheme). It would seem also to follow that the provisions for the equalisation of poindings and arrestments outwith sequestration and liquidation would be repealed.[1] These provisions are rarely invoked except in the case of arrestments of large funds, usually in commercial debt cases.

50. It would be for consideration whether provision should be made retaining, modifying or abolishing the special preferences of the Inland Revenue and local authorities for payment of arrears of taxes and rates out of the proceeds of other people's diligences.[2]

51. Where sequestration or liquidation supervened, diligence executed by the Office within the statutory period before sequestration or winding up would be rendered ineffectual in a question with the trustee or liquidator who would be entitled to recover any proceeds of diligence held by the Enforcement Office.[3] Further diligence by the Enforcement Office would be precluded by the sequestration or liquidation.

52. As we have seen, it is envisaged that a declarator of unenforceability would render the debtor notour bankrupt. A declarator would be a more stringent requirement for the constitution of notour bankruptcy than is provided by the present law under which the main precondition is the expiry of a charge without payment. It would be for consideration whether any other step in the modified diligence procedures should be treated as rendering the debtor notour bankrupt so that he became liable to sequestration, (or, if a company, liquidation), so that fraudulent preferences were cut down, and so that contractual provisions (eg standard security default clauses and termination clauses in hire-purchase agreements) came into operation.

(10) Recovery of admitted debts without decree?

53. It would be legislatively possible to introduce a procedure for the recovery and enforcement of admitted debts modelled on provisions recently enacted in Northern Ireland but not brought into operation.[4] On the creditor's application (intimated to the debtor) the Office would summon the debtor for examination as to whether he admits the debt and, if he does admit it, as to his means. The debtor could admit liability for a lesser sum if it was agreed by the creditor. The debtor could be taken to admit the debt if he did not pay, comply with the summons or notify the Office that he disputes the debt. If he

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[1] Bankruptcy (Scotland) Act 1913, s.10; and also adjudication, see Diligence Act 1661 and Adjudications Act 1672.

[2] The Crown's priority depending on Exchequer cause diligence would be abolished along with that form of diligence which is not now used.

[3] Bankruptcy (Scotland) Act 1913, ss.103 and 104; Companies Act 1948, s. 327.

[4] Judgments (Enforcement) Act 1969 (Northern Ireland), section 86A (inserted in April 1979).

did not admit the debt, (or claimed set-off or had a counter-claim) the application would be dismissed and the creditor would have to raise a court action.

54. Since the majority of debt actions are undefended, the effect would be to transfer a very large case-load from the ordinary courts to the Enforcement Office. It is difficult to see how the foregoing procedure would have advantages over the present system of court actions, and we doubt whether it should be incorporated into the Enforcement Office system.

APPENDIX D: SIMULATION OF LEGAL PROCESS AND HARASSMENT OF DEBTORS

1. In this Appendix, we discuss the law on simulation of legal process and extra-judicial harassment of debtors. A person licensed under the Consumer Credit Act 1974 to undertake debt collection would risk the revocation of his licence by the Office of Fair Trading if he engaged in these practices, but the Office does not have the means of policing debt collection agencies. It is difficult to obtain empirical information on the incidence of harassment of debtors in Scotland, and while it may be that, at present, it is not a very serious problem, it has been regarded as sufficiently serious in England to be made an offence, and in several other legal systems legislation has been passed regulating debt collection in a variety of ways.[1]

2. In England and Wales, the Payne Committee on the Enforcement of Judgment Debts observed:

> "... we are satisfied that some creditors are prepared to use any method and to go to unacceptable lengths to harass and intimidate debtors in order to collect their debts. We accept that creditors ought to be permitted proper latitude in their attempts to obtain payment of overdue debts: and we recognise that the relationship of creditor and debtor often engenders antagonism. After all allowances have been made, however, the conclusion is inescapable that some practices are employed with the object of instilling fear and panic in debtors, causing them anguish and driving them to desperation in trying

[1] Among the voluminous literature, regard may be had to the Payne Report, op. cit., paras. 1230-1234 (which dealt with England and Wales); Report by the Law Reform Commission of British Columbia on Debtor-Creditor Relationships Part I Debt Collection and Collection Agents (1971); Crowther Report on Consumer Credit, op. cit., paras. 6.10.27-29; Research Study by D St.L Kelly (for the Commonwealth of Australia Royal Commission of Inquiry into Poverty) on Debt Recovery in Australia (1977), Chapter 9; as to the position in the USA, see Sheinfield "Current trends in the restriction of creditors' collection activities" (1972) 9 Houston Law Review 615; Greenfield "Coercive Collection tactics - an analysis of the interests and the remedies" (1972) Washington University Law Quarterly 1; Scott and Strickland, "Abusive debt collection - a model statute for Virginia" (1974) 15 William and Mary Law Review 567; Ison, op.cit., pp.292-315.

to pay off their debts. Such creditors disdain the law, which they regard as inefficient or inadequate for their purposes, and endeavour to bypass it by using strong arm tactics or cunning devices. They meet criticism of their practices by affecting moral indignation at the failure of the debtors to honour their contracts."[1]

(a) Simulation of legal process

3. In our Memorandum No. 51, para. 5.25, we point out that impersonation of a sheriff officer is a criminal fraud under Scots law.[2] There may be other practices which do not amount to fraud but which nevertheless deceive or mislead debtors in an objectionable way. Such practices are criminal offences in other countries with similar social values. One such practice has been described by an Australian Law Commissioner as "the use of private documents which may mislead the debtors to whom they are addressed into believing that they emanate from an official source".[3] An example of such a document used in Scotland is set out opposite. This resembles the blue and red 'frighteners' criticised by the Payne Report.[4] Features of documents of this type are that the format and style of the printing resemble that of a document used in legal process, or at least conform to popular conceptions of legal documents; and the language is in the style of an official notice or warning. Such documents may not deceive persons of average education and intelligence but may well mislead less sophisticated debtors.

4. It is, of course, not in the least criminal for a person to threaten to raise a court action, or to threaten to execute diligence, to recover a debt which he thinks is legally due.[5] The debtor's safeguard is that if he is successful, the creditor must bear the expenses of the action, and the criminal law of extortion does not protect the debtor from such threats. Thus, in Silverstein v. H.M.Advocate[6] Lord Justice Clerk Thomson remarked[7] -

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[1] Op. cit., para. 1235.

[2] Donald McInnes and Malcolm McPherson (1836) 1 Swin. 198; cf. Rob. Millar (1843) 1 Broun 529.

[3] Kelly, op. cit., p.137.

[4] Op. cit., para. 1232.

[5] See, however, Gordon Criminal Law (1st ed.), p.649, who suggests that "it is extortion for A to threaten to sue B for a non-existent debt unless B pays him £X whether or not A is entitled to £X from B".

[6] 1949 J.C. 160, a case of 'threatening letters' which are normally prosecuted as extortion or, in common parlance, blackmail.

[7] At. p.163.

FINAL NOTICE

BEFORE PROCEEDINGS IN THE

SHERIFF COURT

For the Recovery of Debt

To .....

You are hereby notified

THAT unless the sum of £ ..... due by you to .....

is paid on or before ..... the .....

day of ..... 19 ..... proceedings will be taken against you without further delay.

Trusting you will see the advantage of settling this account and thereby avoiding the expense to which you will otherwise be liable.

Yours truly,

.....

If you prefer settling with .....

before going into Court, take this notice with you.

Dated this ..... *day of* .....

G. A. H. Douglas & Co. Ltd., Printers, 172 Hope Street, Glasgow

12m 12/71 51C

> "The extraction of money from people by certain means is criminal. Fraud is the obvious example. There the perpetrator induces the victim to part with his money by deception. In the case of threats the inducement is some form of pressure. Where the pressure consists in creating in the victim fear that, unless he yields, his position will be altered for the worse, it is criminal unless the pressure sought to be exerted by the law is legitimate. Legal process is such a form of pressure."

Indeed, effective demands for payment have the beneficial effect of saving the expense of court action and diligence.[1] What is or may be thought objectionable is the use by creditors or debt collectors of documents which appear to have official sanction or the backing of the courts or which give the misleading impression that a later stage in the process of debt recovery (informal demands - litigation - decree - diligence) has been reached than is actually the true position.

5. The practice of simulation by debt collectors of legal process is prohibited as a criminal offence or otherwise regulated by legislation in England and Wales, Canada, Australia and the United States. In England and Wales it is a statutory offence for a person, with a view to coercing payment, (a) falsely to represent himself to be authorised in some official capacity to claim or enforce payment or (b) to utter a document falsely represented by him to have some official character which he knows it has not.[2] In British Columbia, section 22(g) of the Collection Agents Act 1967 prohibited licensed collection agents from using, without lawful authority -

> "any summons, notice or demand or other document, expressed in language of the general style or purport of any form used in any Court in the Province, or printed or written or in the general appearance or format of any such form."

The Law Reform Commission of the province proposed the extension of this prohibition to persons generally and not merely collection agents. There is a wider provision in the Unauthorised Documents Act 1916 of South Australia

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[1] The pursuer in a court action should demand payment first since he must aver that the defender refuses or delays payment and that the action is therefore necessary.

[2] Administration of Justice Act 1970, s.40(1)(c) and (d): see also County Courts Act 1959 s.189 which impose criminal penalties for falsely representing documents to have been issued from a county court.

under which it is an offence to send or deliver a document which is intended or likely to convey to the recipient the impression that the document was issued by a court or tribunal. There are similar provisions in the United States.[1]

(b) Extra-judicial harassment of debtors

6. Apart from simulation of legal process, the question arises whether provision should be made to control or restrain unreasonable harassment by debt collectors generally. We have no firm evidence that such harassment occurs on any significant scale in Scotland but it is seen as a real problem in many other countries and legislation to control it has been passed in England and Wales, several Canadian provinces, Australian states and states of the USA.[2] The fact that at present there are few complaints in Scotland does not mean that harassment has not existed in the past and, more importantly, that it may not exist in the future. If the severity of diligence is lessened as a result of reform, then such practices could become a problem.

7. From official reports, research and case-law in other countries, it appears that, apart from practices which may mislead or deceive debtors, harassment can take a variety of forms. The debt collector may use vulgar, threatening or abusive language in communicating with the debtor or his family whether by telephone or personal visit. He may make repeated telephone calls at inconvenient times of the day or night, during Sundays or holidays, at times, incidentally, when diligence cannot under the common law be executed. He may spread, or threaten to spread, by various means, information about the debt to the debtor's friends, neighbours, relatives, employers, fellow employees, compilers of debtor 'black-lists' and the like, with a view to embarrassing or shaming the debtor into paying the debt.

8. In Scotland, as in other countries where this matter has been considered, there are various criminal sanctions and civil remedies scattered throughout the law which may be invoked by a debtor to curb or compensate for harassment. In the law of delict, damages may be obtained for assault, or threats of assault, and in certain circumstances for nervous shock. While there is no delict of invasion of privacy as such, solatium may be obtained for insults or affronts causing injury to feelings though the offending

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[1] E.g. in Virginia it is an offence for a debt collector to ultilise a communication which simulates legal or judicial process or to misrepresent or create false impressions concerning the true nature of his business, e.g. use of insignias or initials suggesting government involvement and impersonation of officer of the peace.

[2] See the literature cited at para. 1 footnote 1 above.

statement or communication was not made to, or in the presence of, third parties. In cases where communication is made to third parties, actions for defamation or verbal injury may be raised. Interdicts prohibiting molestation are available against, for example, personal visits or telephone calls putting the pursuer in a state of fear, distress or alarm. The criminal law of Scotland also affords protection against assault and threats of assault, which are common law offences, and there may be isolated statutory criminal provisions which would afford protection e.g. the Post Office Act 1969, s.78 (under which it is an offence to make grossly offensive, indecent, obscene or threatening telephone calls or telephone calls which are designed to cause annoyance, inconvenience or needless anxiety, and containing messages known to be false, or made persistently).

9. In general, however, these civil and criminal provisions only afford protection in extreme circumstances. Further, if control of debt collection practices is to be effective, debt collectors should be made aware of the type of conduct which infringes the law. The present scattered provisions can hardly be said to give notice to creditors and debt collection agents of the types of harassment practices which are prohibited.

10. In considering what legislative approach should be taken to prevent extra-judicial harassment of debtors, regard may be had to English law. The Payne Report in 1969 concluded that "society ought not to tolerate the infliction of unnecessary and unreasonable suffering even in the pursuit of just claims"[1] and that "there should be provision for making it unlawful to employ extra-judicial methods for the collection of debts, if they constitute undue harassment of a debtor which is not reasonably necessary for the protection of the interests of the creditor."[2] In implement of this recommendation the Administration of Justice Act 1970 section 40 (which applies only in England and Wales) provides -

> "40.-(1) A person commits an offence if, with the object of coercing another person to pay money claimed from the other as a debt due under a contract, he -
>
> > (a) harasses the other with demands for payment which, in respect of their frequency or the manner or occasion of making any such demand, or of any threat or publicity by which any demand is accompanied, is calculated to subject him or members of his family or household to alarm, distress or humilation;..."

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[1] Cmnd. 3909, paras. 1236 and 1244.

[2] Ibid., paras. 1238 and 1244.

Subsection (1)(a) is the general provision on harassment. Under subsection (2) a person is guilty of an offence under subsection (1)(a) if he concerts with others in harassment though his own conduct by itself does not amount to harassment. Subsection (3) provides that subsection (1)(a) -

> "does not apply to anything done by a person which is reasonable (and otherwise permissible in law) for the purpose -
>
> (a) of securing the discharge of an obligation due, or believed by him to be due, to himself or to persons for whom he acts, or protecting himself or them from future loss; or
>
> (b) of the enforcement of any liability by legal process."

The Younger Report on Privacy observed that the provisions of section 40 did not apply to Scotland because the 1970 Act as a whole did not apply to Scotland and remarked: "Whilst we have no evidence that invasion of privacy in the form of harassment of debtors is prevalent in Scotland we see no reason why similar protection should not be given in that country."[1]

11. We note that in recommending the enactment in British Columbia of a provision similar to section 40(1)(a), the Law Reform Commission of that province suggested certain modifications which merit consideration.[2]

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[1] Op. cit., para. 278.

[2] See Report on Debtor-Creditor Relationships, op. cit., para. 45 where the Commission suggest: "(a) The phrase 'coercing another to pay', in the English version, should be replaced by the phrase 'obtaining payment'. The Commission's view is that the English terminology may lead to an undesirably restrictive interpretation of the scope of the provision. (b) The phrase 'calculated to cause alarm ...' in the English provision should be replaced by the phrase 'likely to cause alarm ...', 'calculated' is a word of notoriously imprecise import in law and, if interpreted to mean 'intended', the provision will lose much of its force and value. Attention should be focused upon the conduct itself and not upon the actor's intentions in engaging in that conduct. (c) It should be made clear that persons other than the alleged debtor, such as his wife and family, can be harassed by attempts to obtain payment by the alleged debtor."

APPENDIX E: ENFORCEMENT IN THE REMOTE AREAS

1. In this Appendix, we describe the provisions of the Execution of Diligence (Scotland) Act 1926, the Remote Areas Diligence Payments Scheme (1959) and the representations made to us concerning the failure of that Scheme.

2. A short history of the enforcement problems in the remote areas is given by the McKechnie Report.[1] The scarcity of messengers and sheriff officers in the remote areas was created or aggravated in the 19th century by the loss of criminal business to the newly established police forces, by the virtual abolition of imprisonment for debt and by the concession to solicitors of powers of citation. The topic was then discussed by the Scott Dickson report (1904)[2] and the first Ashmore Report (1923)[3].

3. In implement of the latter Report the Execution of Diligence (Scotland) Act 1926 (as subsequently amended) makes the following provisions to deal with the problem:

(a) In any [county] in which there is no resident messenger, or in any of the islands of Scotland, a sheriff officer duly authorised to practise in any part of the sheriffdom comprising the county or island has all the powers of a messenger-at-arms in regard to the service of any summons, writ, citation or other proceeding, or to the execution of or diligence on any decree, warrant or order: section 1.

(b) Any arrestment on a summary cause warrant or decree may be executed by registered or recorded delivery letter: section 2(1)(a).

(c) A charge on a summary cause decree for payment may also be executed by registered or recorded delivery letter if the place of execution is (i) in any of the islands of Scotland, or (ii) in any [county] in which there is no resident sheriff officer; or (iii) more than twelve miles from the court granting the decree: section 2(1)(b).

(d) Where the sheriff on application is satisfied that no messenger or sheriff officer is "reasonably available" to execute a decree or warrant, he may authorise "any person whom he deems suitable (other than the applicant's solicitor) to execute it, and the person so authorised has for this purpose all the powers of messenger or sheriff officer: section 3.

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[1] Op. cit., para. 221 et seq.

[2] Report of the Departmental Committee on Sheriff Court Procedure Cd. 2287.

[3] First Report of the Departmental Committee on Messengers-at-Arms and Sheriff Officers (H.M.S.O., Edinburgh).

It seems that, at one time, some use was made of section 3 but recently it has not been operated.[1] Although it has been represented to us that the courts should use their powers under that section,[2] we understand that the sheriffs principal take the view that the strict control exercised by them in issuing commissions and the requirements for bonds of caution and discipline could not readily be applied on an ad hoc basis.

4. The McKechnie Committee's solution for the remote areas was an Exchequer subsidy[3] and their proposals were implemented by the non-statutory Remote Areas Diligence Payments Scheme introduced by the Scottish Home Department circular of 31 August 1959.

5. The object of the Scheme was to give financial assistance towards meeting the element in respect of travelling that is included in the officer of court's account when diligence has been done in a remote area. The principal features of the Scheme are -

(a) A "remote area" is defined as any place more than 30 miles from the nearest office of an officer of court commissioned to act in the district, or a place so situated that the officer would require, when he visited it, to remain overnight before returning to his office.

(b) The Exchequer contribution is based on the mileage charges payable for the officer and any witness, and on any travelling and reasonable subsistence expenses chargeable in addition. The creditor pays the whole mileage charges that would have been incurred if the diligence had been done only 30 miles from the office of the officer of court plus £3; and the Exchequer contribution is 80% of the remainder.

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[1] McKechnie Report, para. 227.

[2] The Council of the Law Society of Scotland observed to our Working Party on Diligence: "It is a matter of regret that the Courts appear to have made little or no use of this helpful provision. The Council has been informed that scattered throughout the Highlands and Islands are many retired police officers. The appointment of such men on a part-time basis, as Enforcement Officers, coupled with a more active use by the Courts of their powers under section 3 of the 1926 Act would, in the opinion of the Council, go far towards solving this very difficult problem." On the other hand, it has been represented to us that community disapproval of such activity by a resident might well be very strong indeed and that retired people cannot be expected to court unpopularity by acting as sheriff officers or witnesses.

[3] Op. cit., para. 248. The Committee defined "remote areas" to mean any district more than 30 miles from an officer's place of business or so situated that an overnight stay was needed (eg Mull/Oban). This covered large areas of the seven crofting counties and parts of the Border counties and Aberdeenshire (paras. 243-4). Almost all the organisations who gave them evidence made representations about the prohibitive cost of doing diligence in the remote areas because of the scarcity of officers there. (paras. 233-238).

(c) Payments are only made if the sheriff clerk of the district where the diligence is to be done approves an application under the Scheme before the journey is made. But approval does not imply that a payment will be made.

(d) The intention was that, so far as practicable, payments could be made only in respect of journeys to do diligence on a number of decrees, the cost of travelling being shared by several creditors.

(e) A payment would not be given if it appeared unreasonable in all the circumstances that Exchequer aid should be given, eg if it is known from experience that there is no hope of recovery.

(f) After the diligence was done, the officer's receipted account for the diligence is required to be submitted to the sheriff clerk and also any relevant information, including whether the expenses of the diligence have been received in full or in part from the debtor.

6. It is understood, however, that no payments have been made under the Scheme. Our Working Party on Diligence received evidence on the reasons for the complete failure of the Scheme. Some bodies thought that it received insufficient publicity and that many solicitors and others do not know about it. But it seems more likely that the disuse of the scheme is the cause (rather than the effect) of the general ignorance which now prevails.[1] Some bodies thought that the Scheme is "totally impracticable" while others saw no reason why it should not be made to work. The Law Society of Scotland observed that:

> "(legal) practitioners in the Highlands and Islands found (the Scheme) cumbersome and virtually impossible to operate because of the considerable volume of preliminary enquiry required and the necessity of obtaining consent of Sheriff Clerks and other officials. It was a condition of the Scheme that the Exchequer grant should be payable only in respect of journeys undertaken by a Sheriff Officer to do diligence on a number of decrees and that the costs should be shared by the various creditors. It is an indication of the inadequacy of this Scheme that a number of practitioners in the northern counties and the Islands are unaware of it and the Council are informed that virtually none would contemplate endeavouring to operate the Scheme."

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[1] The Scheme could scarcely have gone unnoticed by solicitors and others enforcing debts in the remote areas when it took effect: details were published in the Scots Law Times, the Journal of the Law Society of Scotland and the Scottish Law Review at the time. Better publicity could, however, be given by placing the scheme on a statutory basis or by arranging for its insertion in the annual Parliament House Book.