5 TYPES OF ENFORCEMENT

5.1 The various types of diligence are each considered in this Part and proposals for their improvement, clarification and simplification are brought forward.

(A) DILIGENCE ON THE DEPENDENCE

Nature and Purpose of Diligence on the Dependence

5.2 Diligence on the dependence is a provisional or protective measure which is used whilst a court action is ongoing, or just before an action is raised, but has not been finally disposed of. It allows the creditor (pursuer) in the action to take steps to preserve the debtor's (defender's) property so that it will be available to satisfy any claim eventually upheld by the court.

5.3 There are sound economic and public policy reasons for allowing creditors to use diligence on the dependence. Whilst in the great majority of cases people respect and comply with their legal obligations, in a significant number of cases they do not. In such cases compliance with the law may be achieved only after court action. Undoubtedly the effectiveness of using the courts to uphold the law would be undermined if, during the course of a court action, a party was able to dispose of money or other assets in order to avoid making a payment at the conclusion of those proceedings. Thus, diligence on the dependence is a necessary means of protecting those who are forced to use the courts to recover payments lawfully due to them and preventing disposal of assets in an attempt to defeat their legitimate rights.

Types of Diligence on the Dependence

5.4 A warrant to do diligence on the dependence of an action is sought by the pursuer in his summons or writ presented to the court. The court grants a warrant for diligence on the dependence upon commencement of the action. The warrant permits, but does not require, the pursuer to serve diligence on the dependence of the action.

5.5 There are two types of diligence on the dependence, arrestment on the dependence and inhibition on the dependence.

Arrestment on the Dependence

5.6 Arrestment on the dependence is available to pursuers in actions for the payment of money. The effect of an arrestment on the dependence is to 'freeze' either money or goods which are owed to the defender and are held by a third party. The arrestment is served on that third party, who must not make the payment or transfer the goods to the defender. Although the amount of money claimed by the pursuer is stated in the arrestment, the amount of money or the value of the goods frozen is not linked to that amount. The arrestment, therefore, 'freezes' all money or goods due to the defender which are held by the third party, the arrestee.

Inhibition on the Dependence

5.7 By contrast, inhibition on the dependence is used in relation to heritable property, usually land or buildings, rather than money or moveable property. Inhibitions are used

against heritable property in the ownership of the defender himself rather than property which is owed to him by a third party. An inhibition on the dependence affects all of the defender's heritable property regardless of the amount of the claim by the pursuer. It prevents the defender from dealing with his property in a way which might prejudice the claim of the pursuer, for example by selling the property and disposing of the proceeds.

Scottish Law Commission Recommendations

5.8 The Scottish Law Commission examined the substantive law and procedural arrangements for diligence on the dependence and made recommendations for reform in its 1998 *Report on Diligence on the Dependence and Admiralty Arrestments*.[256] The Report was a substantial work which, in addition to making recommendations for reform of diligence on the dependence, also addressed one of the significant types of diligence used on the dependence of a court action, admiralty arrestment.

5.9 The Commission identified a number of difficulties relating to the current operation of the law in this area. In general, these problems concerned a perceived lack of protection for defenders who could find themselves subject to diligence on the dependence. In particular, it considered that warrants for diligence on the dependence may be obtained too easily and that diligence on the dependence too often affects a disproportionate amount of a defender's assets. The ease with which diligence can be used, and the extent of the property which it can tie up pending further determination in the case, can give the pursuer who uses diligence on the dependence a disproportionate bargaining tool in his negotiations with the defender. This can be used to force a settlement which may be to the defender's detriment. Defenders may be further disadvantaged because it is difficult to halt diligence, by way of recall or restriction, after it has been used. The Commission considered that diligence on the dependence should only be available when necessary to protect the pursuer's interests. This is because of the significant effect of paralysing a defender's funds or property before the court has had the opportunity to take a view on the merits of the case.

5.10 The Commission's recommendations have not been implemented. The Executive intends to implement some of the Commission's recommendations and, in addition to making some supplementary reforms, the Executive's intentions are now set out in the paragraphs which follow. In doing so, some of the issues previously raised by the Commission are re-examined.

Availability in the Court of Session

5.11 Diligence on the dependence is currently available to pursuers in 'actions' in the sheriff court or Court of Session. However, there are other types of court proceedings which are not described as 'actions' but which can involve a claim for the payment of a sum of money. One example of this is petition procedure in the Court of Session, for example, where an individual seeks the judicial review of the activities of a public body. In such cases the petitioner may also wish to claim payment of a sum of money, such as damages. At present it is not possible to obtain warrant for diligence on the dependence of such proceedings[257] themselves and a petitioner must use the older procedure of letters of inhibition or arrestment on the dependence.

5.12 It is not clear why a warrant for diligence on the dependence should be available in actions but not so in petition procedure. The Executive agrees with the Commission that

[256] Scot Law Com No 164.
[257] *Ibid*, para 6.9.

"the court's power to grant a remedy should not depend on the accident of the form of the proceedings".[258]

5.13 It is likely that the number of petitions affected is very small and it is not clear that many petitioners are prejudiced by the more complex procedural rules for obtaining diligence on the dependence in a petition for judicial review. This is because almost all petitions for judicial review involve a challenge to a public authority. Such authorities are unlikely to attempt to dispose of their assets as a way of evading their eventual obligation to make payment and therefore the practical need for diligence on the dependence is reduced. Furthermore, the range of public authorities against which diligence could be used is limited by the longstanding rule that diligence cannot be used against the Crown.[259] However, it is possible that, at least in the short term, the number of petitions which include a claim for payment of damages may increase as a result of the implementation of the Human Rights Act 1998.[260] Many challenges brought under the Human Rights Act are likely to proceed by way of a petition for judicial review and section 8 of that Act empowers the court to make payment of damages where such a challenge is successful.

5.14 *The Commission recommended that warrant for diligence on the dependence should be available in petition proceedings where the petition contains a claim for payment of a sum of money other than expenses.* The Executive considers that this recommendation would simplify the system in a situation where there seems to be no compelling reason for preventing petitioners obtaining a warrant. It would make the procedure more accessible and efficient for pursuers seeking this remedy without significant resource implications. This applies irrespective of whether the actual numbers involved may be small although the prospect of numbers increasing makes the proposal more compelling. It is possible that petitioners would begin to apply for a warrant as a matter of course, increasing the numbers involved, however this would be in place of the court having to deal with the more involved arrangements for bills and letters of arrestment or inhibition on the dependence. The simplification of the clerk's task would be likely to balance any increased numbers of petitioners seeking warrant. *The Executive intends to implement the recommended reform.*

Availability in the Sheriff Court

5.15 Currently, the sheriff court has the power to grant a warrant for arrestment on the dependence but not to grant a warrant for inhibition on the dependence. A pursuer who wishes to inhibit on the dependence of a sheriff court action must obtain the warrant to do so from the Court of Session using an old procedure which involves preparation and presentation of a Bill and Letters of Inhibition. The Commission estimated that around 80% of all inhibitions on the dependence registered annually relate to actions in the sheriff court. [261]

5.16 The procedure for obtaining warrants to inhibit on the dependence of an action or in execution of a decree of the sheriff court is the same. Therefore, the procedures relating to use of inhibitions during and after sheriff court actions are currently consistent. It is possible, although unverifiable, that the more complicated procedure leads pursuers to consider more carefully whether warrant to inhibit on the dependence is absolutely necessary. The current rules may, then, lead pursuers in sheriff court actions to regard inhibition on the dependence as an extraordinary remedy.

[258] *Ibid*, para 6.11.

[259] The Crown Proceedings Act 1947, c44, s45, *Stair Memorial Encyclopaedia* Vol 8, para 128.

[260] c42.

[261] Scot Law Com No 164, para 2.90, based on 1996 figures (Source: Registers of Scotland Executive Agency). This equates, numerically, to around 2 700 inhibitions on the dependence each year.

5.17 However, the present procedure is inconsistent with that for obtaining warrant for inhibition on the dependence of Court of Session actions. In the Court of Session, warrant for inhibition on the dependence is granted simply as a matter of course, usually by incorporating a request for the warrant within the body of the summons. Further, the procedure for obtaining warrant for arrestment on the dependence of a sheriff court action is much more straightforward, warrant being granted almost automatically. There appear to be no good reasons of principle for these differences. The more complex procedure may disadvantage pursuers who suffer delays in obtaining their remedy and are put to additional expense.

5.18 *The Commission recommended that sheriffs should be given the power to grant inhibitions on the dependence.* The Commission reported that this proposal enjoyed the widespread support of those who attended its seminar on reform of diligence on the dependence in 1995.[262] The present system has been criticised by the McKecknie Report,[263] the Grant Report [264] and the SLC's Report.[265] The Executive considers that this recommendation would simplify the current system by enabling a pursuer in a sheriff court action to obtain warrant for all competent forms of diligence on the dependence from the same court. It would make the procedure more accessible and efficient for pursuers seeking this remedy without significant resource implications. *The Executive intends to implement the recommended reform.*

5.19 Summary cause and small claims actions make up around 80% of all actions for payment in the Sheriff Court.[266] Currently, arrestments on the dependence are competent in all actions for payment of money, regardless of how small the sum. As regards inhibitions on the dependence, it seems that the law is not clear as to whether inhibitions on the dependence are competent in summary cause actions (claims for a sum of up to £1 500) and small claims (up to £750).[267]

5.20 As a matter of consistency and fairness it is appropriate that the remedies afforded to pursuers by diligence on the dependence should be available equally to all, regardless of the sum sued for.

5.21 Under current arrangements the grant of a warrant could affect extremely large sums of money or valuable heritable property where the debt concerned was relatively small. A question about the ECHR requirement that any deprivation of property must be proportionate to the good to be achieved by that deprivation might then also arise. Accordingly, upon clarification, some further reform should be made to address these matters. Since it is intended to implement proposals to restrict the amount secured by diligence on the dependence to that sued for plus an amount in respect of interest and expenses,[268] this will also serve to address the foregoing issues.

5.22 Alternatively, the complete prohibition of diligence on the dependence, including arrestment currently available, in actions for less than £1 500 could be an option for reform. This would, however, discriminate against creditors who are owed smaller amounts of money and might fail to protect their legitimate property rights. It might also lead to claims

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262 *Ibid*, para 3.93. Attendees included the then Lord Advocate, representatives of the Sheriffs' Association and Sheriffs Principal Association, SMASO and a number of academic experts.

263 Report of the Departmental Committee on Diligence, Cmnd 456 (1958).

264 Report of the Departmental Committee on the Sheriff Court, Cmnd 3248 (1967).

265 Scot Law Com No 164.

266 Based on *Civil Judicial Statistics, Scotland, 2000* (2001). The percentage was similar in 1996 when the Commission considered the matter. (Scot Law Com No 164, para 2.97.)

267 Maher & Cusine, para 4.64.

268 See paras 5.41-5.46.

being made at inflated values in order to pass the minimum threshold for a warrant for diligence on the dependence.

5.23 *Whilst the Commission made no recommendation regarding clarification about the use of inhibition on the dependence in summary cause actions and small claims, the Executive considers that the law should be clarified to make its competence explicit.*

Use of Diligence on the Dependence

5.24 It is difficult to provide accurate information about the actual numbers of warrants for diligence on the dependence which are obtained. This is partly because of the distinction between the numbers of warrants granted and those actually used and partly because the same warrant may be used more than once. The Scottish Law Commission estimated that in 1996 around 100 000 actions for payment were begun in sheriff courts in Scotland.[269] Virtually all the pursuers in these actions would be able to obtain warrants for diligence on the dependence. Using statistics from the early to mid 1990s, the Commission in 1997 [270] *estimated* the total number of arrestments and inhibitions used on the dependence of Sheriff Court and Court of Session actions at around 10 000 per annum. Using the same approach on the recorded statistics for 2000, [271] the estimated figure would be 10 300. No statistics are available for recall or restriction of diligence on the dependence.

Procedure Prior to Commencement of the Principal Action

5.25 As the law stands, it is permissible for a pursuer to serve an arrestment on the dependence before he has formally served notice of his action on the defender, provided that the summons or initial writ is within a specified period. That period is between 20 and 42 days depending on the type of action.[272] In Court of Session actions there is also a requirement that the summons must call within a prescribed period.[273] Furthermore, in sheriff court actions, but not in the Court of Session, a pursuer must report to the court 'forthwith' the service of an arrestment on the dependence prior to the service of the action.[274]

5.26 The Commission took the view that, in principle, it should remain competent to use diligence on the dependence before the commencement of an action. Nonetheless, it considered that the current rules were somewhat confused and that there were unnecessary differences between Court of Session and sheriff court procedures. The Commission recommended that the period within which an action must be served on a defender after service of an arrestment on the dependence should be made 21 days in all types of actions. In communication with the Executive, it has also been argued that, because arrestment on the dependence is served prior to the service of the action on the defender, there can be excessive delay before the defender is able to apply for recall or restriction of the arrestment. This can be due to delays on the pursuer's part both in returning the execution of arrestment to the sheriff court and in serving notice of the action on the defender.

5.27 The Executive considers that a uniform period for service of the action in all cases would be a desirable simplification of the current system but that a shorter period, of within 5 days after service of an arrestment on the dependence, would benefit the defender. There is no reason why a pursuer who obtains a warrant and arrests on the dependence of an action

[269] Scot Law Com No 164, p 25.
[270] Scot Law Com No 164, para 2.100.
[271] *Civil Judicial Statistics*, *Scotland* , 2000, (2001) Table 5.4, this records only arrestments executed on the dependence.
[272] A.S 1993/1956, rule 6.2(1).
[273] Debtors (Scotland) Act 1838, c114, s17.
[274] A.S.1993/1956, rule 6.2(2).

should delay in serving that action on the defender. The Commission also recommended abolition of the requirement that service of an arrestment on the dependence prior to service of the action must be reported to the sheriff clerk. The Commission reported that, "applications for recall of arrestments are not prejudiced by the absence of a requirement to report the arrestment".[275] The Executive agrees that there appears to be no compelling reason to continue this practice. Indeed, the rule does not apply in Court of Session cases and it does not apply in cases of diligence in execution rather than on the dependence.

5.28 *The Executive intends to implement the Commission's recommendations, subject to reduction of the uniform period for service of an arrestment on the dependence to 5 days.*

Automatic Grant of Warrant for Diligence on the Dependence

5.29 Currently, warrants for diligence on the dependence are granted virtually automatically. In almost all cases a pursuer need only ensure that his application follows the appropriate form or style. The main requirement is the inclusion of a claim for payment of a sum of money other than expenses. The application is then checked by a clerk of court who grants the warrant. There is no examination or discussion of the merits of the pursuer's case or his overall chances of success, except in certain unusual circumstances in the Court of Session.

5.30 The current system is a speedy and effective means of preserving assets where a defender may be tempted to dispose of them before an action concludes. An element of surprise is achieved by the pursuer serving an arrestment or inhibition even before an action has been intimated. The automatic grant of a warrant without prior notice to the defender enables a pursuer to retain this element of surprise and makes diligence on the dependence effective.

5.31 However, the Commission considered that the consequences of this were disproportionate. In the case of a business, for example, the use of an arrestment, which freezes money which is otherwise due to the defender, can seriously affect cash-flow. Other indirect consequences may arise, such as the service of an arrestment potentially affecting the goodwill of a business or the confidence of the arrestee, who is often a customer of the business, in the defender. A defender whose business is badly affected by diligence may be more willing to settle an action to escape its effects even though he may have a strong defence to the action.

5.32 The Commission compared the availability of diligence on the dependence in North America, England and other European countries where different arrangements were in place.[276] The Commission also compared it with other protective remedies in Scots law, such as interim interdict and diligence in security of future debts which are not available unless a pursuer can show special circumstances justifying their use.[277]

5.33 In order to ensure observance of the principles of fairness and due process of law, the Commission recommended reform. Having considered different options for reform, *the Commission recommended a move to judicial consideration of the merits in all cases where warrants to do diligence on the dependence were sought instead of such warrants being granted automatically by a clerk of court.* This would involve more detailed scrutiny of applications for warrants, generally by a Court of Session judge or sheriff and probably involving a hearing at which either or both parties to the action were represented.

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[275] Scot Law Com No 164, para 6.19.
[276] *Ibid*, paras 2.47-2.49.
[277] *Ibid*, paras 2.50-2.59.

5.34 The Commission recommended preserving the possibility of surprising a defender, which may be necessary in some cases, by empowering a sheriff or judge to grant an application for diligence on the dependence without the defender being present, perhaps even on the basis of purely written submissions. This would, however, be discouraged and in most cases the defender would be given notice of the application and afforded the opportunity to oppose it at a hearing. A new test would be introduced which a pursuer would have to satisfy before a warrant would be granted. The pursuer would, firstly, have to demonstrate that there was a "real and substantial risk" that the eventual enforcement of any decree granted to him might be made impossible either because the defender was, or was likely to become, insolvent or because he was likely to dispose of, remove or conceal his assets. Secondly, having satisfied the first requirement, the pursuer would also have to show that it was reasonable for a warrant to be granted. In deciding this question of reasonableness, the sheriff or judge could consider the pursuer's prospects of success in the action and all other relevant circumstances. The court would have the power to refuse to grant a warrant for diligence on the dependence but, as a condition of that refusal, could require the defender to give some other form of security to the pursuer. This would be by way of caution (a guarantee) or by lodging an appropriate sum of money with the court.

5.35 These proposals had met with a mixed reaction on consultation. Whilst virtually all respondents agreed that reform of some kind was necessary, views differed widely on the nature and extent of the defects and appropriate reforms required to cure them. Opposition was primarily directed at the loss of efficiency in the current system by replacing simple and quick means with a cumbersome alternative for applicants. There were widespread concerns about it weighing heavily on judicial resources. A number of consultees' felt that there had been some exaggeration of the hardship caused to defenders by the present system. Others felt that the proposed changes would not solve the problems identified by the Commission unless it could be guaranteed that the judges would take a pro-active approach to the consideration of applications.

5.36 Possible ECHR implications were briefly referred to by the Commission although these were not analysed in detail in its Report. The Commission concluded that article 6, the right to a fair trial, was not relevant. Diligence on the dependence is an interim measure and does not involve the determination of civil rights required to engage this right. The Commission wondered whether there might be a risk that article 1 of Protocol 1, the right to property, might be relevant in so far as a warrant for diligence on the dependence amounted to controlling the defender's use of his property. Detailed examination of that article, in the context of inhibition on the dependence, was undertaken in the recent Court of Session case of *Karl Construction Ltd v Palisade Properties plc*. [278]

5.37 Article 1 of the first Protocol to the Convention provides that every person "is entitled to the peaceful enjoyment of his possessions". This right is not absolute and the state may interfere with a person's enjoyment of his possessions if it is in the public interest to do so and provided that the interference is lawful and proportionate to the public good to be achieved.[279] The existence of a system of interim protective measures for litigants is clearly in the public interest. The law of diligence on the dependence is clear and precise, being rooted in common law and developed and clarified over a period of years by the courts. The principal question is whether the current system enables a fair balance to be struck between the public interest in pursuers being able to recover debts and debtors' interests in not being unduly restricted in the use of their property for an excessive period.

5.38 The procedure afforded to defenders for recall, restriction or loosing of the diligence by motion is relatively straightforward and may be used speedily. The period which a

[278] Outer House opinion of Lord Drummond Young, dated 14 January although delivered 14 February 2002, unreported.
[279] *Venditelli v Italy* 1995 19 EHRR 464; *G S & M v Austria* No 9614/81, 34 DR 119 1983.

defender allows to elapse before seeking recall is a matter of his choosing. The grounds for recall are wide, although the Commission considered that these are in practice construed too narrowly and recommend reform which is discussed later.

5.39 The Executive has noted the divergence of opinion in relation to the Commission's recommendations. It has considered the arguments carefully and at some length. Significant change potentially involving substantial costs to the public purse is not to be undertaken lightly. This is particularly so where improvements may be achieved by other means. Diligence on the dependence is an essential measure although there are sound reasons for its reform. The Executive is concerned that the Commission's recommendation would replace arrangements at one extreme by those at the other. Since the principal aim is to reduce the adverse impact on defenders, the Executive considers that this should be achieved by other significant reforms. Including, in particular, restriction of the property attached to the value of the sum sued for, improvement of the grounds and procedures for recall, availability of compensation for loss suffered as a consequence of unjustified use of diligence on the dependence and prior hearings in appropriate cases. [280] Such reforms would strengthen current procedures and the safeguards available to defenders.

5.40 *Accordingly, in so far as proposed that in all cases there should be prior judicial consideration of the merits, the Executive does not intend to implement the Commission's recommended reform, preferring instead other options for reform.* These are discussed in following paragraphs.

The Amount Secured by Diligence on the Dependence

5.41 At present, no monetary or other limit of value is placed on a warrant for diligence on the dependence or on an arrestment or inhibition served under such a warrant. This means that where an arrestment is served the whole funds owed to the defender by the arrestee are frozen, not just the amount sued for. Similarly, an inhibition affects all heritable property of the defender even if it is worth far more than the amount sued for. In addition, a pursuer may obtain warrants for either or both an arrestment and an inhibition. The same warrant may be used more than once to serve arrestments on a number of different arrestees and the same pursuer may do both of those things in respect of the same debt.

5.42 Some high profile cases have been cited as examples of the unfairness of this system. The Commission cited an example from 1993, in an action for defamation against the Glasgow Herald, where a pursuer sought £750 000 in damages. By serving two arrestments he was able to arrest £2.4 million due to the Herald. The arrestments were eventually recalled by the court but only after the defender found caution for £400 000.[281] In the case of *Karl Construction Ltd v Palisade Properties plc* the effects of the inhibition on the dependence was considered to be especially serious because the land in question was used as the defender's stock in trade and was indivisible.

5.43 Uncertainty surrounds the ultimate disposal of a case and the amount of money which a court might order a defender to pay for the principal sum plus interest and expenses. An unrestricted arrestment will give a pursuer greater security but this may very greatly exceed what may be necessary or reasonable. The effect may be disproportionately detrimental to the defender's interests. In addition to the direct inconvenience and/or economic hardship caused to a defender, he may also suffer indirectly in strengthening a pursuer's bargaining position and forcing a defender into an early settlement of the case.

[280] At the time of finalisation of this paper for publication, detailed consideration of the recent case *of Karl Construction Ltd. V Palisade Properties plc* has not been possible.

[281] *Henderson v George Outram and Co. Ltd.,* 1993, SLT (OH) p 824.

5.44 The Commission's preferred option for reform was based on the assumption that its recommendation for a new system of discretion for diligence on the dependence would be in place. Its proposal was simply that the judiciary would restrict a warrant for arrestment on the dependence to particular funds or property when examining every case. In the case of actions to enforce an obligation *ad factum praestandum* (that is, an obligation to do a specific thing, e.g. fulfil a contract of sale) the warrant would be limited expressly to the particular heritable property to which the obligation relates. The Commission acknowledged that a difficulty in this area might arise where a judge was deciding *ex parte* applications, that is where the defender is not present and cannot dispute the pursuer's claim.[282]

5.45 An alternative proposal, which could be incorporated within the current arrangements, was suggested by the Commission in its Discussion Paper. It would limit the amount which could be caught by arrestments on the dependence, the limit being set by reference to a formula. This formula would take into account the sum sued for plus a proportionate amount for expenses and a sum representing interest. It was noted in the Commission's consultation that a formula based on the sum sued for could lead to pursuers making vastly inflated claims in order to secure arrestments over a larger sum. However, that possibility should be limited by other proposals in following paragraphs for strengthening the arrangements for restriction and recall and for a compensation rule. In cases involving particular heritable property, the warrant could be restricted to that property. This would require additional scrutiny on the part of clerks of court but would be relatively straightforward to administer and could be dealt with by a court official. The following proposals for strengthening the arrangements for restriction and recall and for a compensation rule would also assist in instances where heritable property was indivisible and used as stock in trade although additional provision in that regard may also be required.

5.46 The Executive proposes that the court should have the power, when dealing with an application for warrant for diligence on the dependence or for its subsequent restriction, to limit the warrant to particular funds or property or to exclude certain funds or property from the scope of the warrant. The court should have the power to restrict the amount which any arrestment can secure to an amount which it thinks appropriate having regard to the stated facts and the sum sued for.

Grounds for Recall or Restriction

5.47 After a warrant for diligence on the dependence has been used, it is possible for the defender in the action to obtain absolute recall or partial restriction of the diligence. In order to do so, the defender applies to the court and must prove that one of a number of grounds for recall or restriction exists. These grounds are that the diligence has been exercised incompetently or irregularly; that is ineffective or that it is "nimious (excessive) or oppressive".

5.48 It has been noted by the Commission and by other academic and judicial commentators that it can be extremely difficult to convince a court that one of these grounds exists. Also, that practitioners find it difficult to determine the kinds of circumstances which will persuade a court that the use of diligence has been nimious or oppressive.

5.49 In practice, the strict test applied by courts when considering applications for recall or restriction of diligence on the dependence means that it is almost impossible to obtain recall or restriction. This may have an excessively harsh impact on defenders. Further, the vague test applied by the courts makes it difficult to understand when recall or restriction might be available. It is thought that the numbers of applications for recall or restriction are low, perhaps because of the difficulties in obtaining recall or restriction.

[282] Scot Law Com DP No 84, para 2.147.

5.50 *The Commission recommended that the existing test of nimious and oppressive should be abolished and replaced with a new statutory test for recall or restriction of diligence on the dependence*. This should mirror the test applied by a court deciding whether or not to grant the original warrant. That is whether there remains a real risk that the defender is or will become insolvent or will dispose of his assets and that it would be unreasonable in all the circumstances to leave the diligence untouched. *The Executive intends to implement the Commission's recommendation.*

Liability of the Pursuer

5.51 A pursuer is not normally disadvantaged if he uses diligence on the dependence but eventually loses the action in relation to which the diligence has been used. It is said to be difficult to prove the narrow grounds upon which a court will make an award of damages for wrongful use of diligence.

5.52 The Commission took the view that the lack of liability encourages the excessive use of diligence on the dependence because "a pursuer generally has nothing to lose, and everything to gain".[283] It argued that this can lead to "innocent" defenders being left in the position where they have successfully defended the action raised by the pursuer but have nonetheless been severely harmed by the use of diligence on the dependence. They will often have no recourse against the pursuer.

5.53 *The Commission recommended introduction of a new rule whereby a pursuer who fails in his action against the defender would be required to compensate him for the financial losses he has suffered because diligence on the dependence was used against him*. It referred to examples of similar rules in other legal systems, including in England and Wales.

5.54 The Commission had originally suggested the imposition of a strict liability rule, under which principle a pursuer would automatically become liable for the whole of the defender's loss caused by diligence on the dependence if he lost the case against the defender. This option was rejected by many of the respondents to the Commission's Discussion Paper [284] in favour of more limited liability. Some other respondents felt that even where the pursuer is successful he should pay compensation in certain circumstances, for example if he had deliberately misled the court about the need for diligence.

5.55 The Commission's recommendation would require a pursuer to pay compensation if he obtained or executed diligence on the dependence wrongfully or where it was unreasonable for him to apply for the warrant. This rule would apply regardless of the eventual outcome of the case and would allow compensation for third parties, such as an arrestee, affected by wrongful diligence. It considered such a change necessary on the ground that, on principle, such as diligence on the dependence should be used as an extraordinary remedy at the applicant's risk.

5.56 The Executive considers it desirable that individuals should not be deterred from using legal remedies through fear of losing a case, which they in good faith believe to be strong, and becoming liable in damages. Imposing this risk on pursuers may lead to debtors defaulting on their obligations with greater impunity. Nonetheless, since it is intended to retain the current but improved system for granting of warrants, the introduction of a compensation rule might result in greater self-regulation whereby pursuers would, themselves, examine more carefully the propriety of or need for diligence on the dependence. *The Executive intends to implement the Commission's recommendation.*

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[283] Scot Law Com No 164, para 3.56.
[284] *Ibid*, para 3.59.

Diligence on the Dependence of Corporeal Moveables

5.57 The Scottish Law Commission noted that there was "a gap in the provisional and protective measures available under Scots law in so far as there is no means for attaching articles of the defender's movable property in his possession on the dependence of an action for payment".[285] It sought views on whether the gap should be filled in its Discussion Paper and, having received support on consultation, made recommendations for reform in its Report. It is not necessary to rehearse the detail of these again here.

5.58 However, since the Commission's Report was published in March 1998, the Abolition of Poindings and Warrant Sales Act 2001 has been passed. Commencement of that Act has been delayed to enable legislation for alternative arrangements to be implemented. Proposals for an alternative were recommended by an independent Working Group in its Report *Striking the Balance-a new approach to debt management*. It was noted that, the Report having received very widespread support on consultation, the Executive advised that it intends to implement the group's recommendations.[286]

5.59 Should any such legislation pass into law, it would be appropriate for provisional and protective measures to be applied to it. In that event, the detailed recommendations made by the Commission would require adaptation. Having regard to these developments, the Executive wishes to seek further views on this.

Cross-Border Arrestments on the Dependence (and in Execution)

5.60 Very often, arrestments, whether on the dependence of an action or in execution of a decree, are served on a defender's bank account. This is on the basis that the funds held by the bank are considered to be monies owed by the bank to the account holder. It may be that the bank account is the only asset which the pursuer is able to arrest. Problems arise for a pursuer where he does not have full information about the defender's bank account. This is particularly so where he is aware of the bank but not of the location of the branch at which the defender's account is held. Most UK banks have branches both in Scotland and in the rest of the UK.

5.61 It was held in the sheriff court case of *Stewart v The Royal Bank of Scotland plc,* [287] that where a defender's account is held at an English branch of a bank, but the pursuer serves an arrestment on a Scottish branch of that bank, the arrestment will not 'catch' the defender's account. The reasons for the decision, in part, concerned English banking law and in particular, the doctrine of the localised character of banking contracts, i.e. the idea that a customer makes a contract with only one specific branch of a bank. The sheriff expressed regret at the conclusion to which he felt bound to arrive. He noted that, although the pursuer could register and enforce a decree in England, the procedure for doing so was expensive and cumbersome. He commented that the doctrine concerned might be considered to be out of date given "modern conditions of automated accounting and electronic communication".

5.62 Scots law does not impose any obligation on a bank to disclose at which branch a customer's account is held. The rule in *Stewart* can cause difficulties for creditors and may fail to take account of modern commercial realities. Businesses and individuals often have multiple bank accounts, at different branches of the same bank and in different jurisdictions. Funds are transferred quickly and easily on a regular basis.

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[285] *Ibid*, para 4.1.

[286] Para 1.7.

[287] *Stewart v The Royal Bank of Scotland plc,* 1994, SLT (Sh Ct) p 27.

5.63 Reform of this area of the law could be achieved in one of two ways. The first option would be to impose an obligation on banks to disclose to a pursuer holding a warrant for arrestment the details of the defender's bank account, including its location. The second option would be reform of the rules of banking law to allow arrestments served at one branch of a bank to attach funds held at another branch and in another jurisdiction. The latter option might be more attractive to banking interests but would require formulation of suitable cross-border arrangements with banking interests and the UK government. The Executive intends to take this forward as part of the proposals for access to information. [288]

Forms

5.64 After a warrant for arrestment on the dependence is obtained, the arrestment does not become effective until a schedule of arrestment is properly served on the arrestee by an officer of court. Similarly, an inhibition on the dependence must be served on the party to be inhibited, again by an officer of court. It has been noted that, "the style of arrestment is archaic, and this sometimes confuses the arrestee as to his position".[289] This style, and that of the schedule of inhibition served on the party inhibited, is not statutory but a matter of accepted legal practice. The problems relating to the language and style used in diligence are not limited to arrestments and inhibitions on the dependence. This is discussed in Part 7.

Miscellaneous

5.65 The Scottish Law Commission looked at the competition between diligence and floating charges, with particular reference to the meaning of "effectually executed diligence" in the legislation dealing with floating charges. [290] The Commission took the view that it would be preferable if the ranking of diligence were achieved by judicial development rather than legislation. It did however go on to say that legislation would be the better vehicle for the dealing with the meaning of "effectually executed diligence" in the context of the law relating to floating charges. Floating charges are not within the remit of this paper and fall to be considered separately in the context of possible reform in that area of law.

5.66 The Scottish Law Commission made further recommendations for modernisation, simplification or clarity of this area of the law. *The Executive intends to implement the following further recommendations without any adjustment.* These proposals are not discussed in detail by this paper.[291] The following list summarises these, excluding those relating to admiralty arrestments which are dealt with in Part 5B.

> The procedure for obtaining a warrant for diligence on the dependence should be reformed and should, as far as possible, be the same in the Court of Session and in the sheriff court.[292]
>
> The general reforms proposed by the Commission should also apply to diligence on the dependence securing future and contingent debts.[293]

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[288] See Part 3, paras 3.76-3.82 and 3.113.

[289] *Stair Memorial Encyclopaedia*, Vol 8, para 258.

[290] Scot Law Com No 164, paras 9.10-9.23; see also *Squaring the Circle: Revisiting the Receiver and "Effectively Executed Diligence"*, Wortley, The Juridical Review, Part 5, 2000.

[291] *Ibid*, Pt 10: Summary of Recommendations (pp 209-229).

[292] *Ibid,* recommendation 19.

[293] *Ibid,* recommendation 23.

The court should have a broad discretion to award or refuse the expenses of obtaining or opposing the grant of a warrant for diligence on the dependence and of executing an arrestment on the dependence. Nonetheless, there would be a general presumption that a pursuer would be entitled to the expenses of diligence on the dependence.[294]

It should be made clear that a person applying for restriction or recall of diligence on the dependence of a sheriff court action should apply for that restriction or recall to the sheriff in whose court the action is taking place.[295]

Letters of loosing arrestments should be abolished and the Arrestments Act 1617 should be repealed. Loosing as a separate type of order or legal concept should be abolished in relation to arrestments of non-maritime subjects.[296]

Warrants for diligence on the dependence should not be available in actions in which the only monetary claim is for expenses.[297]

Broadly speaking, arrestments, both on the dependence and in execution, should expire after 3 years.[298]

The diligence of adjudication in security of future or contingent debts should be abolished.[299]

5.67 The Scottish Law Commission consulted widely before issuing its Report. It is not considered necessary or appropriate to re-consult on these matters. The Executive does not intend to implement the recommendations contained in the Commission's Report in full. Consultees' views on the intended approach would be welcomed and consultees are invited to indicate their support for the reforms proposed.

Q. 5A. 1 Consultees are invited to comment or to indicate their support for the reforms proposed.

Q. 5A. 2 In the event that alternative arrangements for attachment of corporeal movable property pass into law, should provisional and protective measures be applied?

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294 *Ibid,* recommendation 24.
295 *Ibid,* recommendation 25.
296 *Ibid,* recommendation 26.
297 *Ibid,* recommendation 27.
298 *Ibid,* recommendation 28.
299 *Ibid,* recommendation 29.

(B) ADMIRALTY ARRESTMENT

5.68 Admiralty arrestment is a significant type of diligence permitted on the dependence of an action. As part of its wider consideration of diligence on the dependence, the Scottish Law Commission examined admiralty arrestment in its *Report on Diligence on the Dependence and Admiralty Arrestments*.[300] The Executive's intentions regarding the Commission's recommendations are set out in the following paragraphs.

Nature and Purpose of Admiralty Arrestment

5.69 Admiralty arrestment concerns the arrestment of ships and cargo on board ships. The arrestment of ships and cargo on board ships differs from arrestment on the dependence generally in that the ship does not require to be in the hands of a third party in order to be arrested. It can be arrested in the hands of the owner, for a debt due by the owner. Arrestment of a ship prevents it sailing to its next destination until either the arrestment is recalled, or adequate alternative security is provided. The physical act of carrying out the arrestment is performed by officers of court. The court has power, if specific averments are made in the summons seeking warrant to do diligence on the dependence, to grant warrant to dismantle any part of a ship to prevent her sailing, but in modern Court of Session practice this is a remedy that is rarely exercised.

5.70 Ships trade world-wide, and are often now owned by one ship companies registered offshore. Unlike other assets, they are unlikely to be static in one place, or even one country or continent, for much longer than it takes them to load and discharge their cargo. Accordingly, the ability to arrest a ship in an appropriate jurisdiction, in order to secure a legitimate claim, is an important consideration for international trade generally. The Executive does not believe that Scotland should be a less favourable jurisdiction within which to arrest than others.

Background and Current Law

5.71 There are three types of Admiralty arrestment. An **arrestment on the dependence** may be used to secure a claim directed against the owner of the ship, or shares in the ship,[301] with the speciality that the arrestment does not require to be in the hands of a third party. An **arrestment *in rem*** is an arrestment carried out to enforce a claim against the ship itself or against some other piece of maritime property. It is enforceable against the ship, irrespective of ownership. Three common examples are claims in respect of salvage of a ship, claims arising out of a collision, and claims which a crew member has for his wages arising out of service on a particular ship. Arrestment *in rem* also founds jurisdiction against the vessel.[302] An **arrestment to found jurisdiction** may be used to establish jurisdiction in Scotland, but it does not have the effect of detaining the vessel. [303] Its sole effect is to establish jurisdiction, and if it is not followed by an arrestment on the dependence, then the vessel will be free to sail.

[300] Scot Law Com No 164, Pts 7-8, and recommendations 51-77.

[301] Always provided that the claim is one which falls within s47(2) of the Administration of Justice Act 1956, c46.

[302] s47(3) also provides certain other categories of cases in which, by virtue of the statutory provision only, an arrestment *in rem* may be executed.

[303] An arrestment to found jurisdiction does not create a *nexus* over the vessel arrested.

5.72 The United Kingdom is a signatory to the 1952 Brussels Arrest Convention,[304] which was introduced into Scots law by the Administration of Justice Act 1956. [305] An exhaustive list of claims in respect of which a vessel may be arrested is contained in section 47(2) of the 1956 Act, which is derived from the Brussels Arrest Convention. Unlike arrestments on the dependence generally, arrestments of vessels can only be carried out in relation to a claim which falls within the list contained in section 47(2).[306]

5.73 It was considered necessary to update the provisions of the 1952 Brussels Arrest Convention and a new International Convention on Arrest of Ships was adopted following a diplomatic conference in Geneva.[307] Before the UK decides whether to ratify the 1999 Geneva Arrest Convention, it is intended that a joint consultation exercise will be conducted by the Department for Transport, Local Government and the Regions and the Executive. Account has been taken of the Geneva Convention in considering the Scottish Law Commission's recommendations in this area.

Scottish Law Commission Recommendations

5.74 The Commission made a number of recommendations to clarify the use of terminology in respect of maritime claims, and to harmonise the provisions for admiralty arrestments in the Court of Session and the Sheriff Court.[308] These recommendations broadly seek to ensure that the admiralty jurisdiction of the court is regulated by statute; that the procedure in the Court of Session and sheriff court is based on the same model; to make it clear that the time of the execution of the arrestment is the time at which ownership is tested; and for retention and clarification of certain existing areas of law, including the definition of "ship". *The Executive intends to implement the reforms recommended in these recommendations.*

Automatic Grant of Warrant for Diligence on the Dependence

5.75 The Commission recommended that a warrant for a statutory arrestment *in rem* should be a discretionary remedy rather than an automatic grant of warrant for diligence on the dependence.[309] Also that warrant to arrest a ship on the dependence should be treated in the same manner as all other warrants to arrest on the dependence. [310] In line with the proposals in Part 5A, *the Executive does not intend to implement the Commission's recommended reform.*

Subsequent Arrestments

5.76 Sister ships are those which are owned by the same legal entity. Although a claim may arise in relation to one ship, it is competent to arrest another ship owned by the same entity to obtain security for the claim. The Commission made recommendations in relation to re-arrest of the same ship or arrestment of a sister ship on the dependence of the same claim.[311] Part of the recommendation followed, broadly, terms of the Brussels Arrest

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304 International Convention for the Unification of Certain Rules relating to the Arrest of Seagoing Ships 1952.

305 c46, Pt V, ss 45-51, and 57.

306 For recent consideration, see decision of Lord Hamilton in *Tor Corporate A.S. v China National Star Petroleum Corporation* 27 July 2000, (unreported).

307 12 March 1999.

308 Recommendations 51-57, 60, 63, 65, 66, 67, 68 and 69 (2-4) and 70.

309 Recommendation 58.

310 Recommendation 59. See discussion at paras 5.29 -5.40.

311 Recommendation 61.

Convention for this purpose.[312] This could result in a creditor, who has arrested a ship of low value in relation to the value of his claim, being prevented from obtaining adequate security by the arrestment of more than one vessel. Accordingly, whilst the Executive considers that judicial control over such subsequent arrestments requires to be maintained, in order to balance the interests of the creditor and the shipowner, *it is intended to implement the recommendation subject to a requirement of cause shown*. Thus, an application would have to be made to the court for authority to arrest again on the original warrant. Intimation to the ship owner would not be required, in line with the view, mentioned in paragraph 5.30 that the element of surprise is important.

Liability of the Pursuer

5.77 *It is intended to apply the Commission's recommendation in relation to liability of the pursuer equally to admiralty arrestments on the dependence as to diligence on the dependence generally.*[313] However, consultees' views are sought regarding the appropriate test to be applied for a pursuer's liability in damages as a result of his use of diligence on the dependence. The Commission proposed that part of the test should be based on it having been unreasonable to apply for the warrant. This differs slightly from the wording incorporated into the Geneva Convention.[314] Views are sought on whether the appropriate test should be whether the diligence was "unreasonable" or "wrongful or unjustified".[315] Views are also sought on whether a distinction should be made with arrestments *in rem* because they are a necessary part of an action *in rem*. The Commission also proposed that this recommendation should apply equally to cases where a statutory arrestment *in rem* is permitted, under section 47(3) of the 1956 Act, and *the Executive proposes to implement this recommendation.*

5.78 In line with the Executive's intentions for diligence on the dependence generally, it is not intended to provide for the provision of security by the pursuer, as a condition of the grant of a warrant to arrest, or the maintaining of an arrestment of a vessel once executed.

5.79 The Commission recommended that the test in relation to an arrestment *in rem* should be whether the pursuer had acted unreasonably and without good cause.[316] *The Executive intends to implement this recommendation.*

Service of the Summons

5.80 It is acknowledged that the nature of ship arrestments, as discussed above, means that the defender, and perhaps also the pursuer, may not have places of business within the jurisdiction of the Scottish Courts. Their dispute is normally subject to the Court's jurisdiction only by virtue of either an arrestment *in rem* or an arrestment to found jurisdiction. In these circumstances the implementation of the recommendation in relation to service, discussed in paragraphs 5.25 to 5.28, may result in admiralty arrestments becoming almost worthless as it will not be possible to serve the writ abroad within the five day period. This is because of the requirements for service of documents abroad, which provide for translation into the appropriate language and thereafter service in accordance with the law of the country concerned. The reality of commercial practice is that security is often provided by the owners of an arrested ship very quickly after the arrestment, and arrangements may thereafter be made for acceptance of service. If, however, that is not the case, then a

[312] Article 3(3).

[313] Recommendation 6. See paras 5.51-5.56.

[314] The Geneva Convention formulation had been objected to by the UK delegation at the diplomatic conference at which the Geneva Convention was adopted.

[315] Scot Law Com No 164, paras 7.111-7.124.

[316] *Ibid*, paras 7.120 -7.122 and recommendation 62(2).

pursuer could be prejudiced by the inability, despite the use of his own best endeavours, to serve within the five day period envisaged.

5.81 Views are, therefore, sought on two alternative options in relation to admiralty arrestments on the dependence. The first option is that provision could be made to authorise service of the summons on the master of the vessel, on the basis that such service shall be deemed to be service on the owner, or demise charterer, as the case may be. Generally speaking the master will be the agent of either the owner or the demised charterer.[317] The second option is to make specific provision to extend the five day rule in relation to admiralty arrestments and provide for an automatic period of, say, 21 or 42 days, with an additional right to apply to the court to extend that period provided that the pursuer can be shown to have acted with reasonable diligence in instructing service during that period.

Arrest of Sister Ship

5.82 The Commission made recommendations in relation to the re-arrest of a ship or the arrestment of a second sister ship on the dependence of the same claim.[318] The recommendation was based on the assumption that an application would require to be made to the court for a new warrant. The Brussels Convention simply requires there to be "good cause for maintaining that arrest",[319] whilst the Geneva Convention has an expanded provision which permits such second arrestment if the security already provided is inadequate.[320] Views are sought on whether the Commission's recommendations should be implemented, subject to a requirement of good cause or inadequate security or both.

Judicial Sale of Demise Chartered Ships

5.83 The views of consultees are also sought on whether, and if so to what extent, the judicial sale of vessels should be regulated by statute. At present the procedure is contained in the rules of the Court of Session.[321] Representations have been made to the effect that the procedure contained in the Rules of Court does not operate as well in modern commercial practice as it might do. The Commission made recommendations in relation to certain aspects of the judicial sale of ships arrested in respect of claims against demise charterers of ships, although the Commission's draft Bill made provision for certain further regulation of the actual procedure by way of subordinate legislation.[322]

Care of Ship under arrest and her Crew

5.84 At present in Scotland when a vessel is arrested, the pursuer has no responsibility for the care of the ship or her crew whilst under arrestment. In certain circumstances, arresting pursuers have made arrangements to ensure the vessel is not imperilled, and that any crew necessary to keep her safely alongside are cared for. These circumstances have tended to be in circumstances where the owner of the vessel has simply abandoned it when it has been arrested. In England there is an Admiralty Marshal, who is the public official responsible for the execution of the arrestment and subsequent administration of the arrestment and care of the vessel whilst under arrestment. He may incur cost to maintain the ship whilst she is under arrestment and this may include the cost of crew members

[317] A.S. 1994/1443, rule 46.4 makes limited provision for the calling of the master of the vessel as a defender representing the owners.
[318] Recommendation 61.
[319] Article 3(3).
[320] Article 5.
[321] Rule 46(5).
[322] Recommendation 74.

necessary to keep the vessel safely alongside. The Admiralty Marshal's charges and expenses form a first charge on the proceeds of any judicial sale of the vessel. In Scotland, it is understood that such instances are infrequent. However, views are sought on whether the problem in relation to the crews whose owners have deserted them is such that specific legislative provision requires to be made for them, and whether this would prejudice the rights of creditors unnecessarily.

Arrestment on the Dependence of Demise Chartered Ships

5.85 A demise charter of a ship is essentially one in which the charterer becomes, to all intents and purposes, the owner of the ship for the period of the charter. He has, during the duration of the charter, the right to full possession and control of the ship. The nearest analogy would be a full repairing and insuring lease of heritable property.

5.86 In England and Wales an arrestment of a ship may be executed where the demise charterer is the person who would be liable for the claim.[323] Demise charters are now common in modern shipping. There appears to be no good policy reason either to maintain a difference from the situation in other UK jurisdictions (the position in England and Wales is in accordance with the Brussels Arrest Convention 1952).[324] A creditor should not be deprived of a remedy against his debtor simply because of the way the debtor has chosen to arrange his affairs.

5.87 The Commission recommended that arrestment on the dependence of a ship, which is demise chartered, should be permitted where, at the time of the execution of the arrestment, the defender is the demise charterer of the ship.[325] The Geneva Arrest Convention provides that this remedy be available only where the defender is the demise charterer **both** at the time when the maritime claim arose **and** when the arrestment is effected,[326] which is in accordance with the Commission's recommendation. *The Executive intends to implement this recommendation.*

Demise Chartered Ships

5.88 The Commission also recommended that if a vessel had been arrested on the dependence of a claim against a demise charterer, and the claim was subsequently established, it should be capable of being converted into an arrestment which will permit the pursuer to sell the ship under the authority of the court.[327] The Commission noted that the procedure would require to be governed by the rules of the Court of Session. *The Executive intends to implement this recommendation.*

5.89 The Executive also intends to implement further recommendations regarding arrestment of a third party's ship to found jurisdiction in an action against a demise charterer; regarding competition between arresting creditors of the owner and demise charterer; and concerning ranking in sequestration.[328]

Q 5B. 1 Consultees are invited to comment or to indicate their support for the reforms proposed.

[323] In an action *in personam.*
[324] Article 3(4).
[325] Recommendation 73.
[326] Article 3(1)(b).
[327] Recommendation 74.
[328] Recommendations 75-77.

(C) DILIGENCE AGAINST EARNINGS

5.90 The 1987 Act had introduced a new system of continuous arrestment against earnings to replace the previous system of repeated single arrestments against earnings. Arrestments against earnings enable a creditor to obtain payment by making deductions from a debtor's wages or salary at the point of payment by the employer.

5.91 An arrestment against earnings can be used only where decree has already been pronounced against the debtor and either no time to pay direction or order is in place or such a direction or order has been breached by the debtor. The 1987 Act introduced three types of arrestment against a debtor's earnings:

- an earnings arrestment,
- a current maintenance arrestment
- and a conjoined arrestment order.

5.92 In addition to the three types of arrestment against earnings provided for by the 1987 Act, further provision for deductions to be made from an employee's earnings has also been made in relation to specific types of debt. The legislation relating to child support provides for a deduction from earnings order for recovery of child support due under a maintenance assessment. Deduction from earnings orders are also the standard method of recovery of some types of student loans.

Summary of Current Law

Earnings Arrestment

5.93 An earnings arrestment is the most commonly used of the three types of arrestment against earnings. It can be used only after the expiry of a charge for payment which has been served on the debtor [329] which gives the debtor 14 days notice that the creditor intends to use some sort of diligence. After expiry of this period a creditor may instruct an officer of court to serve a schedule of arrestment on the debtor's employer and must also provide the debtor himself with a copy of the schedule where it is reasonably practicable to do so.[330]

5.94 When served with a schedule of arrestment, the employer must make deductions from the debtor's earnings and forward the amount of those deductions to the creditor. The amount of the deduction depends on how much the debtor earns, the provisions of the 1987 Act being intended to ensure that a debtor retains a certain minimum level of income which cannot be affected by the arrestment. Statutory tables, which were recently updated, provide the formula by which the employer must calculate the total amount to be deducted. [331] The Executive intends to update the statutory tables on a three yearly interval on the basis of changes in the average earnings index. [332] Different tables apply depending upon whether the employee is paid daily, weekly or monthly. The employer may, although he is not required to, charge the debtor a fee for operating the earnings arrestment. The fee is chargeable each time the deduction is made, i.e. each week if the employee is paid weekly or each month if paid monthly. The fee, which may be varied, has remained at 50p since the 1987 Act came into force in 1988.[333]

[329] See Part 6, para 6.23.
[330] 1987 Act, s70.
[331] *Ibid*, s49 and Sch 2 as amended by SSI 2001/408.
[332] This accords with a recommendation of *It Pays to Pay,* para 87-88.
[333] 1987 Act, s71.

5.95 The earnings arrestment remains in place until the debt is paid off, the employee changes employment, or the creditor recalls or abandons the arrestment.

Current Maintenance Arrestment

5.96 A current maintenance arrestment, as the name suggests, may be used to enforce an ongoing maintenance obligation. Like an earnings arrestment, the current maintenance arrestment is served on the debtor's employer and results in deductions from earnings. Maintenance is a periodical sum payable under a maintenance order. A maintenance order may be any one of a list of orders specified by an Act, such as an order for payment of a periodical allowance on divorce or on the granting of a declarator of nullity of marriage.[334] A current maintenance arrestment cannot be used until the debtor is in arrears of a sum equivalent to one instalment of maintenance.[335]

5.97 The sum to be deducted under a current maintenance arrestment is calculated differently from those deducted under an earnings arrestment. It is based upon a daily rate of maintenance which is multiplied by the number of days in the appropriate pay period, i.e. 7 days where the employee is paid weekly. However, there is a limit to the amounts which may be deducted, equal to £10 per day.[336] This is on the basis that the debtor must be left with a fixed subsistence level of earnings. As a result, the total daily rate may not be recovered by the creditor. As is the case with earnings arrestments, the employer may deduct a fee of 50p from the debtor's earnings every time a deduction is made under a current maintenance arrestment.

5.98 A current maintenance arrestment continues in force until the obligation to pay maintenance ceases or is superseded by another order, the creditor recalls or abandons the arrestment, or the debtor changes employer.

Priority between Earnings Arrestment and Current Maintenance Arrestment

5.99 There is a general rule that only one diligence may be used against a debtor's earnings at any one time, with one exception. Where one earnings arrestment and one current maintenance arrestment have been served on an employer in respect of the same debtor, the employer may operate both arrestments. However, where the debtor's net earnings are not sufficient to meet his liabilities under both arrestments, the employer must operate the earnings arrestment first. After doing so, any remaining available earnings are directed towards the current maintenance arrestment.[337]

Conjoined Arrestment Order

5.100 Arrestment against earnings becomes more complex when a number of creditors want to arrest the earnings of the same debtor. In general, only one diligence can be used against a debtor's earnings at any one time. The general rule against multiple diligences could disadvantage creditors where additional creditors want to execute arrestments against earnings but find that one is already in place. In this situation the additional creditors can apply to the court for a conjoined arrestment order. This applies equally to a maintenance creditor who can conjoin with an existing current maintenance arrestment.

5.101 Where a conjoined arrestment order is made, the arrestment against the debtor's earnings which is already in force is recalled. It is then replaced by a new conjoined

334 *Ibid*, s106.
335 *Ibid*, s54.
336 *Ibid*, s53(2)(b) as amended by SSI 2001/408, reg 2.
337 *Ibid*, s58.

arrestment order which requires the employer to make deductions from the debtor's wages or salary. After a conjoined arrestment order has been granted additional creditors may also apply to have their debt covered by the conjoined arrestment order.[338] Although the deductions to be made under a conjoined arrestment order can be more complex to calculate, the basic principle is that the debtor should always be left with a minimum subsistence level of earnings.

5.102 By contrast to earnings arrestments and current maintenance arrestments, which require the debtor's employer to forward the deductions to the arresting creditor, much of the administration of conjoined arrestment orders is the responsibility of court staff. Although the debtor's employer continues to make the deductions, he forwards it to the sheriff clerk who allocates the appropriate sum to each creditor. Payments are allocated in proportion to the amount of each creditor's debt. Under a conjoined arrestment order, which is enforcing both ordinary and maintenance debts, priority is given to the ordinary debts before payments towards the maintenance debts are made.[339]

Child Support and Student Loan Deductions from Earnings Orders

5.103 In addition to the three types of earnings arrestment provided for by the 1987 Act, provision for deductions to be made from an employee's earnings has also been made in relation to specific types of debt under other legislation.

5.104 The legislation relating to child support provides for deduction from earnings orders (DEO) for recovery of child support due under a maintenance assessment. Where a DEO is in place, it takes priority over any earnings arrestment under the 1987 Act. [340] Deduction from earnings orders are also the standard method of recovery of some types of student loans. However, by contrast to child support DEOs, student loans DEOs do not take priority over ordinary earnings arrestments. Indeed, where a student loan DEO is in place, its operation is suspended by the subsequent service of an earnings arrestment. [341]

Use of Earnings Arrestments

5.105 Arrestment against earnings is a means of enforcement which is used extensively. The numbers of arrestments served in recent years are specified in table *III* below.

Table III **Numbers of Arrestments Against Earnings Served [1]**

Year	Served Under Summary Warrant Procedure [2]	Served Under Non Summary Warrant Procedure [3]	Total
1996	99,117	9,532	108,649
1997	88,152	9,762	97,914
1998	74,200	10,991	85,191
1999	73,464	9,267	82,731
2000	81,982	11,050	93,032

Source: Civil Judicial Statistics.

Note: 1. It should be noted that the figures for conjoined arrestments are not recorded separately.

Note: 2. Includes earnings arrestments served in respect of community charge, council tax and other summary warrant arrestments.

Note: 3. Includes both earnings and current maintenance arrestments.

[338] *Ibid*, s62(5).

[339] *Ibid*, s63(5).

[340] *Ibid*, s73(1) as amended by the Child Support Act 1991, c48, Sch 5, para 8(6). "Net earnings" for the purposes of earnings arrestments is to be calculated after deduction of payments due under a Child Support DEO.

[341] Education (Student Loans) (Repayment) Regulations 2000, SI 2000/944, reg 36(5).

These are not broken down by the different types of earnings arrestment. Nor is possible to specify figures concerning the numbers put into operation or any further details regarding their application. Most arrestments against earnings are administered entirely by a debtor's employer, except in the case of conjoined arrestment orders where the sheriff clerk is responsible for distributing funds to creditors.

5.106 The research into the operation of the 1987 Act assessed the use of arrestments by interviewing creditors, debtors and employers and by taking account of information which officers of court are required to provide.[342] The research evaluation reported a significant increase in the use of earnings arrestments following their introduction during the period 1989-1995. Between 1990 and 1994 the number of arrestments increased almost seven-fold then levelled out in 1995. In 1996 their number peaked, since when they have shown a fairly consistent downward trend.

5.107 Earnings arrestments introduced by the 1987 Act appear to be the preferred method of diligence by creditors and debtors alike. Relevant excerpts are reproduced in Annex A.

Principal Research Findings

5.108 Of the reforms introduced by the 1987 Act, the research found those relating to arrestments against earnings to have been the most successful. Their use has increased significantly [343] since the Act came into effect and arrestments have been found to be an effective and efficient method of debt recovery. Arrestments against earnings were clearly preferred by creditors who could equally have enforced their debt by other means. Whilst the sample study was small in relation to the extensive use of the measure, the research results were, nonetheless, a useful indicator of issues and concerns surrounding arrestments against earnings.

Debtors' Experiences

5.109 The *Study of Debtors* reported the experiences of a small sample of debtors who had been subject to arrestments against earnings. Debtors commented on the following aspects of arrestments against earnings.

5.110 **Notice**. A few debtors interviewed reported that they had not received a copy of the schedule of arrestment, whilst the majority had not received notice from their employer that deductions were about to be made from their earnings. The time lapse between the employer receiving the schedule and the commencement of deductions could be very short, indeed the deductions could begin the same day as receipt of the schedule of arrestment. It is a prerequisite for commencing diligence that a charge for payment has been served on the debtor and one of the purposes of this is to give due warning that the creditor intends to use diligence. The exception to this is in the case of diligence following a summary warrant where statutory notice has already been given. However, the research suggested that many debtors in the sample could not recall having been served with the charge, reporting that "not one respondent appeared to understand the significance or the implications of receiving a charge for payment".[344]

5.111 **Levels of deductions**. Perhaps unsurprisingly, the research revealed that most debtors interviewed were of the view that the deductions made under arrestments against earnings were too high. Also, where debtors had not been served with a schedule of

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[342] 1987 Act, s84.
[343] *Analysis of Diligence Statistics*, ch 3.
[344] S*tudy of Debtors*, p 44, para 4.

arrestment, they were unable to calculate for themselves whether the correct amounts were deducted from their earnings (the schedule of arrestment reproduces the tables of deductions).

5.112 **Awareness of time to pay**. The research reported having interviewed only three debtors who had been granted a time to pay order following service of an arrestments against earnings. The majority of debtors interviewed had not been aware of the possibility of applying for a TTPO.

Creditors' Experiences

5.113 The research found that, quite overwhelmingly, arrestments against earnings were the most popular enforcement mechanism amongst creditors. The new system of arrestments introduced by the 1987 Act was considered a great improvement on the older system involving the need to repeat arrestments against earnings. Creditors commented on the following aspects of arrestments against earnings.

5.114 **Levels of deductions**. The commercial creditors interviewed were divided in their view as to the level of deductions from earnings made under arrestments against earnings,[345] although there was no evidence of overwhelming dissatisfaction amongst creditors in this matter. One creditor suggested that the debtor's employer should be obliged to provide details of the debtor's earnings, which would allow creditors to confirm that they were receiving the correct level of deductions. The small number of creditors interviewed who had experience of conjoined arrestment orders generally felt it was better to receive a share of the debtor's earnings than nothing at all.

5.115 **Effectiveness of earnings arrestments**. Creditors generally found arrestments against earnings to be an effective method of recovering debts. However, many of the study sample reported that, during the subsistence of the arrestment, the debtor would cease to be employed before the debt was repaid.

5.116 **Change of Employment**. Other research revealed that local authority creditors found that debtors changing their employment was a significant problem.[346] It was noted that arrangements for attachment of earnings in England and Wales placed a duty on such debtors to notify local authorities in writing of any changes in employment status under penalty of a fine. [347] The Scottish Law Commission briefly considered the issue in its 2000 Report but made no recommendation.[348]

Employers' Experiences

5.117 Whilst representatives of only eleven employers were interviewed, the research nonetheless concluded that the employers interviewed "reported being relatively content with the procedures relating to arrestments against earnings".[349] This was despite a steady increase in the volume of arrestments against earnings since the introduction of the 1987 Act. Employers commented on the following aspects of arrestments against earnings.

5.118 **Administration of the Arrestment**. The *Study of Facilitators* reported that, in general, employers were able to understand the schedule of arrestment and calculate the appropriate deductions to be made. Similarly, employers did not report difficulties in

[345] *Study of Commercial Creditors*, pp 67-68.
[346] IRRV, ch 4, paras 63-64.
[347] *It Pays to Pay*, paras 83-84.
[348] Scot Law Com No 177, paras 5.78-5.79.
[349] *Study of Facilitators*, p 96, para 14.

implementing conjoined arrestment orders. Some larger employers who were interviewed did note occasional difficulties in identifying the employee in respect of whom the arrestment had been served and suggested that arrestments should contain further identifying particulars in addition to the debtor's name and address.[350] Some smaller employers expressed the view that the administration of arrestments was time consuming and that, as had been predicted by the Scottish Law Commission, the amount of compensation "was not sufficient to cover the costs involved".[351]

5.119 **Employer/Employee Relationship**. The Commission, in its 1980 Consultative Memorandum,[352] noted the suggestion that the service of an earnings arrestment could adversely affect a debtor's relationship with his employer and, at worst, the employee might be dismissed. However, the Commission concluded that there was little evidence that dismissal as a result of arrestments on any significant scale.[353] The research evaluation did not reveal any significant difficulty regarding this issue. The *Study of Commercial Creditors* noted that a small number of creditors reported their reluctance to use earnings arrestments because of the threat of dismissal of the debtor.[354] By contrast, the *Study of Debtors* found that the majority of respondents did not believe that arrestments were a significant issue in the workplace.[355] Of the employers interviewed, the majority stated that no action was taken against the debtor because of the arrestment. The research concluded that "By and large, employers seemed neither to record incidences of arrestments nor take action against debtors, with the main exception being where the person involved had responsibility for money in their job".[356]

Policy Issues and Proposals for Reform

5.120 There appears to be widespread general satisfaction with the system of arrestments against earnings introduced by the 1987 Act. The research revealed only relatively minor concerns regarding the operation of arrestments against earnings and some minor proposals for reform are made below.

5.121 A small number of other important policy issues in relation to arrestments against earnings are also considered in the paragraphs which follow together with proposals for further improvement. Some significant issues, however, concern matters which fall within the reserved competence of the UK Parliament which are also considered.

Priority between Types of Earnings Arrestment

5.122 As noted in paragraph 5.99, where one earnings arrestment and one current maintenance arrestment have been served on an employer in respect of the same debtor, the employer may operate both arrestments but, if the debtor's net earnings are not sufficient to meet both, the earnings arrestment is operated first. A re-evaluation of the current rules of priority between arrestments is considered appropriate at this time.

5.123 In its 1985 Report, the Scottish Law Commission offered four justifications for according earnings arrestments priority.[357] Firstly, in sequestration a maintenance creditor

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[350] *Ibid*, p 94, para 5.
[351] *Ibid*, p 95, para 8.
[352] Scot Law Com CM No 49.
[353] *Ibid*, para 1.16.
[354] *Study of Commercial Creditors*, p 69, para 29-33.
[355] *Study of Debtors*, p 46, para 14.
[356] *Study of Facilitators*, p 96, para 14.
[357] Scot Law Com No 95, para 6.248.

cannot rank for current maintenance, the reason for this rule being that maintenance is due only when the debtor has surplus income and an insolvent creditor cannot be said to have a surplus. The general rule is, therefore, that a maintenance creditor must follow the maintenance debtor's fortunes. Secondly, the debtor's dependants, if they were living with the debtor, would not be given priority and would be maintained in kind rather than in cash. It seemed to the Commission difficult to justify giving separated dependants, who are maintained in cash, a better right. Thirdly, in most cases of competing arrestments, the debtor will be insolvent and the level of maintenance awarded in the decree should be varied downward or recalled. The ordinary creditor has no title to apply for this to be done and it seemed unfair that the creditor should suffer loss simply because the maintenance debtor failed to make such an application. Fourthly, the Commission considered that in many cases the maintenance creditor would be able to rely on supplementary benefit for support if maintenance fails and an ordinary creditor could not make good a bad debt in this way.

5.124 Since the Commission assessed and reported on these matters, both social attitudes to, and government policy towards, maintenance obligations have shifted. The justifications then offered by the Commission are now considered less persuasive in light of the changed environment, particularly the weight attached to the argument that the state would provide for maintenance creditors where a debtor failed to do so. An increased emphasis on the importance of fulfilling maintenance obligations is evidenced by the creation of the Child Support Agency. The 1987 Act was reformed by the Child Support Act 1991 to give priority to recovery of child support debts by allowing the operation of a current maintenance arrestment where a creditor defaults on just one, rather than previously three, instalments of maintenance.[358] In bankruptcy legislation, arrears of child maintenance incurred pre-sequestration is one of the few debts not extinguished on a debtor's discharge.[359]

5.125 The present arrangement, which ranks current maintenance arrestments below earnings arrestments, is now out of line with current policy. Special protections have been accorded to children by the dedicated legislation of the Child Support Act 1991. Indeed, the onerous nature of the obligation to aliment a dependent child may be considered more compelling than that of other alimentary obligations, such as obligations to former spouses. Recent trends in family law reform and the current social climate have seen a reduction in continuing commitment of financial support between former spouses, for whom self-reliance is now expected, but the same may not be said for the obligation to maintain children.

5.126 It is considered appropriate to bring arrestments against earnings policy in line with current policy for affording priority to maintenance of children. There may be two options for reform. Where one earnings arrestment and one current maintenance arrestment are in operation against the same debtor, the current maintenance arrestment could be given priority. This had been considered by the Commission in its 1985 Report. Using such a rule of priority could mean that a creditor who had served an earnings arrestment for recovery of an ordinary debt would receive nothing under that arrestment.[360] Alternatively, one earnings arrestment and one current maintenance arrestment could rank equally. This may, however, be difficult to implement because deductions from earnings are made differently under earnings arrestments, on a sliding scale, from current maintenance arrestments, where the whole amount of maintenance is deducted subject to a level of protected earnings. If earnings and current maintenance arrestments were to rank equally, a method of apportioning the deductions from earnings would have to be found which could be regarded as affording equal treatment to earnings arrestments and current maintenance arrestments.

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[358] 1987 Act, s54(1)(c) as amended by the Child Support Act 1991, c48, Sch 5, para 8(4).

[359] Bankruptcy (Scotland) Act 1985, c66, s55(2)(d)(ii).

[360] Scot Law Com No 95, para 6.247.

5.127 The Executive considers that the priority given to an earnings arrestment, where it operates alongside a current maintenance arrestment, should be removed. The Executive is minded to amend the 1987 Act in order to, in the least, allow current maintenance arrestments to rank equally with earnings arrestments. However, the Executive also seeks views from consultees on whether priority should be given to current maintenance arrestments involving child maintenance.

Q. 5C. 1 (a) Should current maintenance arrestments rank equally with earnings arrestments

(b) or should current maintenance arrestments involving child maintenance have priority over earnings arrestments?

Relationship with Deductions from Earnings Orders

5.128 **Child Support DEOs**. As noted, deductions from earnings orders for the recovery of child support debts are given priority over all other arrestments against earnings and deductions from earnings orders for student loans. Provision for this priority, made by the child support legislation, reflects the increasing policy priority attached to payment of child maintenance debts which the Executive continues to support.

5.129 **Student Loan DEOs**. Currently, particular arrangements pertain for the recovery of student loans by earnings arrestment which suspend operation of a student loan DEO if an earnings arrestment is subsequently served.[361] This arose because introduction of the system for recovery of student loans was made by regulations which did not carry enabling powers for amendment of the 1987 Act and, accordingly, the current arrangements were temporary pending a suitable opportunity for amendment of the 1987 Act. The result was that the calculations which employers require to make were complex and differ in Scotland from the arrangements in other parts of the UK.[362]

5.130 The Executive considers that student loan debts should be treated in the same way as other ordinary debts and that student loan DEOs should rank equally with earnings arrestments. Accordingly, it is proposed that the 1987 Act should now be amended so that, where an earnings arrestment and a student loan DEO are served against the same debtor, the student loan DEO should be treated as if it is an earnings arrestment and an application to conjoin should be competent. Thus, where an earnings arrestment is conjoined with a student loan DEO, the appropriate deductions from earnings should be calculated by reference to the usual sliding scale for earnings arrestments under the 1987 Act rather than the 9% deduction from gross earnings applicable where only a DEO is in force.

Q. 5C. 2 Should student loan DEOs be treated as earnings arrestments for the purpose of a conjoined arrestment order?

Miscellaneous Reforms

5.131 It is intended that a number of minor reforms should be made to the 1987 Act regarding the operation of arrestments against earnings. These are considered necessary for the purpose of clarity regarding issues which have been made known to the Executive about the operation of the 1987 Act in practice or in response to the relatively minor concerns raised in the research evaluation.

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[361] Education (Student Loans) (Repayment) Regulations 2000, SI 2000/944, reg 36(5).

[362] Detailed guidance for Scottish employers is available from Inland Revenue-leaflet IR 59.

5.132 **Operating Fees for Employers.** The existing level of fee chargeable by employers against earnings for operating an arrestment was considered by some employers to be low although many employers do not charge the fee. It is intended to increase the level of fee which may be charged from 50p to £1. The question of fees for arrestees in non-earnings arrestments is considered in part 5D.[363]

5.133 **Jurisdiction for Conjoined Arrestment Orders**. A minor issue relating to jurisdiction to make a conjoined arrestment order merits reform for the purpose of clarity. Section 60(2) of the 1987 Act provides that, "the sheriff…shall make a conjoined arrestment order" and the definition of sheriff for the purposes of making such an order is set out in section 73(1) as, "the sheriff having jurisdiction over the place where the existing earnings arrestment or current maintenance arrestment or either such arrestment was executed". However, there is no definition in the Act to assist in determining where the place of execution of an arrestment is. This has given rise to difficulties for some sheriff clerks dealing with applications for conjoined arrestment orders where jurisdiction was founded on the place of execution of service of the arrestment, i.e. the place where the earnings arrestment was posted to the employer.[364]

5.134 It is considered that the place of execution in these circumstances was intended as the place where the arrestment was effective. In order to eradicate any doubt in this area, it is proposed that the 1987 Act be amended to provide that the place of execution of an earnings arrestment or current maintenance arrestment, for the purposes of a conjoined arrestment order, is the place where the arrestment was effective. That is, the place of employment of the debtor. Amendment should also be made to deal with the situation where an arrestment is executed at a place of work but wages are paid from a central source in a different jurisdiction or even outwith Scotland.

5.135 **Holiday Pay and the Definition of Earnings**. Treatment of holiday pay, for the purposes of making deductions under an arrestments against earnings, was not specifically considered when the 1987 Act was originally formulated. Deductions from earnings are calculated under the Act on a sliding scale based on the size of the earnings themselves. In situations where a number of weeks' holiday pay is paid in one lump sum, some employers have calculated the deduction as though the lump sum represented the debtor's earnings for one ordinary pay day. This practice was endorsed by the Sheriff in *Feeney v United Biscuits*.[365] It was held that holiday pay fell within the definition of earnings [366] and the employers were entitled to aggregate the employee's holiday pay with the usual weekly wage in order to determine the amount of the weekly wage to which the provision for deductions of earnings should be applied.[367]

5.136 It is considered likely that the aggregation of holiday pay and its treatment as relating to one pay day is not what was intended when the Act was drawn up and that the resulting increased deduction is inequitable. It is proposed that the 1987 Act should be amended to prevent such aggregation of holiday pay for the purposes of earnings arrestments and consultees' views regarding this are sought.

5.137 **Confidentiality in Postal Service of Arrestment Schedules**. A question was raised about confidentiality in the service of arrestment schedules by post to rural communities. Current rules of court require the envelope used for postal service of the schedule served on an employer to be marked:

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[363] See paras 5.253-5.267.

[364] Scottish Courts Administration Circular 35/1995, 30 August 1995.

[365] SCLR, 1993, p 965.

[366] 1987 Act, s73.

[367] *Ibid*, s49(1)(a).

"ARRESTMENT OF EARNINGS OF AN EMPLOYEE

This letter contains an earnings arrestment schedule/current maintenance arrestment schedule/conjoined arrestment order. If delivery of the letter cannot be made at the address shown it is to be returned immediately to (*name and address*)".[368]

This marking is intended to ensure that such schedules are handled only by appropriate personnel and are treated in a confidential manner.

5.138 It has, however, been suggested by an individual, who required to operate a schedule for a small organisation operating within a rural area, that such markings could have the opposite effect because the markings on envelopes attract the postman's attention and in small communities rumours run rife. Duties of care and confidentiality are owed, by both an employee who receives delivery of a schedule on behalf of the organisation on whom it is served and the employee of Royal Mail who delivers it, to their respective employers. Where a schedule served by post is properly handled by those concerned there should be no opportunity for breach of confidentiality. Should that occur, it would be a matter of grave concern for the employer or Royal Mail. No other difficulties or concerns of this nature have been reported and any relaxation of the requirement of a confidentiality notice could have detrimental consequences for the vast majority of cases. It is considered that the current arrangements operate successfully and it is not intended to make any change to them.

Q. 5C. 3 Should the fee which may be deducted from earnings by employers operating an arrestment against earnings be increased to £1?

Q. 5C. 4 Should the definition of the place of execution of an earnings arrestment or current maintenance arrestment for the purposes of a conjoined arrestment order be clarified in the 1987 Act?

Q. 5C. 5 Should holiday pay be aggregated in a single pay period for the purposes of determining deductions from earnings?

Q. 5C. 6 Are current arrangements for confidentiality marking of schedules transmitted by post satisfactory?

Awareness and Exchange of Information

5.139 The research evaluation concluded, and other anecdotal evidence confirms that the provisions of the 1987 Act relating to arrestments against earnings generally operate well. However, there appear to be a small number of instances where otherwise successful arrangements may have been lessened by lack of awareness about them. Measures to increase the general level of awareness could be adopted.

5.140 **General Education Programme**. As noted before, administrative action could again be taken towards combating debtors' ignorance of the protections available to them within a general education programme.

5.141 More specifically, the following procedural reforms could be adopted in order to provide increased information to each of the parties involved.

[368] A.S. 1988/2013, rule 66.

5.142 **Debtor Awareness of Time to Pay**. Debtors subject to arrestments against earnings appear not to be aware that they can apply for a time to pay order if they believe the deductions which are being made from their earnings are unmanageable. The copy schedule of arrestment served on the debtor could provide full details of the debtor's right to apply for time to pay, together with an application form.

5.143 **Service of the Arrestment Schedule**. To combat ignorance of the existence of an arrestments against earnings amongst those debtors affected, the current obligation to serve a copy of the schedule of arrestment on the debtor only "where practicable" could be strengthened. The requirement to serve a copy of the arrestment schedule could be excused only in the most extraordinary circumstances in order to assist with effective notification of the debtor. Where service could not be effected, the arresting creditor could be required to report full details of the efforts which had been made to the court.

5.144 In addition to the foregoing option for service of the arrestment schedule, it would also, or alternatively, be possible to place a duty on employers to transmit a copy of the schedule to their employee notifying the employee of the date on which the first deduction is to be made and its amount.

5.145 **Style of Arrestment Schedule**. The main difficulties reported by employers related to their perception that they received insufficient information about the arrestment. The style of arrestment schedules could be amended to include more detailed information about the identity of the employee concerned where known. This would be of particular benefit to employers with a large workforce, although its effectiveness would be limited by the degree of knowledge held by the creditor.

5.146 **Transmission of Information Amongst the Parties Involved in Arrestments Against Earnings**. Similarly to provision of information for debtor protection purposes, increasing the flow of information as between debtor, employer and creditor may assist each in their knowledge or understanding about their part in the process. Employers, in particular, fulfil an important public function by administering arrestments against earnings for which they obtain little, and often no, reward (although this may be elective). Thus, appropriate reform which could ease this administrative burden should be made where possible.

5.147 Requiring further production of information by one party would most likely have the effect of placing a corresponding burden on another. Since the instances where difficulties have been reported are few, consultees' views are sought on the merits of such possible changes. In addition, since in many cases deductions from earnings may be paid for disbursement within the new debt arrangement scheme, it may be that any such transmission of information would be more effectively built into arrangements for a DAS.

5.148 Debtors, creditors and employers each had their own concerns about lack of information surrounding the financial position concerning arrestments against earnings. Debtors were concerned about being able to calculate for themselves that the correct deductions were being made from their earnings. The frequent use of arrestments against earnings demonstrates their popularity amongst creditors as a method of diligence and the research evaluation demonstrated broad satisfaction with the current system. Nonetheless creditors expressed some dissatisfaction with the current situation as they may not be able to determine whether the correct payments are being made to them because they do not know the level of the debtor's earnings. Creditors also wished to be informed when debtors employment status changed during the course of arrestment against earnings. Employers felt uninformed about continuing to operate arrestments against earnings as they were unaware of the debt remaining outstanding for which deductions required to be made.

5.149 In order to address these inter-related concerns it would be possible to require the parties to exchange a flow of information amongst themselves. In so far as possible this should be done within the existing procedures in order to minimise any additional burden. When deducting and transmitting payment to the creditor, employers could briefly specify the debtor's earnings and the calculation of the deduction made. In the case of a conjoined arrestment order this information could be transmitted to the sheriff clerk who could in turn transmit it when disbursing payments. It could also be made available to the employee. Creditors could be required to keep employers informed about the status of the employee's debt. An obligation could be placed upon creditors to provide statements of account to both employers and debtors. Such statements could be provided at regular intervals, such as every 3 or 6 months. An obligation could be placed upon debtors to notify creditors of any change in their employment status.

Q. 5C. 7 Should the copy schedule of arrestment served on the debtor provide details of the debtor's right to apply for time to pay and an application form?

Q. 5C. 8 Should information about arrestments against earnings be included within a general education programme about enforcement?

Q. 5C. 9 (a) Should the arresting creditor be required to report to the court details of efforts made when service of the copy schedule could not be effected on the debtor

(b) or should employers be required to transmit a copy of the schedule to their employee notifying the employee of the date on which the first deduction is to be made and its amount

(c) or is neither measure necessary?

Q. 5C. 10 (a) Should arrestment schedules include more detailed information about the identity of the employee?

(b) If so, what additional information should be specified where known?

Q. 5C. 11 Should the debtor, employer and creditor be required to exchange a flow of information amongst themselves regarding employment status, earnings, deductions made and the debt outstanding?

Relationship of Arrestment against Earnings with Ordinary Arrestment

5.150 Concerns have been raised about creditors using both arrestments against earnings and ordinary arrestments against the same debtor simultaneously. This issue is considered and proposals for reform are set out in Part 5D. [369]

Reserved Matters

Cross-Border Situations

5.151 Arrestments against earnings under the 1987 Act are effective only in respect of a debtor whose employer is subject to the jurisdiction of the Scottish courts. This excludes, for example, employers whose only place of business is in England.

[369] Paras 5.228-5.252.

5.152 **Background**. Difficulties have been reported by some creditors seeking to use arrestments against earnings in cross-border situations. Particular problems have arisen for people seeking to recover maintenance from a former spouse who, whilst still living in Scotland, works in England. The difficulty faced by such individuals has also attracted academic comment.[370]

5.153 **Summary of Current Law**. Current legislation did not provide for recovery of maintenance from earnings in some such instances where the creditor is also resident in Scotland. The Debtors (Scotland) Act 1987 dealt with the special needs of maintenance creditors by introducing a new current maintenance arrestment procedure which attaches in each period the maintenance due for that period. However, a current maintenance arrestment or earnings arrestment can only be operated by an employer where the employer is subject to the jurisdiction of the Scottish courts. Where the English employer has no place of business in Scotland he is not subject to Scottish jurisdiction.

5.154 There is, however, provision for the enforcement of Scottish maintenance orders in other parts of the UK.[371] Thus, the person entitled to payments under a Scottish court order for maintenance may apply for the order to be registered for enforcement in the English courts. It is a condition of registration that "the person liable to make those payments resides in another part of the United Kingdom, and that it is convenient that the order should be enforceable there".[372] In the circumstances discussed, there is again a difficulty with jurisdiction as the debtor does not reside in another part of the UK. Although the Civil Jurisdiction and Judgments Act 1982 also makes provision for enforcement of UK judgments between jurisdictions of the UK, it specifically disapplies orders of the type to which the 1950 Act applies.[373] Nor could the Scottish maintenance creditor raise an action in England which could allow for enforcement in England using English methods of enforcement since, again in the circumstances discussed, the fact that the parties were habitually resident in Scotland would mean that the English courts would not have jurisdiction.

5.155 Such creditors may seek to recover arrears of maintenance by recourse to other forms of diligence.

5.156 **Policy Issues**. This difficulty applies to a very small number of cases and few instances have arisen in practice. Nonetheless, it was not intended that this small category of creditors should not have recourse to arrangements for cross border enforcement of this type of order. It is proposed that this small gap in provision should be closed.

5.157 **Legislative competence**. It is highly doubtful whether provision to close this gap would be within the competence of the Scottish Parliament.

5.158 This is a matter in which the Executive and the UK Government have equally significant interests. The Executive will take this forward in discussion with the UK Government with a view to considering UK-wide proposals. Consultees' views on such reform are sought.

Q. 5C. 12 Should efforts be made to devise arrangements for arrestments against earnings in cross-border situations?

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[370] Green's Family Law Bulletin, September 1994, G. Maher, *Diligence and the Recovery of Aliment*.

[371] Maintenance Orders Act 1950, c37, Pt II.

[372] *Ibid*, s17(2).

[373] 1982 Act, s18(5)(a).

Exemptions from Arrestment against Earnings

5.159 When considering the current law relating to arrestment against earnings it is appropriate to review the exemptions from arrestment of earnings afforded to certain categories of earnings.[374]

5.160 **Non-Fisherman Seamen's Wages**. Currently seamen, that is merchant seamen but not fishermen, enjoy a greater degree of protection from arrestments against earnings than the vast majority of employees.

5.161 *Summary of Current Law*. The Merchant Shipping Act 1995 provides that the wages due or accruing to a seaman employed in a United Kingdom ship are subject in Scotland to arrestments against earnings.[375] However, the 1987 Act provides that, except in respect of maintenance debts, the wages of a seaman, other than a member of the crew of a fishing boat, are not to be treated as earnings for the purposes of enforcing a debt by way of an arrestments against earnings.[376] The combined effect of these provisions is that the diligence of arrestment against earnings can be used against a merchant seaman only in respect of a maintenance debt. Other diligences are also available for use against a merchant seaman in respect of such a debt.

5.162 *Background*. Protection from arrestment for seamen's wages was formerly provided for by the Merchant Shipping Act 1970,[377] although the origins of the protection lie in the nineteenth century. Previously wider exemptions have already been restricted. The Department of Trade considered the matter in 1977 when it suggested that "in modern conditions, it was doubtful whether there was still a case for the exemption of merchant seamen's pay from arrestment". As a result of that consultation, the Merchant Shipping Act 1979 abolished the exemption of the wages of all seamen of fishing boats and the wages of all seamen were made arrestable under decrees of aliment, financial provision on divorce and other maintenance orders but not under other decrees".[378]

5.163 The Scottish Law Commission, in its 1980 Memorandum,[379] then considered that, in light of the relatively recent legislation on the issue it would not be appropriate for it to re-open the topic. The Commission maintained that position in its 1985 *Report on Debtor Protection*.[380] Of those who submitted written responses to the consultation on the 1985 Report, only one respondent expressed an objection to the exemption, stating that they did not, "consider that that the Commission have given any justification for the exemption to be maintained. We consider that it is part of the function of a wide review of diligence that it should aim to make the system coherent and we therefore think the exemption should be abolished".[381]

5.164 After the enactment of the Debtors (Scotland) Act 1987, which introduced the new system of arrestments against earnings, a drafting mistake in the 1987 Act was discovered which left open the possibility of carrying out the old action of arrestment and furthcoming against the wages of merchant seamen.[382] It remained Government policy that the earnings of merchant seamen should be protected from earnings arrestment. An amendment to

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[374] A recommendation in *It Pays to Pay* supports this, para 91.

[375] Merchant Shipping Act 1995, c21, s34(1)(b) by reference to s46(1) of the Debtors (Scotland) Act 1987.

[376] 1987 Act, s73(3)(c).

[377] Merchant Shipping Act 1970, c36, s11.

[378] Merchant Shipping Act 1979, c39, s39(2) and (3).

[379] Scot Law Com CM No 49.

[380] Scot Law Com No 95, para 6.46.

[381] Response of Scottish Legal Action Group to Scot Law Com No 95, p 6.

[382] G Maher, *The Arrestment of Earnings of Merchant Seamen*, 1989 SLT, (News), 340.

clarify the law was thus included in the Merchant Shipping (Registration, etc.) Act 1993.[383] The law relating to merchant shipping was later consolidated by the Merchant Shipping Act 1995.

5.165 *Policy Issues*. The reasons for the introduction in 1970 of the original exemption from wages arrestment for all seamen appears obscure. It is thought that the rationale may have been because a seaman may well be away from home for long periods and be unable to defend himself against a civil action for debt. Nowadays, however, whilst some seamen may be away for long periods of time, it is understood that the majority are now employed on relatively short voyages. Means of communications whilst at sea have also developed considerably. Persons employed in many other industries or professions may be away for long periods of time but do not enjoy such protection. The current protection applies only to a seaman employed in a UK registered ship. UK resident seamen employed on foreign registered vessels are not so protected. There appears to be no justification for this distinction. Fishermen do not enjoy such protection.

5.166 Equally, seamen are not protected against other diligences and there seems no persuasive reason why only earnings should be protected. The corollary of protection of seamen in this way is a reduction in protection for creditors. In turn, lenders who find that they are unable to enforce credit agreements on merchant seamen may generally consider merchant seamen unworthy of credit. Thus, merchant seamen may well be better served by the withdrawal of the protection.

5.167 The Executive's policy for the Scottish enforcement system is for of equal treatment of debtors and equal protection of creditors. On that basis, current protections from arrestments against earnings enjoyed by merchant seamen should not be maintained. The reasons for doing so outweigh any historic justifications for the protections from arrestments against earnings provided to seamen. However, unilateral change in the Scottish position would leave seamen employed in different parts of the UK subject to different rules on arrestments against earnings and is undesirable.

5.168 *Legislative Competence*. The Scottish Parliament's competency to legislate on the issue of arrestment of the earnings of merchant seamen is restricted. Any legislative change which might be made in order to achieve this would require both pieces of relevant legislation to be considered in conjunction, involving amendment of section 73 of the Debtors (Scotland) Act 1987 and amendment or repeal of section 34 of the Merchant Shipping Act 1995. The subject matter of the 1995 Act is reserved to the UK Parliament. [384]

5.169 This is a matter in which the Executive and UK Government have equally significant interests. The Executive will take this issue forward in discussion with the UK Government with a view to considering UK-wide proposals. Consultees' views on such reform are sought.

5.170 **Armed Forces' Pay**. Exemption from arrestment against earnings is also afforded to armed forces' pay.

5.171 *Current Law*. The 1987 Act provides that sums paid to the armed forces which are assignable under armed forces legislation are not treated as earnings for the purpose of arrestment.[385]

[383] Merchant Shipping (Registration, etc.) Act 1993, c22, Sch 4, para 9.
[384] 1998 Act, c 44, Sch 5, sE3.
[385] 1987 Act, s73(3)(b).

5.172 *Policy Issue*. The Scottish Law Commission considered this exemption in its 1980 Consultative Memorandum and 1985 Report. The Commission then noted that alternative arrangements were operated by the Defence Council against pay to members of the armed forces on application by debtors for settlement of debts. On the basis that those arrangements were similar to the new system of arrestments against earnings proposed by the Commission, it recommended maintaining an exemption and this was supported by consultees.

5.173 *Legislative Competence*. The Scottish Parliament's competency to legislate on the issue of arrestment of the earnings of members of the armed forces is restricted. Any legislative change which might be made in order to achieve this would require amendment of section 73 of the Debtors (Scotland) Act 1987 and the armed forces' legislation which that section exempts. Defence is a matter reserved to the UK Parliament. [386]

5.174 No difficulties in operation of the alternative arrangements operated by the armed forces have been reported and the Executive does not propose any amendment to existing arrangements.

5.175 **Occupational Pension Schemes**. Another exemption from arrestment against earnings is afforded to occupational public service pension schemes. Currently many public service occupational pensions enjoy protection from arrestments against earnings which is not extended to private pensioners.

5.176 *Background and Current Law*. The 1987 Act provides that earnings for the purpose of arrestment includes sums payable to the debtor "as a pension, including a pension declared to be alimentary, an annuity in respect of past services…and any periodical payments of compensation for the loss, abolition, relinquishment, or diminution in earnings of any office or employment".[387] Exemptions from the general provision regarding pensions include "any occupational pension payable under any enactment which precludes the assignation of the pension or exempts it from diligence".[388] However, they are not excluded from the definition of earnings which may be subject to a deduction from earnings order for the purpose of collecting child support maintenance. [389]

5.177 The Commission noted that the enactments regulating statutory occupational pension schemes invariably have provisions protecting the pension from attachment by sequestration or diligence, including, for example, those pertaining to the police, firemen, teachers, civil servants, local government officers, national health service personnel, armed forces personnel and members of parliament. The Commission had suggested abolition of this exemption in its 1980 Memorandum which had been supported on consultation but, on reflection, did not so recommend in its 1985 Report.[390] This was on the basis that there were many special superannuation enactments and any such change should only be recommended by an advisory body with UK terms of reference. No such advisory body was appointed to give consideration to the matter.

5.178 *Policy Issues*. Many exemptions or special rules historically afforded to public servants have been abolished or eroded. In general, there are now usually no significant public policy reasons why public servants should be treated differently from other citizens simply by reason of their service to the state. Public servants' earnings, previously

[386] 1998 Act, Pt I, Sch 5, para 9.
[387] 1987 Act, s73(2)(c).
[388] *Ibid*, s73(3)(d).
[389] The Child Support (Collection and Enforcement) Regulations 1992, SI 1992/1989.
[390] Scot Law Com No 95, paras 6.40-6.45.

exempted from arrestment, have been arrestable for some considerable time [391] and there appears to be no reason why corresponding income from pensions should remain outside the normal rule.

5.179 *Legislative Competence*. In general, the regulation of occupational pension schemes is a reserved matter,[392] as are some particular public service occupations, such as the civil service,[393] armed forces [394] and regulation of the health professions.[395] The Scottish Ministers now exercise certain functions for the regulation of occupational pensions for other public servants, such as for teachers or fire, police, local government officers and MSPs. The introduction of any provisions in relation to arrestment of occupational pension schemes would be likely to create a special rule of diligence for pensions, which would properly be a matter for the UK Parliament. Although a number of statutes would be involved this should not preclude appropriate reform, albeit that the process may require substantial consultation and co-ordination.

5.180 This is a matter in which the Executive and UK Government have equally significant interests. The Executive will take this issue forward in discussion with the UK Government with a view to considering UK-wide proposals. Consultees' views on such reform are sought.

Q. 5C. 13 Should non-fisherman seamen's wages continue to be exempt from arrestments against earnings?

Q. 5C. 14 Should occupational pensions continue to be exempt from arrestments against earnings?

Recovery of Excessive Pensions Contributions

5.181 It is not currently possible for creditors to recover by diligence funds determined by other legislation to be excessive contributions made by a debtor into a pension scheme. Such a mechanism has been introduced recently in the context of bankruptcy law, allowing excessive pension contributions to be recovered by the trustee in bankruptcy following sequestration of a debtor's estate. This was designed to deter potential abuse as, once pensions were protected on bankruptcy, some unscrupulous bankrupts may have attempted to evade creditors by putting monies into their pensions. It is not known whether debtors may be making excessive pension contributions with the intention of evading their obligations. Nonetheless, the relationship of the new bankruptcy provisions with diligence and whether any analogous provision should be extended to enforcement law are considered.

5.182 **Background and Summary of Current Law**. As part of a recent consultation exercise on reform of the pensions system and the introduction of stakeholder pensions, the UK government discussed the extent to which an individual's pension fund could be made available for the benefit of creditors in the event of that individual's bankruptcy. The Green Paper noted a discrepancy in the then existing arrangements.[396] The pension rights of a member of an occupational pension scheme who became bankrupt were usually protected from seizure to pay off creditors. Personal pension holders did not enjoy the same

[391] 1987 Act, Sch 8 repealed s2 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966, c19.

[392] 1998 Act, Sch 5, Pt II, sF3.

[393] *Ibid*, Pt I, para 8.

[394] *Ibid*, para 9.

[395] *Ibid*, Pt II, sG2.

[396] *A New Contract for Welfare: Partnership in Pensions* (Cm. 4170 (1998)), ch 8.

protection. It was considered that that was unfair. It was only reasonable to expect that everyone who has made a genuine attempt to save for their retirement should have their rights protected, regardless of the type of pension arrangement they have. It was, therefore proposed that all tax-approved private pension rights should be exempt from the bankruptcy process, thus falling outside the jurisdiction of the trustee in bankruptcy.[397]

5.183 However, it was recognised that by increasing the protection available to pension funds it would also increase the potential for unscrupulous debtors to abuse this protection by channelling resources into pension funds so as to put them beyond the reach of creditors. To combat this possibility it was proposed that there would be "a mechanism to allow a court to order that excessive contributions paid into the scheme can be recovered from the pension fund and paid to the trustee in bankruptcy".[398] This mechanism was intended to ensure a proper balance between "the interests of creditors and the principle that people should be encouraged to save for their retirement".[399] The proposals were enacted as part of the Welfare Reform and Pensions Act 1999.[400]

5.184 **Arrestments Against Earnings and Pensions Contributions**. The law of diligence currently affords special protection to contributions to pension schemes. In its 1985 Report, the Scottish Law Commission distinguished between what it considered to be voluntary deductions from earnings, such as membership dues of a trade union, and other deductions which it viewed as compulsory. The Commission proposed that the definition of earnings for the purpose of the new system of arrestments against earnings should be net of, "income tax and certain social security and superannuation scheme contributions".[401]

5.185 For the purposes of making deductions in implement of an arrestment against earnings made under the Debtors (Scotland) Act 1987, the relevant earnings of a debtor are his earnings net of, *inter alia,* "amounts deductible under any enactment, or in pursuance of a request in writing by the debtor, for the purposes of a superannuation scheme".[402]

5.186 **Policy Issues**. It is necessary to consider whether, as a matter of policy, there should be a parallel mechanism allowing a creditor to recover excessive pension contributions without having to first sequestrate the debtor. It might seem only right that a debtor should not be able to escape his obligations simply by making additional voluntary contributions to a pension fund from which he will eventually derive benefit. Indeed, the special protection from arrestments against earnings given to pension contributions would seem to justify further special measures to prevent abuse of this privilege. The recovery scheme created by the 1999 Act provides an attractive model, with judicial supervision and safeguards, upon which such a diligence could be based.

5.187 However, making it possible for creditors to recover excessive pension contributions without the necessity of sequestrating the debtor raises a number of important policy considerations. In particular, it may be inappropriate to confer upon individual creditors powers which have, until now, been available only in bankruptcy proceedings, including powers to invalidate the debtor's transactions retrospectively and to obtain details about his financial circumstances. The nature of bankruptcy proceedings is, in important respects, different to that of diligence.

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397 *Ibid,* para 48.
398 *Ibid*, para 49.
399 *Ibid*.
400 s16 of the 1999 Act, c30, amended the Bankruptcy (Scotland) Act 1985, c66, by inserting ss 36A-36C.
401 Scot Law Com No 95, para 6.72.
402 1987 Act, s73(1) as amended.

5.188 Bankruptcy involves the appointment of a trustee upon whom is conferred statutory functions. Although these include the ingathering and distribution of the bankrupt's estate, the permanent trustee has other functions, the performance of which may be viewed as being primarily in the interests of the general public rather than those of the debtor or his creditors. For example, the permanent trustee must consult with any commissioners in bankruptcy and have regard to any advice given by them or by the Accountant in Bankruptcy. The permanent trustee must also provide the Accountant in Bankruptcy with such information as he may require to discharge his supervisory functions. Equally, the office of Accountant in Bankruptcy is a public one which carries with it duties to administer and supervise the system of sequestration.[403]

5.189 These public elements of bankruptcy reflect the seriousness of the sequestration process. Sequestration of a debtor is essentially a last resort, whereby his whole estate and financial affairs are vested in a trustee appointed by the court for the benefit of his creditors. The bankruptcy process may be viewed as the ultimate sanction imposed by the community to prevent a debtor continuing his decline into further insolvency. The rules which prohibit undischarged bankrupts from holding certain offices and which place restrictions on their capacity to acquire further assets can be seen both as a penalty imposed by the state and as necessary to protect the general public from irresponsible debtors.

5.190 By contrast, diligence does not carry a public interest element to the same degree. Although this consultation paper proposes introduction of an office responsible for the oversight and supervision of diligence in the public interest, diligence is essentially a private act instructed by an individual creditor who has no specific duty to take into consideration the public interest nor the interests of the debtor's creditors as a whole. Further, the use of diligence against a debtor does not generally result in legal restrictions on his capacity to contract in future nor in disqualification from particular offices.

5.191 It is considered that these general differences between sequestration and diligence may justify permitting the recovery of excessive pensions contributions in the former case but not in the latter. This proposition is supported by consideration of the nature of certain specific aspects of the scheme.

5.192 In particular, the recovery of excessive pension contributions under the 1999 Act requires the court to reopen private transactions, between the debtor and his pension scheme, at a later date. The power to invalidate otherwise lawful transactions, between an insolvent debtor and a third party, is a well-established feature of bankruptcy law.[404] The justification for these powers must lie in the special nature of bankruptcy, that where a debtor is insolvent his own interest in his property must give way to the interests of his creditors: "from the moment of insolvency the debtor is bound to act as the mere trustee…of his creditors, who thenceforward have the exclusive interest in his funds".[405] There is no existing diligence which similarly permits the setting aside of lawful transactions between the debtor and a third party which have been concluded prior to the commencement of diligence. Restrictions on a debtor's rights to deal with his own property may be a consequence of diligence but do not operate retrospectively. A creditor who uses diligence against, but does not seek the sequestration of, a debtor must normally take him as he finds him and cannot object to transactions concluded before diligence is executed.

[403] *Stair Memorial Encyclopaedia*, Vol 2, para 1304 et seq..

[404] Statutory power to set aside gratuitous alienations (where a debtor transfers assets for less than their true value) dates from the Bankruptcy Act 1621 and the power to set aside unfair preferences (where a debtor gives unjustifiable preference to one creditor rather than another) was enshrined in the Bankruptcy Act 1696.

[405] Bell, *Commentaries* II, 170, cited in *Stair Memorial Encyclopaedia*, Vol 2, para 1388. The word 'trustee' is not to be read absolutely literally.

5.193 It is considered that the power to retrospectively set aside otherwise lawful transactions should be a strictly limited one. A right to interfere with transactions between a debtor and his pension provider should not be extended to creditors doing diligence. The principle of legal certainty demands that parties should, wherever possible, be able to know their rights, and legal consequences of their actions, before entering into legal relations. Widening the category of cases in which transactions may be invalidated at an indeterminate later date introduces uncertainty into the system which would be undesirable. Introduction of this possibility within this type of diligence would raise the issue of power to reopen other, analogous, transactions by debtors throughout the diligence system. It might reasonably be asked by a creditor why only excessive pensions contributions should be open to recovery and not, for example, contributions to life policies. It is considered undesirable to erode the principle that a creditor must do diligence against the debtor 'as he finds him' and not as he may have been 6 months, 1 year or 5 years later.

5.194 It is also worth noting that, in the case of bankruptcy, there is only one permanent trustee to exercise the powers conferred by the 1999 Act. Should the power to recover excessive pensions contributions be extended to creditors doing diligence, the problem of 'multiple' creditors would have to be addressed. This would raise questions such as whether all creditors should be entitled to a share of excess contribution, how they should be ranked in respect of one another and other diligences.

5.195 **Legislative Competence**. For the reasons indicated, it is not considered desirable to extend the new provisions regarding recovery of excessive pension contributions in bankruptcy to the law of diligence. If a contrary view was taken, it would, nonetheless, be appropriate to ensure that any measures to allow diligence against excessive pension contributions were devised for application throughout the UK. As noted, the regulation of, occupational pension schemes, and personal pension schemes, is a reserved matter.[406] The introduction of any provisions in relation to excessive pension contributions would be likely to create a special rule of diligence for pensions, which would properly be a matter for the UK Parliament.

5.196 The Executive does not currently intend to further consider the issue of excessive pension contributions for application within the context of the law of diligence.

Direct Deductions from Social Security Benefits

5.197 Deductions, for payment of a limited category of debts, can be made directly from certain social security benefits before they are paid to the claimant. Consideration of this issue has been included in this section simply because direct deductions may be classified as a procedure akin to diligence against earnings.

5.198 **Deductions from Benefits Orders**. The Department for Work and Pensions operates a direct payment system which allows deductions to be made from a claimant benefit and paid to a creditor.[407] The system provides for certain creditors to enforce specific classes of debt by means of an application for a deductions from benefit order. Deductions can only be made from income based benefits,[408] except in the case of overpayments of benefit when deductions will be made regardless of the type of benefit.

5.199 This arrangement is limited to creditors who provide continuing public services such as local authorities and utility suppliers. The following classes of debt may be recovered under the direct payment system:

406 See para 5.179.
407 Social Security (Claims and Payments) Regulations 1987.
408 Such as income support and jobseekers allowance.

- housing costs and accommodation charges
- mortgage interest payments
- mains, gas and electricity charges, including re-connection
- water charges [409]
- arrears of council tax and community charge
- child support maintenance
- unpaid fines and compensation orders forming part of a sentence in criminal proceedings.
- recovery of an existing overpayment
- repayment of a social fund loan.

5.200 Variable maximum percentage limits, depending on the type of debt concerned, are applied to the deductions in order to ensure that the claimant is left with adequate income to meet subsistence needs and does not lose entitlement to other benefits such as housing benefit and welfare foods. These are based on multiples of 5% of the personal allowance for a claimant aged 25 or over and, normally, an upper limit of three 5% deductions is imposed. There is provision for the order of priority between applications where there are several applications for a deductions from benefit order. Highest priority is given to applications in respect of housing debt followed by applications concerning debts for fuel, water, council tax and fines. Local authorities may apply for an order only after a summary warrant or decree for payment has been granted against the claimant. This is not the case with other creditors for whom orders may be made upon direct application to the Department for Work and Pensions. However, although it is understood that a charge is levied on other creditors, there is no charge levied by the Department for operating deductions for local authority taxes.

5.201 **Calls for Extension of Benefit Deduction Orders**. Suggestions have been made for extension of the current arrangements for deductions from benefits orders. Ordinary creditors would generally welcome the opportunity of recourse to the scheme for recovery of legally constituted debts. Others have suggested extension of the scheme for limited purposes.

5.202 The Scottish Law Commission recommended that local authorities, who are already entitled to seek direct deductions from benefit for arrears of council tax, should be able to do so without firstly having to obtain a summary warrant or decree. This was in order to avoid imposition of the 10% surcharge applied by local authorities when a summary warrant is obtained and to prevent it adding to the burden of those on low incomes.[410] It followed a similar recommendation in *It Pays to Pay*. [411] It has also been proposed that benefit deductions orders should be extended to a wider range of benefits, including those not means tested, in a paper contributed to the *Report of the Improving Debt Recovery Working Group*.[412] This was on the basis that claimants often welcome direct deductions from benefits as it provides respite, in many instances, from the prospect of alternative enforcement action being taken.

5.203 **Policy Issues**. The classes of debt for which direct deductions from benefit orders may currently be made all have special features. Some relate to expenditure which is essential to retain or maintain the claimant's home, such as rent and fuel charges. These are regarded as priority debts and charges, with the main consideration being to protect the

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[409] This does not apply in Scotland because of current billing arrangements.

[410] See reference to the surcharge in paras 6.35-6.37.

[411] Paras 65-68.

[412] December 2000, an interest group comprising representatives of Scottish Socialist Party, Scottish National Party and certain religious, not for profit advice sector and poverty action organisations.

claimants from the greater hardship which would be caused, for example, by eviction or disconnection of an essential service. Others are connected with benefits themselves, such as recovery of overpayment of benefits.

5.204 Having regard to the policy rationale for the existing system, it is difficult to identify justification for extension to debts owed to ordinary creditors. It would represent a significant departure from existing policy based on the protection of vulnerable claimants from further hardship by maintaining essential services and ensuring that the claimant is left with adequate income to meet basic subsistence needs. The current arrangements are permitted for clear welfare purposes and it is not the role of the social security system to become engaged in managing benefit claimants' financial affairs. That is a matter for the claimant and, correspondingly, responsibility for collection of debts rests solely with individual creditors. It is not considered that extension of the current system for ordinary debts would be in the public interest.

5.205 **Legislative Competence.** The Scottish Parliament does not have competence to legislate in this area, since social security is a matter reserved to the UK Parliament.[413] The Executive has been addressing the issue, in relation to collection of arrears of council tax, in discussion with the Department for Works and Pensions.

Q 5C. 15 Should local authorities' existing ability to apply for benefit deductions orders be adjusted to enable applications to be made prior to obtaining a summary warrant?

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[413] 1998 Act, Sch 5, sF1.

(D) ARRESTMENT AND ACTION OF FURTHCOMING

5.206 This section considers the diligence known as arrestment and action of furthcoming and makes proposals for reform of the law relating to such arrestments in execution (arrestment on the dependence was considered in Part 5A). Arrestment and furthcoming is sometimes also referred to as common law arrestment, ordinary arrestment, non-earnings arrestment and, in relation to a sub-category, bank arrestment.

5.207 An arrestment in execution is a diligence which enables a creditor to attach moveable property, goods or funds, which are owed to the debtor but are in the possession of a third party. The arrestment is directed towards the third party who, after having been served with a schedule of arrestment, may not release the goods or money to the debtor. In order to obtain possession of the goods or funds, the creditor who has served a valid arrestment must complete the diligence with a second step involving a new court action, known as furthcoming. This is an action to have the court order the third party to pay over to the creditor the sums arrested.

Nature, Purpose and Effect

5.208 Arrestment in execution is directed towards a third party, upon whom a schedule of arrestment is served. The creditor serving the arrestment is known as the arrester, the third party upon whom the schedule of arrestment is served is known as the arrestee and the debtor whose property is affected by the arrestment is described as the common debtor. Service of the arrestment is carried out by an officer of court, although this can be by postal service.[414]

5.209 A valid arrestment has the effect of freezing the goods or funds held on the debtor's behalf by the arrestee. Should the arrestee breach the arrestment, by paying over the funds or returning the goods to the common debtor, he may become liable to the arrester for the whole value of the arrested property.[415] Likewise, the arrestee may also become liable to the common debtor should he pay over the goods or money to the arrestee before either (1) a decree of furthcoming has been granted in respect of the arrested sums or (2) the debtor has granted a mandate authorising the arrestee to make payment to the arresting creditor.

5.210 Moveable property owed to the common debtor by a third party which could be arrested would include, for example, shares, payment due under insurance or life insurance policies, fees due for services rendered, funds held in bank or building society accounts, awards held liable under court proceedings, rental payments, bequests and interests in a deceased's estate, goods held by an auctioneer or carrier. Arrestment of ships was discussed in Part 5B. Certain items of moveable property cannot be arrested, for example property which is owned jointly with another party and most social security benefits and pensions.

5.211 An important feature of an arrestment in execution is that the arrestment attaches all the goods or funds held by the arrestee on behalf of the common debtor, not merely funds or goods to the value of the arrester's debt.[416] However, by virtue of the doctrine known as

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[414] Personal service, service at the arrestee's dwellinghouse and edictal service (where the arrestee is not in Scotland) are also competent (Maher & Cusine, para 5.03).

[415] *Ibid,* para 5.39.

[416] Although see the discussion in paras 5.214-5.226.

tantum et tale[417] the right over the property which the creditor obtains by serving the arrestment is only as extensive as the right which the common debtor had himself.

5.212 Arrestment is described as an inchoate or incomplete diligence. This is because, in itself, the arrestment does not entitle the arrester to take possession of the arrested goods in satisfaction of his debt. Instead, the arresting creditor must raise a separate action of furthcoming. Although the arrestment attaches all property of the common debtor in the hands of the arrestee, the action of furthcoming normally craves only payment and delivery of funds or goods to the value of the debt together with the expenses of the diligence. In the case of corporeal moveable goods which have been arrested, the creditor may also seek warrant to sell the goods.

5.213 In a large number of cases of arrestment an action of furthcoming is not required because the common debtor will execute a mandate which gives authority to the arrestee to transfer the arrested property to the arresting creditor.

Amount of Property Attached by Arrestment

Summary of Current Law

5.214 It is generally considered that a validly executed arrestment in execution attaches the whole of the common debtor's property in the possession of the arrestee, regardless of the size of the actual debt due.

5.215 As previously noted, this was also true of arrestments on the dependence. In the case of arrestments on the dependence, the schedule normally specifies a certain sum which represents the debt together with an amount to cover interest and expenses. The sum is usually followed by the expression, "more or less". Authority for this proposition is of long standing which it is understood originates from *Ritchie v McLachlan,* [418] in which a creditor served a schedule of arrestment on the dependence which purported to arrest £50, "more or less, with all goods, gear, debts and sums of money". It was held that this specification had no effect in law and that the arresting creditor could obtain furthcoming of the whole debt due to him, which was in excess of £50.

Policy Issues and Scottish Law Commission Consideration

5.216 The Scottish Law Commission noted in 1989 that it could trace no reported cases involving the same issue in relation to arrestments in execution. In the case of such arrestments, the sum specified in the schedule is usually more precise, being calculated on the basis of a principal sum for which decree has been obtained together with a known level of expenses, and may not include the qualification 'more or less'. The Commission concluded that "even an arrestment in execution attaches more than the specified sums if the words 'more or less' qualify those sums".[419] This view is supported by a recent sheriff court case involving arrestment in execution of a summary warrant in which the sheriff held that he was "bound by Ritchie v McLachlan to hold that the specific figure is not in law a limit of the sum attached by the arrestment".[420] In that case the specified sum was qualified by the phrase 'less or more'.

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[417] Maher & Cusine, para 5.37.

[418] 1870 M 815.

[419] Scot Law Com DP 84, para 2.144.

[420] *Bremner v TSB (Scotland) plc* 1993 SLT (Sh Ct) 3.

5.217 The rule expressed in *Ritchie* has been the subject of judicial and academic criticism. In *Ritchie* itself, Lord Benholme dissented on the grounds that he could not, "see the use of inserting the sum of £50, if that is not to be considered the limit of the sum arrested…I hesitate to hold that an arrestment for £50 will cover £1 000. I have great doubts if the specification of £50 is to be held *pro non scripto*,".[421] More recently, Sheriff Principal Ireland described Lord Benholme's opinion as being the, "common sense view…that there was no point in stating a specific sum in the schedule if that was not to be the limit of the effective arrestment".[422]

5.218 It has been questioned whether the rule is a rational one by drawing attention to the effect which such specification might have on the arrestee. [423] Namely that "The statement in the arrestment itself of what sum is arrested may mislead the arrestee into thinking that he is safe to pay the common debtor any balance over and above the sum stated in the arrestment".[424]

5.219 In both its Discussion Paper and Report on diligence on the dependence, the Commission considered whether a limit should be placed on the amount which may be attached by an arrestment. It referred to the McKechnie Committee's conclusions that the excessive use of arrestments could prejudice the debtor and that, as a matter of principle, "the arrestee and the debtor should know the extent of, and liability under, an arrestment on the dependence".[425]

5.220 In its Discussion Paper, the Commission suggested that a limit be placed on the amount arrestable by arrestments on the dependence and in execution. It had recommended, however, that any statutory limit should apply only to *sums of money* due by the arrestee to the defender and should not apply to other moveable property.[426] It also made proposals for situations involving foreign currency.[427] However, when it published its Report on diligence on the dependence, the Commission distinguished between arrestments on the dependence and arrestments in execution. It took the view that for arrestments in execution "in some respects the case is stronger for introducing upper limits on the amounts arrested".[428] This was because, by contrast to cases of diligence on the dependence, the amount of the principal sum, judicial expenses and accrued interest would all be known at the point when the arrestment was served. Nonetheless, following the mixed reaction which the suggestions in its Discussion Paper had received, the Commission rejected the introduction of fixed upper limits for the following three main reasons.[429]

5.221 The Commission considered, firstly, that it would be extremely difficult if not impossible for a creditor to predict accurately the expenses of an action of furthcoming.[430] The Commission supported the principle that a creditor should be able to recover these expenses but noted that at the stage of execution of an arrestment the creditor does not know whether an action of furthcoming will have to be raised. If the arrestment did not attach a sum sufficient to meet the expenses of the action of furthcoming, the creditor may be forced to use further diligence to recover those expenses.

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[421] See fn 126. Reported at p 820.

[422] *Bremner v TSB (Scotland) plc* 1993 SLT (Sh Ct) 3, p 4.

[423] *Stair Memorial Encyclopaedia*, Vol 8 para 251, fn 2.

[424] *Ibid*.

[425] Report of the Committee on Diligence (Chairman: Sheriff H McKechnie) Cmnd 456 (1958), para 44, quoted in Scot Law Com DP No 84, para 2.145.

[426] Scot Law Com DP No 84, para 2.151.

[427] *Ibid*, paras 2.153-2.162.

[428] Scot Law Com No 164, para 9.104.

[429] *Ibid*, para 2.113.

[430] *Ibid*, para 9.105.

5.222 Nonetheless, actions of furthcoming are already relatively rare.[431] If a compulsory mandate system were to be adopted (see paragraph 5.280), then the need for furthcoming would all but disappear and with it the question of the expenses of the action. Also, if the separation between arrestment and furthcoming is retained, then a creditor who believes he may be forced to raise an action of furthcoming could include within the sum arrested an amount prescribed by statute to cover the expenses of that action. This solution was originally suggested by the Commission itself in its 1989 Discussion Paper.[432] Should the debtor then sign a mandate for release of the funds, these expenses would be released from the scope of the arrestment automatically.

5.223 The second reason against placing a limit on the funds arrested by an arrestment in execution was that the aim of the limit, being the protection of the debtor, could be defeated if a creditor served an arrestment on more than one of the debtor's accounts.[433] In such circumstances, the limit would apply separately to each account and the various arrestments could have the effect of arresting two or more times the amount of the limit. The Commission's reasoning was understood to be that because the only way to protect the debtor in these circumstances would be to allow recall or restriction of the arrestment on wider grounds than are currently available, and that widening these grounds was undesirable, it would be better not to introduce the protection at all.

5.224 However, the current system permits the arrestment of more than one account and that multiple arrestments are capable of attaching the whole funds of the debtor in each of the arrested accounts. Whilst it may be difficult to recall or restrict an arrestment in execution, a limit on the amount arrestable offers more protection than no limit at all and provides significant protection to a debtor who has only one bank account.

5.225 The Commission's third reason was that in the case of an arrestment in execution the debtor does not warrant the protection which would be afforded by a limit on the amount which could be attached by the arrestment. This was on the basis that the debt has been found due, normally after a court process, and "the debtor's remedy is to pay the debt which will have the effect of extinguishing the arrestment".[434]

5.226 Whilst this is a persuasive argument, the purpose of diligence is to recover only those sums which are due and payable to the creditor rather than to punish the debtor by imposing an excessive burden upon him.

Proposals for Reform

5.227 As a matter of principle, it is inequitable that an arrestment to recover a specific debt should be capable of attaching an amount far exceeding that debt. This principle is more important in the case of arrestments in execution, rather than on the dependence, because there can be greater certainty as to the sum required to be arrested. The problem remains and, on balance for the reasons discussed, it is considered that the preferable course is as originally suggested by the Commission. Namely, that an arrestment in execution of an extract decree [435] for payment of a sum of money should attach whichever is the lesser of an amount equivalent to:

[431] In 2000, there were 184 actions of furthcoming disposed of in the Sheriff Court and none in the Court of Session (*Civil Judicial Statistics, Scotland,* 2000, (2001), Tables 2.3, 3.7 and 3.9).

[432] Scot Law Com DP 84, para 2.149.

[433] Scot Law Com No 164, para 9.106.

[434] *Ibid*, para 9.107.

[435] and equivalent.

- the debt due by the arrestee to the defender or

- the aggregate of the sums of:
  - the principal sum decerned for in the extract decree;
  - the judicial expenses decerned for in the extract decree;
  - the expenses of executing the arrestment;
  - a sum to be prescribed by statute or statutory instrument to cover the expenses of a possible action of furthcoming; and
  - interest at the appropriate rate (or rates) accrued up to a date specified in the schedule of arrestment, being a date occurring not later than the date of execution of the arrestment, together with one year's future interest at the rate specified in the extract decree, to cover the possibility of further delay in payment or recovery by furthcoming. (In the case of an arrestment enforcing an extract registered document of debt, the sums aggregated would be the same, except that judicial expenses would not be exigible.)

Q. 5D. 1 Should the amount of property attached by an arrestment in execution be restricted in the manner proposed?

Protection of Subsistence Level from Arrestment

Background and Current Law

5.228 As noted in Part 5C, the Debtors (Scotland) Act 1987 introduced a new type of earnings arrestment, in terms of which the amount of a debtor's earnings which could be attached by a creditor was limited. In particular, the 1987 Act provided that a minimum level of daily, weekly and monthly earnings would be exempt from arrestment, so as to protect debtors from undue hardship and to ensure that they retained an income sufficient for basic needs. The 1987 Act also specified categories of income which were to be exempt from earnings arrestment including any "pension, allowance or benefit payable under any enactment relating to social security".[436] Most social security benefits and child support maintenance are also exempt from ordinary (non-earnings) arrestment by virtue of the statutory provisions which govern them.

5.229 There is no specific protection from arrestment of money held in a debtor's bank or other account. An arrestment of such accounts, like any other ordinary arrestment, attaches the entire balance in the account and, by action of furthcoming, the creditor can obtain possession of the funds up to the value of the outstanding debt. It makes no difference whether an earnings arrestment is already being operated against the debtor in question or whether the debtor is in receipt of social security benefits.

5.230 The result is that a debtor who is already subject to an earnings arrestment, and by implication has been left with a minimum income, may find their entire bank or other account arrested.

The Bank Arrestment (Scotland) Bill

5.231 A Member's Bill sought to address this issue with the stated aim that the Bill should deal with precisely the difficulty outlined above and that debtors should not be afforded different levels of protection according to which diligence their creditor chose to use.[437] This

[436] 1987 Act, s73(3)(e).

[437] Proposal lodged in the Scottish Parliament on 26 April 2000 by Alex Neil MSP.

was not supported by the Executive on the basis that it took an isolated approach to reform of the law of diligence, the Bill would have required extensive amendment to achieve the reforms intended by its author and it was doubtful whether its proposals were workable. The Executive, however, confirmed that it was sympathetic, in principle, to the idea of preserving within bank accounts arrested a basic sum, similar to the protection that already exists when earnings are arrested.[438]

Policy Issues

5.232 Central to previous diligence reform was an emphasis on balancing the rights of creditors to enforce their debts with appropriate protections for those debtors who were unable, rather than unwilling, to meet their obligations.

5.233 As a matter of principle, the law should, as far as possible, provide the same level of protection from hardship to all debtors regardless of the diligence which their creditor chooses to use. In particular, where it is acknowledged that debtors should be entitled to a minimum level of income, as is the case with earnings arrestments, that minimum level should not be eroded by further diligence such as an arrestment in the hands of a bank. This is particularly important where the funds in the account derive from (a) earnings from which deductions have already been made under an earnings arrestment or (b) social security benefits and child support which are themselves exempt from arrestment. In both these instances, the debtor is in receipt of funds which are intended to enable him merely to subsist and for a child's welfare, which the legislature intended to be free of diligence.

5.234 Of particular concern to campaigners for reform has been the compound effect of operation of arrestments executed in the hands of banks following the operation of an earnings arrestment. Promotional material published by an action group, for support of the Member's Bill and subsequently by one of its members,[439] included case studies detailing the hardship caused to specific individuals.[440] While the evidence that hardship is being caused by the simultaneous operation of earnings and ordinary arrestments is anecdotal, there is little reason to doubt that this does occur. Whilst it is difficult to assess the true scale of the problem, it is considered that the degree of inequity, even if experienced in few cases, is such as to render reform appropriate.

5.235 Central and local authorities are significant users of this diligence. In recent years they were responsible for the vast majority of all non-earnings arrestments served.[441]

Options for Reform

5.236 The Executive has considered options for reform in order "to ensure that those who have their accounts arrested are not left bereft of the wherewithal to live".[442] There are a number of practical difficulties with each option. Consultees' views on possible alternatives are sought.

5.237 **Option 1 - Protected Minimum Balance**. The principal element of the Member's Bill mentioned concerned introduction of a statutory lower limit on the amount of money which

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[438] Jim Wallace, Deputy First Minister and Minister for Justice, Scottish Parliament Official Report, 8 June 2000, Vol 7, No 2, Col 108.

[439] *Bank Arrestments, A Comment from Citizens Advice Scotland*, June 2001.

[440] The Bank Arrestments Action Group, an association of voluntary sector organisations including Citizens Advice Scotland, Money Advice Scotland and the Scottish Sheriff Court Users Group.

[441] Approximately 96%. The 2000 *Civil Judicial Statistics* record service of 98 582 non-earnings arrestments in pursuance of summary warrants but only 3828 non-earnings arrestments served in execution of a sheriff court decree.

[442] Jim Wallace, Deputy First Minister and Minister for Justice, Scottish Parliament Official Report, 8 June 2000, Vol 7, No 2, Col 108.

could be attached by arrestment of a bank or building society account. Regardless of the amount of the debt, a minimum threshold level of an account balance would be exempt from arrestment. As already noted, where an earnings arrestment is in place, a minimum amount of earnings must be preserved when deductions were made by an employer. The amount which was then proposed for preservation on arrestment [443] was equivalent to the minimum amount preserved under an arrestment against earnings. There are, however, a number of difficulties both with the figure itself and the concept of a fixed exempt amount.

5.238 A minimum subsistence level based on a weekly requirement could only be justified if the debtor was receiving additional funds each week which allowed him to replenish that amount. The goal of preserving minimum subsistence level of income would not be served by a weekly limit where the debtor received funds less frequently, for example where salary is paid monthly or a student loan or grant is paid quarterly. By way of illustration, if a debtor who is paid a salary of £500 on the first of each month has his bank account, into which his salary has been paid, arrested on the second of the month his available balance will be reduced to the weekly level until he is able to lodge additional funds. The financial hardship to this debtor could be severe.

5.239 Accordingly, reform designed to maintain a fixed minimum balance in a debtor's bank account does not take account of the variability of individual circumstances, particularly in relation to the date of arrestment. The choice of amount to be set as a lower limit on the funds which may be attached by an arrestment will be, necessarily, an arbitrary one. If the lower limit is not intended to protect a debtor for a month or longer, but for only so long as is necessary to allow the debtor to apply for recall or restriction of the arrestment, then a potentially greater difficulty arises. Currently, in the case of arrestments in execution, "the general rule is that such an arrestment will be recalled only on payment of the debt, including the expenses of the arrestment itself".[444] To provide effective protection on the basis of recall or restriction, these grounds would have to be extended to take into account the debtor's family and personal circumstances. Actions for recall or restriction of an arrestment are currently quite rare. It is doubtful whether debtors would use such a mechanism, given the extremely low uptake of other debtor protections which require the debtor to take action of his own volition.

5.240 This option would also give rise to practical difficulties for debtors with more than one bank account. Where a debtor had more than one account, banks would be required both to share information concerning the balances in each and co-operate in implementation of the arrestment. It would be necessary, although considerably problematic, to provide for which of the two or more banks should be entitled, or compelled, to maintain the specified threshold in its account. Also, whether the protected balances should be divided equally between accounts, for example where there are three accounts would each account maintain an available balance of a third of the protected level. Further, how each bank would discover when, and to what extent, the debtor has closed an account or removed his available balance and what effect should such action have. Where, for example, three accounts are arrested but the debtor withdrew the one third protected level from one of those accounts, should the protected balance in the other two accounts rise to a half each or would the protected level remain as at the date of arrestment until the debtor signs a mandate or an action of furthcoming is raised. The former would involve constant monitoring of the balance in each account and the gradual release of funds previously attached by the arrestment which would place a disproportionate burden on the arrestee.

5.241 A difficulty for the creditor would be the reliance upon the debtor to disclose honestly the details of his bank and building society accounts. Debtors may maintain the minimum

[443] Then £63.

[444] Maher & Cusine, para 5.40.

threshold level in one bank account whilst preserving a much higher balance in another account. It would be necessary to impose on a debtor a duty to disclose his bank details which is discussed in paragraphs 5.272 - 5.273.

5.242 A protected level for subsistence would be for the purpose of protecting only individual rather than commercial debtors. The reason for this distinction is a sound one as commercial organisations do not have subsistence requirements comparable to those of individuals. It would be necessary to devise a workable test which would distinguish between individual and commercial bank and similar accounts.

5.243 **Option 2 - Exemption Based on Source of Funds (protecting earnings and social security benefits)**. As noted, certain types of payment are exempt from ordinary arrestment, including earnings to which the debtor remains entitled after deductions have been made under an earnings arrestment and most social security benefits. However, many employees have their earnings paid directly into their bank account. Payment into bank accounts is the preferred method of paying benefits, and from 2003 will become the normal method of payment.[445] In these circumstance it is "not clear whether, once payment has been made, the prohibition on arrestment continues to apply where the payment can still be separately identified as such (e.g. in a bank account)".[446] Different views have been expressed on the point.

5.244 Academic consideration of alimentary funds, including wages, salaries and pensions, which are generally exempt from arrestment concluded that, "a sum which is alimentary remains so for as long as it is identifiable".[447] This is by the case of *Woods v Royal Bank of Scotland* [448] in which the Sheriff Substitute held that payments to a debtor under the Workmen's Compensation Act 1906, which by statute were exempt from arrestment, were clearly identifiable within the debtor's bank account and therefore protected from an arrestment of that account. In particular, the sheriff noted that the payment in question "is perfectly identified and has been immixed with no other funds".[449]

5.245 It is generally considered, although not formally determined, that exempt payments, including earnings and social security benefits, lose their exempt status once they are paid into a bank account. On a number of occasions the Scottish Law Commission has considered the question of whether, and how, to protect earnings and other sums exempt from arrestment after those funds have been lodged in a debtor's bank account.[450] Although acknowledging the decision in *Woods v Royal Bank of Scotland*, the Commission nonetheless concluded that, "it seems that alimentary income payments (which include earnings) which enjoy some protection under the common law do not retain their alimentary character once they have been paid."[451] Thus, in relation to social security benefit paid into bank accounts, while most social security benefits are exempt from arrestment, in terms of section 187 of the Social Security Administration Act 1992, that statutory protection is lost once benefit has been paid into a bank account. The obligation to account is regarded as the subject of attachment and once benefit has been paid into a bank account it then becomes part of the claimant's property and the obligation to account to the claimant is discharged. The subject of attachment, at that point, becomes the bank's obligation to account to the account holder for the funds held on their behalf.

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[445] UK Government announcement May 1999.

[446] Macphail, para 29.29.

[447] *Stair Memorial Encyclopaedia*, Vol 8, para 280.

[448] 1913 SLT (Sh Ct) p 499.

[449] *Ibid*.

[450] Scot Law Com CM No 49, para 4.11-4.14; Scot Law Com No 95, paras 6.285-6.286; Scot Law Com No 164, paras 9.109-9.112.

[451] Scot Law Com No 164, para 9.109. The Commission cites as authority Stewart, pp 93-101.

5.246 *Scottish Law Commission Consideration*. The Commission also explored whether it would be possible to extend the exemption from arrestment of funds such as earnings after they had been paid into a debtor's bank account. It noted, in the context of earnings arrestments, that creditors "could frustrate the statutory exemptions by arresting the employee's bank account" and discussed ways of trying to prevent this.[452] It briefly referred to some foreign legal systems and to statutory rules which protect the earnings of debtors even where they have been transferred into a bank account and/or mixed with other funds.[453] The Commission came to the view, however, that the potential for protecting funds in bank accounts by interpretation of existing statutory provisions was limited and, in terms of tracing protected earnings which have become mixed with other funds, that "Scots law…does not have general principles and rules regulating tracing and specific provision would have to be made".[454]

5.247 Some years later, the Commission reconsidered the issue, of protecting exempt sums after they have reached a bank account, and again rejected it noting that responses to its earlier Consultative Memorandum had been wholly negative and "Those who commented on this proposal unanimously rejected it. Several commentators thought it would be difficult to frame effective and fair rules on tracing earnings, where for example they had become mixed with other funds. In view of this response, we make no recommendations to change the law".[455] Further revisiting the issue in its 1998 Report, the Commission concluded that "there does not seem to be any easy solution to the problem. It would not be sensible to prohibit arrestment of any bank account into which earnings were paid, because a large part of the credit balance could well consist of other sums that should not be protected from attachment by creditors. It would be difficult and time-consuming to evaluate the extent to which the balance consisted of the debtor's current earnings. Most people pay sums other than earnings into their bank accounts so that in order to determine the proportion of the balance one might have to look at payments in and withdrawals over a considerable period of time. Even if the only sums paid into a bank account were earnings there is the question of how far savings out of past earnings should be protected or whether the protection should extend to the last payment of earnings only".[456]

5.248 It would seem that the only straightforward method of protecting earnings and social security benefits would be through the creation of dedicated accounts into which only these sums could be paid. This would, of course, require the support and co-operation of the banks who would have very little to gain from such a scheme.

5.249 **Option 3 - Prohibition of Ordinary Arrestment Where There are Pre Existing Earnings Arrestments and/or Receipt of Social Security Benefits**. A third option might be to prohibit absolutely arrestment of the bank account of a debtor where that debtor is already subject to an earnings arrestment or where the bank account is used to hold social security benefits. However, this option would also give rise to practical difficulties and may not achieve the goal of protecting debtors from undue hardship. A general difficulty would be that, in many cases, a creditor or bank may not know whether an earnings arrestment is in place. The protection would, in such cases, require to be retrospective in its operation. Thus, a creditor could serve an arrestment in the first instance but proof of the existence of a live earnings arrestment would entitle the debtor to have the ordinary arrestment in the hand of a bank or similar arrestee recalled.

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[452] Scot Law Com CM No 49, para 4.11.

[453] *Ibid,* paras 4.11-4.12.

[454] *Ibid*, para 4.12.

[455] Scot Law Com No 95, para 6.285.

[456] Scot Law Com No 164, para 9.111.

5.250 This would not, however, assist employed debtors who are not subject to an earnings arrestment at all but who suffer serious hardship because the bank account into which their earnings are paid is arrested. In addition to these practical problems, providing such protection would be inequitable for creditors since the mere existence of an earnings arrestment is not, of itself, proof that the debtor would be caused undue hardship by the service of an arrestment in the hands of a bank.

5.251 As before, for the protection of social security benefits, the debtor would require retrospective entitlement to have an arrestment in the hands of a bank recalled or restricted where he could show that he was in receipt of a relevant benefit. As noted in relation to social security benefits, payment by automated credit transfer is to become the normal method for payment of benefit from 2003. The Department for Work and Pensions is currently finalising detailed policy on this issue although it is understood that claimants will still have the option (as at present) of uplifting their benefit payments from the Post Office in cash form after 2003.

Consideration of Reform

5.252 The foregoing options demonstrate that there is no straightforward solution which would not itself carry significant difficulties. It is appropriate that there should be reform in order to ensure that minimum protected levels in arrestments against earnings should not be eroded by further diligence such as an arrestment in the hands of a bank. However, any such reform must be proportionate in relation to the numbers affected and the corresponding impact on creditors and arrestees. The Executive seeks consultees' views on these matters on the options for reform discussed and any other potential alternatives.

Q. 5D. 2 In cases where an arrestment is served in relation to an account of a debtor who is already subject to an earnings arrestment or is in receipt of social security benefits, should reform be introduced:

(a) as indicated in option 1, or

(b) as indicated in option 2, or

(c) as indicated in option 3, or

(d) by alternative means (please specify)?

Fees for Arrestees

5.253 The question of whether a fee ought to be payable to a third party upon whom an arrestment has been served was considered by the Scottish Law Commission in its 1992 *Report on Statutory Fees for Arrestees*.[457] The Commission's recommendations have not been implemented. The Executive has re-visited the Commission's work on statutory fees for arrestees and duties to disclose information concerning the extent of funds, if any, arrested. The Executive intends to implement some of the Commission's recommendations as set out in the paragraphs which follow.

Impact of Arrestment on Third Party Arrestees

5.254 Arrestments are frequently served on third parties who do not, in fact, hold any property or goods owed to the defender/debtor in question. This is particularly true in the

[457] Scot Law Com No 133.

case of arrestments served on the main clearing banks. Assuming that an individual may hold an account with at least one bank, many arresters serve speculative arrestments on a number of banks. The Commission's Report noted that, of the total number of arrestments served on the four main Scottish clearing banks, those successful in attaching any funds had then varied between 6% and 35%.[458] Up to 65% of arrestments served had then been found to have no customer connection, where the debtor did not hold an account at all with the bank in question.[459] The remainder of failed arrestments had done so because, although the debtor had held an account, there was no credit balance available to be attached by the arrestment. Current success rates are not known.

5.255 In order to avoid liability to the arrester, an arrestee must check carefully whether an arrestment served upon him has in fact attached anything and, if so, must safeguard the attached assets. This investigation may be relatively straightforward for an arrestee with only a small number of debtors who are easy to identify. The previous administrative burden of dealing with large numbers of arrestments may be less onerous due to technological advancement, as discussed in paragraph 5.257 and 5.264.

Background to SLC Report and Subsequent Developments

5.256 Scottish banks had made representations that the enforcement system placed an unfair burden upon them as arrestees. The Committee of Scottish Clearing Bankers[460] had in the late 1980's noted a steady increase in the numbers of arrestments served on the banks during the previous decade. The Scottish Law Commission considered the matter and, in 1990, issued a Discussion Paper on *Statutory Fees for Arrestees* [461] which was stated to be "in part a response to representations made...by the Scottish Committee of Clearing Bankers".[462] The Commission invited responses to provisional proposals for the introduction of a scheme of statutory fees for arrestees. This was based on a sliding scale fee for banks and larger financial institutions calculated on the size of the institution and the number of branches required to be circularised for each arrestment. Views of respondents to the consultation were mixed, principal opposition being on the basis that fees for arrestees would increase costs and discourage the use of arrestment. In its final Report, issued in 1992, the Commission then, on principle, concluded that arguments in favour of introduction of fees outweighed those against.[463] Responses to the Commission's conclusions in its Report produced polarised views. It was not considered that an appropriate balance of interests or support for the proposals favoured reform.

5.257 Since representations were originally made by arrestees and considered by the Commission, significant developments have taken place. Most notably the leap in technological advancement and widespread use of electronic record keeping and communication. Thus, the process has become considerably less burdensome, particularly for larger institutions which may employ the most modern and sophisticated systems.

Policy Issues and Proposals for Reform

5.258 The Commission’s recommendations had been based primarily on grounds of principle rather than by weighing the practical benefits and disadvantages to different interest groups which might result from a system of fees for arrestees. Most of the factors

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458 *Ibid*, para 2.33-34, from information supplied by the Committee of Scottish Clearing Bankers.

459 *ibid*, para 2.35, supplied as before.

460 Representing the Bank of Scotland, The Royal Bank of Scotland Plc, The Clydesdale Bank Plc and (now) Lloyds TSB Scotland Plc.

461 Scot Law Com DP No 87.

462 *Ibid*, para 1.3.

463 Scot Law Com No 133, para 3.32.

previously considered remain relevant, although the weight which should be attached to them may now vary due to developments which have taken place since they were last assessed and additional relevant factors.

5.259 **Innocent 3rd parties**. The Commission's principal reason for recommending a fee was because arrestees are innocent third parties who are not directly concerned in the disputed matter but are "required to comply with diligences served on them under a warrant of the court which has been obtained by a pursuer or creditor for his own benefit".[464] The unfairness of arrestees being put to expense in complying with an arrestment, effectively acting as unpaid debt collectors, was described by the Commission as the "fundamental factor favouring statutory fees for arrestees".[465]

5.260 However, the Commission's proposals were primarily made in response to representations from Scotland's largest financial institutions and it is questionable whether they should be properly regarded as innocent bystanders suffering injustice. Any arrestee may not be viewed as an entirely unconnected bystander as an arrestment is only possible because the arrestee has a pre-existing legal relationship with the common debtor. In entering into a creditor/debtor relationship, financial institutions in particular are aware of the possibility of arrestments being served upon them. A respondent to the Commission's Discussion Paper argued that "a bank…in holding itself out as being prepared to borrow from a person and make use of their money, or to extend credit to them, must be prepared to accept as a condition of so acting the possibility of their customer falling into debt, and should make provision for the expenses likely to arise from it".[466] Another respondent had commented that "the increased administrative work in dealing with arrestments is part of the inevitable oncosts to which a Clearing Bank exposes itself as it increases its activities in competition with other financial institutions". The Commission had rejected the argument that the costs borne by arrestees were acceptable because arrestees also benefit from the use of arrestments and that an inexpensive and effective diligence system is of value to the whole community. The Commission referred to other participants in the legal system, such as witnesses and jurors, who at present receive expenses. However, this comparison may not be wholly appropriate. Jurors and witnesses are more clearly 'innocent' inasmuch as they normally have no prior legal connection with the parties in dispute and could not have anticipated or planned for their involvement in the matter. Further, many legal duties involve persons incurring expenses for which they are not compensated, such as a party who has been served with a specification of documents and who incurs expense in producing the documents demanded.

5.261 **Statutory and Common Law Precedents**. The Commission compared the English law procedures which are broadly similar to arrestments. The *Mareva* injunction is like an arrestment on the dependence inasmuch as it results in the freezing of goods or funds in the hands of a defendant or third party. The third party served with a *Mareva* injunction must, if requested to do so by the plaintiff, confirm whether it holds any assets of the defendant but in return is entitled to be compensated by the plaintiff for the reasonable costs of complying with the *Mareva* injunction. An English garnishee order, similar to an arrestment in execution, is served on a deposit-taking institution[467] and that institution is entitled to a flat rate fee in compensation for expenses incurred in complying with the order.[468] The level of the fee, which is deducted from the debtor's account, is fixed by statutory instrument and is currently £55 per order. The Commission also noted the statutory fee payable to employers

[464] *Ibid*, para 3.28.
[465] *Ibid.*
[466] The response of the Legal Services Agency to Scot Law Com No 87, *SCOLAG* Issue 164 (1990) pp 64-66.
[467] Banks, building societies, insurance companies etc.
[468] Attachment of Debts (Expenses) Order, SI 1996/3098, Art. 2.

who operate earnings arrestments. Currently, an employer may deduct 50p from an employee's earnings each time he is required to operate an earnings arrestment.[469]

5.262 However, garnishee orders are used much less frequently than arrestments are used in Scotland and the procedural requirements to be fulfilled by an applicant for a garnishee order or *Mareva* injunction are relatively more onerous.[470] The fee payable to employers operating earnings arrestments represents a small token fee for employer arrestees which may be charged against the employees earnings should employers wish to do so. Those sought by financial institution arrestees and proposed by the Commission were substantially greater at £10 in 1992.[471]

5.263 **Other Persons Entitled to Fees**. The Commission regarded it as unfair that other persons involved in the diligence system, such as solicitors and officers of court, are able to charge fees for their services but that arrestees cannot. However, the role of solicitors and officers of court in the diligence system is somewhat different from that of arrestees. The former are engaged to provide services for which they receive a fee in return. The latter are placed under an obligation by a legal rule which, as noted, benefits the whole community.

5.264 **Increase in Volume of Arrestments and Recovery of Costs by Financial Institutions**. The Commission had viewed the then substantial increase in use of arrestments as a reason for the introduction of fees for arrestees. Numbers in recent years show a gradual increase, as indicated in the table below.

Table IV **Arrestments in Execution**

Year	Served under Non Summary Warrant Procedure	Served under Summary Warrant Procedure[1]	Total
1996	2,158	81,706	83,864
1997	2,005	89,641	91,646
1998	1,978	96,707	98,685
1999	1,998	98,613	100,611
2000	3,828	98,582	102,410

Source: Civil Judicial Statistics

Note 1: Includes non earnings arrestments in execution served in respect of community charge, council tax and other summary warrants.

The Commission's view was that the administrative burden imposed on arrestees, "which may possibly have been not unreasonable, or at least was borne without complaint, in the past appears to have become unreasonable because of that increase".[472] The main clearing banks had considered that they had been bearing a disproportionate share of the costs of arrestments. It is not correspondingly clear whether costs incurred by arrestees in complying with arrestments have increased on the same scale. Indeed, it may be surmised that such costs would have decreased as a result of the rapid technological progress made by institutions in recent years. Nor is it clear whether the costs incurred by them do in fact represent a loss to the banks or are simply absorbed within and passed on to customers in the form of bank charges. Banks could themselves take action to recover their costs from their customers by making contractual provision for inclusion of this within general service charges or as an additional charge to the account of any customer served with an

[469] 1987 Act, s71. But see para 5.132.

[470] See the discussion at Scot Law Com No 133, paras 2.13-2.23.

[471] *Ibid,* recommendation 5.

[472] *Ibid*, para 3.31.

arrestment. The Committee of Scottish Clearing Bankers has been unable to supply an up to date assessment of the current burden of complying with arrestments as each bank applies different procedures.

5.265 **Potential Impact on the Diligence System as a Whole and Informal Means of Collection**. The potential effect which such fees might have on the diligence system as a whole is another relevant factor. Concerns have been expressed that further increases in the cost of arrestment, one of the most popular diligences used in Scotland, would be to the detriment of both creditors and debtors. Creditors with legitimate claims might be deterred from pursuing them, whilst those debtors who were affected by arrestment would have an additional item of expenses charged against them. Further concerns have been raised about the possibility of informal means of collection by direct pressure or of those who provide credit restricting that provision in cases where recovery by the use of diligence was likely to involve the creditor in an increase in costs readily categorised as throwing good money after bad. Although perhaps overstated, reforms which would make arrestments a less attractive option or lead to an increase in the use of unacceptable methods of debt collection and/or restriction of credit would be undesirable.

5.266 **Effect on Small Creditors**. It has been argued that the introduction of fees for arrestees would have a disproportionate effect on smaller creditors. Particularly, in small claims cases, consumer creditors should have access to an effective system of enforcement against commercial debtors. Also that the introduction of fees would render the costs of arrestment too high for many small creditors, effectively denying them a means of enforcing their decree.[473] Although it has also been suggested that fees could act as a deterrent against indiscriminate excessive use of arrestment.

5.267 **Reform**. It is not considered that the balance of the arguments weighs in favour of imposition of a statutory fee for arrestees and there have been significant changes since the issue was previously considered by the Scottish Law Commission. If the only consideration were parity between ordinary arrestments and earnings arrestments, the appropriate nature of any such fee would be considered to be in line with the current level and means of imposition, that is by deduction from the debtor, in earnings arrestment. Whilst other arrestees may not, financial institutions have an opportunity to recover their costs by making contractual provision for the charging of a fee, either specifically or within general service charges, to any customer on whose account an arrestment is charged. The Executive does not intend to implement the Scottish Law Commission's recommendations for introduction of statutory fees for arrestees.

Duties of Disclosure

5.268 Two issues arise in the context of arrestment which concern disclosure of information. The first is whether an arrestee should be permitted, if not obliged, to disclose to an arresting creditor whether his arrestment has successfully attached property belonging to the debtor and, if so, how much? The second is whether a debtor should be obliged to disclose details of all accounts held by him.

Disclosure by the Arrestee

5.269 Currently when an arrester serves an arrestment he may not know whether the arrestment has been successful in attaching any of the common debtor's goods or funds. There is no legal obligation on arrestees to disclose to an arresting creditor the existence or extent of assets attached by an arrestment. The effect of this current situation is that an

[473] The response of the Legal Services Agency to Scot Law Com No 87, *SCOLAG* Issue 164 (1990).

arrester may incur additional expense in raising an action of furthcoming only to find that the arrestment had failed to attach any funds.

5.270 Despite the absence of an obligation to do so, an arrestee might voluntarily disclose whether an arrestment served upon him had been successful. Indeed, until fairly recently it was "the practice of the Scottish banks that they would inform a creditor using an arrestment in execution if the arrestment had attached an account of the common debtor (though the banks would not do so where the arrestment was used on the dependence of an action)".[474] However, the limitations of a voluntary system of disclosure became evident during the early 1990's at around the same time as banks had become frustrated by the lack of fees for arrestees. In 1992, one bank stated its intention to no longer answer arrestment enquiries "unless authorised by a customer to do so, or unless an action of furthcoming is raised".[475] This was on the basis that there was no legal obligation to do so prior to an action of furthcoming and that, for reasons of client confidentiality, they considered it necessary to obtain a customer's consent before responding to any enquiry about the status of a customer's account.

5.271 **Scottish Law Commission Consideration**. The Scottish Law Commission addressed this issue in its *Report on Statutory Fees for Arrestees*. Different views have been expressed as to whether disclosure by a bank or other financial institution of information as to the existence and extent of funds attached by an arrestment in execution would breach its duty of confidentiality to its customers.[476] The Commission described the earlier practice, of disclosing details of funds attached by an arrestment, as sensible and practical. It took the view that it was in the interests of both the arresting creditor and the arrestee that this information should be released and that "it would be unsatisfactory to require an arrester to raise an action for furthcoming for the sole purpose of discovering that no funds or property had been attached by the arrestment".[477] The Commission went further by supporting not only a right but a duty on arrestees to disclose information. It supported the view expressed on consultation that for an arrestee to withhold the information was simply to put the creditor to the expense of a possibly fruitless action of furthcoming.[478] However, the Commission had proposed that the duty be restricted to arrestments in execution, recognising that any right to disclosure "might be open to abuse by the use of arrestments on the dependence of a trumped up action specially designed to elicit the confidential information".[479]

Disclosure by the Debtor

5.272 A duty placed on a debtor to disclose to his creditors details of his bank and other accounts would assist creditors in targeting diligence effectively and reduce the burden on financial institutions obliged to process large numbers of arrestments which are ultimately ineffective. Since no duty currently exists this can lead to creditors serving multiple arrestments on a number of banks and other financial institutions in the hope, but not in the knowledge, that funds will be attached. Such a duty would be most appropriate in the case of arrestments in execution which proceed only after legal constitution of the debt due to the creditor.

474 Macphail, para 29.17.

475 Letter from Bank of Scotland circulated to solicitors and sheriff officers, 16 July 1992.

476 See discussion of the common law position in Scot Law Com No 133, paras 2.7-2.8.

477 *Ibid,* para 4.5.

478 *Ibid,* para 4.8.

479 *Ibid,* para 4.9.

5.273 Imposition of any such duty of disclosure is an issue of importance to all aspects of the enforcement system and is one which should be addressed in the wider context of access to information, as discussed in Part 3 of this paper.[480]

Policy Issues and Proposals for Reform

5.274 A system which requires unnecessary court procedure places an unacceptable burden on arresting creditors and public resources which should not be condoned or continued. Former voluntary arrangements for disclosure of information about the success of arrestments have, for the most part, ceased to operate in practice. A statutory duty of disclosure on arrestees would enhance the efficiency and effectiveness of the diligence of arrestment. This is supported by a recommendation of *It Pays to Pay*.[481] It would, in turn, place a burden on arrestees. Necessary arrangements are understood to be undertaken by some at present and had previously been undertaken by others. The financial implications for arrestees and the balance of respective interests have already been discussed in paragraphs 5.252-5.267 and apply equally in this regard.

5.275 It is considered that this would be an appropriate and important reform. *Accordingly, the Executive intends to implement the Scottish Law Commission's recommendations for introduction of an arrestee's duty of disclosure from its* Report on Statutory Fees for Arrestee *as follows*: [482]

1) Where an arrestment in execution has been laid, or an arrestment on the dependence has been followed by extract of the decree for the principal sum or expenses in the depending action, the arrestee, if required to do so by the arrester or his agents, should be under a duty to disclose to the arrester or his agents whether any funds and other moveable property have been attached by the arrestment and the nature and extent of those funds or property. Such a disclosure should not be treated as a breach of any duty of confidentiality which the arrestee may owe to the common debtor with respect to those funds or property.

2) The sanction for breach of the duty of disclosure should be liability imposed on the arrestee for the expenses incurred by the arrester in any action of furthcoming in respect of those funds or property.

3) An arrestee should not be entitled to make any charges to the arrester for implementing the foregoing duty of disclosure.

4) For the above purposes, an arrestment in execution includes an arrestment in pursuance of an extract decree in court proceedings, a summary warrant, an extract document of debt registered for execution in the books of court, and a document of debt enforceable by diligence as if so registered.

5.276 In reaching this conclusion, consideration has been given to Article 8 of the European Convention of Human Rights which guarantees the right to respect for family and private life, home and correspondence. Paragraph 2 of Article 8 provides that "There shall be no interference by a public body with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or

[480] Paras 3.76-3.82 and 3.113.
[481] Paras 89-90.
[482] Scot Law Com No 133, Recommendation 16, clause 7.

crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

5.277 Whilst it is doubtful whether the rights expressed in article 8 are engaged in the circumstances discussed, the duty of confidentiality in relation to a person's private life would, in any event, be in accordance with the law and necessary in a democratic society in the interests of the economic well-being of the country and for the protection of the rights of others. The information to be disclosed by new law is already disclosed by existing law, by action of furthcoming, and reform would simply make it available at an earlier stage. The proposed reform would be subject to appropriate safeguards to prevent arbitrary use of the state sanctioned arrangements.[483] It is general practice to anticipate actions of furthcoming and disclose the information voluntarily which will be formalised by the proposed reform.[484] Disclosure of such information for a specified and limited purpose is in the public interest and not overridden by the general public interest in maintaining a right to confidentiality. Measures for efficient enforcement of unfulfilled civil obligations to pay money are in the economic well-being of the country and of others rights to receive settlement of debts. Consideration of the balance of such interests by the European Court of Human Rights clearly indicates that public interference of the sort proposed would be justified and proportionate when considering both the need to respect private life on the one hand and, on the other, the economic well–being of the country and the protection of the rights of others.[485]

Actions of Furthcoming

Current Practice

5.278 As already noted, arrestment is an inchoate diligence which means that, in order to obtain a real right to the property arrested, a creditor must take further action. He must do one of two things. He may obtain a mandate from the common debtor which authorises the arrestee to release the property to the creditor. In the case of arrestments in execution, this is the most common way of bringing an arrestment to an end. Alternatively, if the common debtor is unwilling to execute a mandate, the creditor will be entitled to possession of the arrested property only after achieving success in an action of furthcoming.

Table V **Actions of Furthcoming**

Year	Court of Session[1]	Sheriff Court[2]
1994	0	213
1995	7	177
1996	5	159
1997	6	150
1998	2	97
1999	7	151
2000	0	184

Source: Civil Judicial Statistics.

Note 1: Actions of furthcoming initiated.

Note 2: Actions of furthcoming disposed of.

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483 *Camenzind v Switzerland*, RJD 1997-III, 2880.

484 Scot Law Com No 133, para 2.2.

485 See, for example, *MS v Sweden*, RJD1997-IV, 1437 and *Dudgeon v UK*, (1981) 4 EHRR 149.

5.279 The number of arrestments which result in an action of furthcoming are few as indicated in table V overleaf. They represent an extremely small proportion of arrestments served. By way of illustration, in the year 2000 a total of 102 410 non-earnings arrestments in execution of sheriff court decrees and summary warrants were served whereas the sheriff court disposed of only 184 actions of furthcoming.[486] In practice, the vast majority of common debtors grant a mandate in favour of the arresting creditor. However, the execution of a mandate is an entirely voluntary act on the part of the debtor. The Report *It Pays to Pay* had recommended that local authorities enter into protocol agreements with banks for this purpose.[487]

Policy Issue and Proposal for Reform

5.280 It is considered desirable to give formal recognition to the current practice in relation to granting of mandates for the release of funds to the creditor who has served an arrestment in execution. This could be achieved by making provision for an automatic mandate. Where a creditor served an arrestment in execution, the property arrested and due to the creditor would be released automatically without the need for an action of furthcoming or execution of a mandate. This would simplify the arrestment process and reduce the procedural burden on creditors who have already obtained a decree. It would be necessary to incorporate a safeguard for debtors in the event that there may, for example, be some irregularity concerning service of the arrestment. Deferred release of the property, after a period of 28 days in which the debtor could lodge an objection, could be applied. In the few cases where this was necessary, a hearing to determine whether the debtor's objection was valid would replace the action of furthcoming and it would be rather less burdensome procedurally.

Q. 5D. 3 Should the law relating to actions of furthcoming be reformed to provide for automatic release of property to a creditor following service of an arrestment in execution subject to a 28 day period for objection?

Schedule of Arrestment

Current Styles of Arrestment Schedule

5.281 Until recently, the style of schedule of arrestment was only governed by statute in exceptional cases, although there have always been common law rules as to the information which must be contained in the schedule. Defects in the schedule may also render the arrestment invalid, for example where there is an error in the name or designation of the arrester, arrestee or common debtor.[488] A prescribed form of schedule for arrestments in execution of Court of Session decrees is now provided for by the Court of Session Rules.[489] However, there is no prescribed form of a schedule for arrestments in execution of sheriff court decrees and the style which is commonly used [490] has been considered archaic and liable to cause confusion on the part of the arrestee.[491] By way of illustration, arrestments served on bank accounts may state that the arrestment has:

> "lawfully fenced and arrested in the hands of [the arrestee] the sum of [£] less or more, due and addebted by the said arrestee to [the common debtor]...together with

486 *Civil Judicial Statistics*, 2000, (2001), Tables 3.7 and 3.9.
487 Paras 89-90.
488 *Hendersons Trustees,* 1831 9 S 618 .
489 A.S. 1994/1443, rule 16.15(1)(f) and Form16.15-E.
490 See the example in Stewart, p 846.
491 *Stair Memorial Encyclopaedia*, Vol 8, para 258.

> all horses, cattle, goods, gear, merchant-wear of all sorts, sums of money, rents of land and houses, and every other thing presently in their hands, custody and keeping pertaining and belonging to [the common debtor], all to remain in the hands of the said arrestee under sure fence and arrestment at the instance of the said pursuers, aye and until they shall be fully satisfied and paid the sums of [£], being the [details of the debt]".[492]

Policy Issue and Proposal for Reform

5.282 It is considered appropriate that the style of schedule of arrestment in execution should be prescribed for sheriff court decrees in similar manner to that provided for in the Court of Session. This should achieve greater simplicity and coherence in the arrangements for arrestment. In doing so, the language and style of the schedule should be modernised. For the purpose of consistency, it would be desirable to review all current forms of schedule of arrestment.

Q. 5D. 4 Should all forms of schedule of arrestment, in execution and otherwise, be modernised and prescribed by rules of court?

[492] *Bremner v TSB (Scotland) plc* 1993 SLT (Sh Ct) p 3.

(E) DILIGENCE CONCERNING HERITABLE PROPERTY

5.283 A number of forms of enforcement may be taken against heritable property, such as land or buildings, and related interests in heritable property, such as rents or leases. They have, for the most part, remained unchanged for many years and were not altered, to any significant extent, by the diligence reforms in the late 1980s.[493] However, the Scottish Law Commission has undertaken substantial work in this area, culminating in its 2001 *Report on Diligence*.[494] The Executive has considered the Commission's recommendations and the Executive's intentions regarding the reforms proposed are set out in this Part. Further aspects of diligence concerning heritable property, not included in the Commission's work, have also been considered and proposals for their reform are also set out in this Part.

Scottish Law Commission Consideration

5.284 The Scottish Law Commission's *Report on Diligence* followed public consultation over a period of years from its Discussion Papers on *Adjudication for Debt and Related Matters*,[495] *Equalisation of Diligences*,[496] *Diligence Against Land*[497] and *Attachment Orders and Money Attachment*.[498] The Commission made a range of recommendations on diligences concerning heritable property, including abolition of certain aspects and reform of others, as well as introduction of new diligences.

Inhibition in Execution

5.285 The use of this diligence on the dependence of an action was examined separately by the Scottish Law Commission in its *Report on Diligence on the Dependence and Admiralty Arrestments*.[499] The Commission's recommendations and the Executive's proposals for reform with regard to its use on the dependence were set out in Part 5A. As a diligence in execution of a decree, or equivalent, the Commission has made further recommendations for reform.[500]

5.286 The diligence of inhibition is a form of enforcement which is widely used and generally regarded as effective.[501] It prevents a debtor from dealing with his heritable property in a way which might prejudice the debt owed to the inhibiting creditor, for example by selling the property and disposing of the proceeds. It affects all of the debtor's heritable property situated in Scotland, regardless of the amount of the debt owed to the creditor. This is achieved by registering the inhibition in the Register of Inhibitions and Adjudications following service of the warrant granting authority to inhibit on the debtor.

5.287 The Commission recommended retention of inhibition subject to reform. In particular, the Commission recommended that inhibition should continue to have the effect of rendering reducible future voluntary deeds by the inhibited debtor, but that it should no longer confer a preference on the inhibiting creditor in respect of post-inhibition debts incurred by the debtor. It recommended clarification of the remedies available to the inhibiting creditor where there

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[493] In the 1987 Act.
[494] Scot Law Com No 183.
[495] Scot Law Com DP No 78.
[496] Scot Law Com DP No 79.
[497] Scot Law Com DP No 107.
[498] Scot Law Com DP No 108.
[499] Scot Law Com No 164.
[500] Scot Law Com No 183, Pt 6.
[501] *Ibid,* para 6.2 and 6.3.

has been a breach of inhibition and of the rules of prescription which apply to the exercise of those remedies. It recommended means of resolving certain problems which arise in conveyancing transactions when an inhibition has not been discovered at the date of settlement.

Adjudication for Debt

5.288 The diligence of adjudication for debt affects specified heritable property. A creditor holding a decree or similar authority ordering payment must raise an action of adjudication. The decree granted by the court has the effect of granting a heritable security in favour of the creditor by judicial means. The Commission recommended that this diligence be abolished, on the basis that much of the law on adjudication for debt is uncertain and obscure. The Commission considered that, in practice, its operation presented few advantages for creditors and contained little by way of protection of the interests of debtors. It considered that the law on adjudication did not reflect appropriate principles for the contemporary law of diligence and recommended that it be replaced.

Land Attachment

5.289 The Commission recommended that a new diligence, land attachment, should be one of two new diligences to replace adjudication for debt. This new diligence would enable a creditor holding a decree or similar authority to obtain a real right over heritable property in security for the debt due. After a period of six months this could be followed by an application to the court for authority to sell.

5.290 **Options for Reform**. In so far as a land attachment might affect heritable property occupied as a dwellinghouse, the Commission offered two options by which the creditor's right over the attached property would be completed, but it made no recommendation. The first option would be to exempt dwellinghouses from sale in all circumstances. The second option would permit sale, subject to special measures for debtor protection to prevent or minimise the potential for homelessness of the debtor and other occupiers of the dwellinghouse. This would be subject to debtor protections, including time to pay arrangements. It would be supported by further debtor protections prohibiting sale unless the debt exceeded a certain amount or where it would be unduly harsh in the particular circumstances, in line with provisions of the Mortgage Rights (Scotland) Act 2001.[502]

5.291 The Executive considers that the first option would render the diligence substantially ineffective against such property. In addition to protecting vulnerable debtors, it would be open to abuse by the debtor who was not prepared to co-operate. The Executive considers that the second option offers a more equitable balance between creditor and debtor interest. Accordingly, it is intended to implement the Commission's second option for reform.

Attachment Order

5.292 The Commission recommends that a new diligence, an attachment order, should be the second of two new diligences to replace adjudication for debt. An attachment order would act as a residual diligence to attach property, including rights in heritable property, which would not otherwise be caught by land attachment or other forms of diligence. A creditor, holding a decree or equivalent, would make an application to the court for an attachment order following service of a charge for payment. It would have the effect of creating a real right or preference over the property in favour of the creditor. It would be necessary to make a further application to the court for an order authorising sale, or other appropriate procedure dependent on the nature of the property, in order to satisfy the debt

[502] asp 11.

due. The process would include provisions to protect third parties who had transacted in good faith in respect of the attached property and for debtor protections including time to pay arrangements.

Implementation of the Commission's Recommendations

5.293 The Scottish Law Commission consulted widely before issuing its Report. It would not usually be considered necessary or appropriate to re-consult. However, consultation prior to publication of the Commission's Report spanned a period of some 10 years, between 1988-1998. Also, for expediency having regard to the Executive's general review of the law of enforcement, the Commission submitted its Report without a draft bill. Preparation of a bill is the Commission's normal practice in order to give expression to its recommendations and work through the application of general principles for reform to detailed rules.[503] Accordingly, there may be intervening circumstances or issues in relation to these matters, or their interaction with any matters raised in this consultation paper, which consultees may wish to make known. Further, the Executive seeks views on the options for reform offered by the Commission in relation to its recommendation for a new diligence of attachment orders. Subject to views expressed on consultation, including the general issue concerning service of a charge, discussed in Part 7 the Executive is minded to implement the Commission's recommendations.

Q. 5E. 1 Consultees are invited to comment on the reforms proposed for:

(a) inhibition

(b) adjudication for debt

(c) land attachment

(d) attachment orders.

Sequestration for Rent

5.294 Sequestration for rent is a long established common law method of enforcement available to landlords, and certain other creditors, for recovery of rent. Sequestration for rent is not in any way related to sequestration in the sense of insolvency.

Nature and Purpose

5.295 In addition to other means of enforcement, landlords may raise an action of sequestration for rent to enforce a right in security over corporeal moveable property situated on heritable property for which rent is due. The moveable property may be sold in order to realise funds for settlement of the debt.

5.296 The right in security is known as the landlord's hypothec. The hypothec is security for one year's rent and does not secure arrears. It has been restricted in relation to the type of lease for which rent may be due and now only applies to leases of urban subjects and holdings not exceeding two acres in size. The right exists in mineral leases, game rents, nurseries and market gardens. The hypothec gives a right in security over property (*invecta* and *illata*) [504] belonging to the tenant and it can also extend to property owned by third parties brought onto the premises by the tenant, for example property on hire (but not on hire

[503] Scot Law Com No 183, para 1.2.
[504] Effects brought on to the premises.

purchase). It can even cover property which has been sold but not yet removed from the premises. There are a number of exemptions including property on the premises temporarily, property belonging to a member of the tenant's family or a lodger, property subject to a conditional sale agreement or property exempted from poinding and money bonds or bills.

Action of Sequestration for Rent

5.297 The landlord enforces his right in security by way of an action of sequestration for rent. There are two types of action which are often combined. Firstly, sequestration in payment, where the term for payment has passed, and, secondly, sequestration in security, where the term of payment has not yet arrived. Certain protections have been applied to this type of action by recent legislation. Provision has been made to give the tenant time to pay at any time before sale of the sequestrated property takes place.[505] Moreover, the diligence may not be applied in respect of rent due for any house let on an assured tenancy except with leave from the sheriff.[506]

5.298 An action of sequestration for rent is competent only in the Sheriff Court and, depending on the amount of rent due, may proceed either by way of an ordinary action or as summary cause. The landlord applies to the court for a warrant to place the property under judicial control (sequestrate it) and for a warrant to sell the property to the value of the rent due. It is common for the landlord to seek, at the same time, an order requiring the tenant to refurnish (replenish) the tenancy or pay the sum of the future rent to the court by way of bond of caution or consignation should insufficient property remain after sale. A warrant to eject the tenant and re-let the tenancy, in the event that replenishment is not made or caution not found, may also be part of the application.

5.299 The warrant to sequestrate is granted on the landlord's application without hearing parties. The warrant entitles the landlord to instruct officers of court to inventory and sequestrate or secure the property. Prior notice of the sequestration does not require to be given to the tenant. The action and warrant are intimated to the tenant who is cited to appear at a subsequent hearing to consider the action.

5.300 The tenant may seek recall of the sequestration, usually on providing a bond of caution or consignation. Where the landlord's action is successful, the court will grant a warrant to sell the property to the extent of the sum due by public auction. The landlord must lodge a report and statement of the debt within 14 days of the sale. Where any balance of rent remains outstanding the landlord may either seek to have the tenant replenish the tenancy and further sequestrate or seek to carry out alternative means of diligence.

5.301 During the period between the sequestration of the property and its sale, the tenant may continue to use the property but may not sell or interfere with it in breach of the sequestration. A breach of sequestration is treated in a similar manner to a breach of interdict. If the landlord exercises the sequestration for rent wrongly, oppressively or unnecessarily he may be liable in damages to the tenant in an action of wrongful diligence.

Effect on Third Parties

5.302 Any third party, whose property has been included in the sequestration, may apply to the court to be sisted as a party to the action and may seek recall of the sequestration in respect of his property. Where the warrant of sale had been granted he may apply to have

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[505] The Rent (Scotland) Act 1984, c58, s110.

[506] The Housing (Scotland) Act 1988, c43, s29.

all other items sold before his. In accordance with the general principle, the "third party is presumed to know the law and, therefore, is presumed to have consented to the landlord's hypothec over him when he delivers the articles into the possession of the tenant of the premises".[507] Even where consent has expressly been withheld, it has not prevented the sale of the third parties' property.[508] Where a sub-lease has not been approved or acknowledged by the landlord, a sub-tenant's property may be sequestrated for the rent due to the landlord by the principal tenant and it is immaterial that the sub-tenant has paid his rent to the tenant. Although, where the landlord has agreed to the sub-let, the hypothec secures only payment of any rent due by the sub-tenant.

Use of Sequestration for Rent

5.303 It is understood that this diligence is used extremely infrequently. However, no statistics are available to support this. The case law on the subject suggests that it is rarely used and only in commercial situations.[509]

Policy Issues and Proposal for Reform

5.304 Sequestration for rent is a specialised form of diligence, not generally available and which may give advantage to a landlord over other creditors. It is a powerful means of enforcement which may be exercised as a protective measure prior to the debt being legally constituted. Perhaps the most significant effect is on third parties, who may have hired out or given use of their property to a tenant. The presumption is that third parties are aware of the existence of the hypothec and have consented to it. That everyone should be deemed to be aware of the law is unobjectionable in principle, but the impact of the diligence on third parties for satisfaction of the tenant's debt is considered to be disproportionate notwithstanding any right of relief.

5.305 Having regard to the limited use of this diligence it is not clear whether there remains any need for a special diligence for use by landlords or, indeed, whether landlords should continue to be afforded a preference over other creditors. It is questionable whether this form of diligence remains relevant within a modern enforcement system, particularly insofar as it may remain competent in relation to residential property. All creditors, including landlords, will have the possibility of recourse to attachment of a tenant's corporeal moveable property by way of the alternative arrangements which it is intended to introduce in place of poinding and warrant sale.[510] For purposes of consistency and transparency, it may be preferable to restrict recourse to attachment of corporeal moveable property by that means in future.

5.306 Subject to consultees' views on any continuing need for this form of diligence and to introduction of legislation for alternative arrangements to poinding and sale, the Executive is minded to abolish sequestration for rent. This would not affect the landlord's hypothec.

Q. 5E.2 Should sequestration for rent be abolished?

[507] *Ditchburn Organisation (Sales) Ltd. v Dundee Corporation* 1971 SLT 218, p 220.

[508] *Ibid.*

[509] *Ditchburn Organisation (Sales) Ltd. v Dundee Corporation* 1971 SLT 218; *DH Industries Ltd. v R E Spence and Co. Ltd.* 1973 SLT 26; *Scottish & Newcastle Breweries Ltd. v Edinburgh District Council* 1979 SLT 11; *Cumbernauld Development v Mustone Ltd.* 1983 SLT 55.

[510] Recommended in *Striking the Balance*, see Part 1, para 1.7

Maills and Duties

Nature and Effect

5.307 Maills and duties is a common law diligence of long-standing which may be used by a creditor holding a heritable security over property which is leased. It would be used by a creditor in a bond and disposition in security. However, following introduction of standard securities,[511] it was no longer possible to create a new bond and disposition in security. It is thought that there are now few holders of bonds and dispositions in security. The Abolition of Feudal Tenure etc. (Scotland) Act 2000, once in force, will abolish the right of any remaining creditor in a ground annual to enforce payment. [512]

5.308 It enables the creditor to attach rent payable to the debtor by a tenant of his heritable property. The effect of this is to require the tenant to pay his rent direct to the landlord's heritable creditor. The landlord is bypassed and the creditor can act in his place by pursuing the tenant for payment of arrears or rent if not paid and may terminate or grant new leases.

Action of Maills and Duties

5.309 An action of maills and duties may be raised by a creditor who holds a debt secured over land (*debitum fundi*) which gives him the right to take possession of the heritable property. Certain classes of heritable creditors who have other remedies have been excluded from its use so that its availability is now limited. [513] The action may be raised in the sheriff court or the Court of Session under common law or statute. [514] The tenant is either called as a party to the action or is given intimation of it. This prohibits him from paying rent to the landlord and, upon intimation of the decree for maills (rent) and duties (personal services) [515] the tenant becomes liable to pay rent direct to the heritable creditor.

Use of Maills and Duties

5.310 It would appear that this method of enforcement is no longer used, although no statistics for its use are available. There has been no reported case law for many years.

Policy Issue and Proposal for Reform

5.311 The availability of recourse to this form of enforcement has been restricted over the years by developments in the law in relation to heritable property. The small category of creditors to whom it would be available will have reduced in numbers over the years and any remaining appear not to have made use of it. Maills and duties appears to have become obsolete and is no longer necessary in the modern enforcement system. Subject to consultees' views on any continuing need for this form of diligence, the Executive is minded for clarity to abolish any residual recourse to the diligence of maills and duties.

Q 5E. 3 Should residual availability of maills and duties be abolished?

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[511] Conveyancing and Feudal Reform (Scotland) Act 1970,c35.

[512] s56.

[513] For discussion of these restrictions see *Stair Memorial Encyclopaedia,* para 394 and Maher & Cusine, para 8.65.

[514] The Heritable Securities (Scotland) Act 1894, c44.

[515] Walker, *Civil Remedies*, ch 21, p 332.

Ejection

5.312 It may be necessary to have recourse to the enforcement system for the purpose of ejecting a person from heritable property.

Nature and Purpose

5.313 Ejection may be undertaken on the authority of decrees of recovery of possession of heritable property, removing or ejection. However, there is a great deal of confusion about the procedures which may be invoked for the purpose of obtaining authority to eject someone from heritable property. This is primarily because of the way in which the terminology is used in the various statutes which permit the remedy. Academic writing has endeavoured to clarify this as follows:

> "Each of the terms 'removing' and 'ejection' has two meanings and it is essential to set these out first in the hope that the confusion may be dispelled, or [at] least reduced. The term 'removing' has a general meaning which covers any surrender of heritable property and it is usually applied to the surrender of a lease by a tenant. However, it has the more specific meaning of an action by which the landlord seeks to recover possession of property from a tenant. The tenant's right is terminated by a judicial process. By contrast, 'ejection' is used as an action whereby the owner or possessor of heritable property seeks to recover possession from someone who has no right or title, the typical example being a squatter. It is also used in another sense to denote the last stage in an action of removing (or its equivalent) whereby the court grants warrant for the eviction of the occupants by officers of court."[516]

Actions of Removing

5.314 There are numerous statutory bases upon which an action of removing may be competent. Similarly, different procedures are available in the courts by which removing may be sought. These are a matter of property law and civil court procedure which are not considered substantively as part of this exercise.

5.315 In the sheriff court, a decree in a summary cause action for recovery of possession of heritable property grants warrant for ejection. It is unclear whether it is necessary to serve a charge when executing a warrant of ejection for enforcement of a summary cause decree for recovery of possession of heritable property and, if so, what period of charge is required. The courts appear to have been reluctant to take a view on whether or not there should be a charge and, if so, whether a 48 hour or 14 day period of charge should apply.[517] In an ordinary action for removing, decree grants warrant for ejection. Service of a charge, giving two days notice is usually, but not always, required, although it is understood that, in practice, officers of court instructed by the heritable proprietor will always issue notice. An action of removing raised in the Court of Session requires to be followed, in the event of success, by further procedure involving service of a charge and signetted letters of ejection which are transmitted to the sheriff where the heritable property is situated.

Action of Ejection

5.316 An action of ejection is also the remedy for removal of an occupier who does not hold title to occupy the heritable property, such as a squatter. Where a decree with a warrant for

[516] Maher & Cusine, para 9.51.

[517] "*Is a Charge Necessary for Recovery of Possession of Heritable Property?*", Civil Practice, Issue 15, May 1997, p 8.

ejection has been granted, a charge is not necessary but the sheriff may require notice to be given.[518]

Enforcement by Ejection

5.317 Ejection is the means by which the decree of removing, recovery of possession of heritable property or ejection may be enforced. As noted, the need for a charge to be served on the occupier and the duration of the period of charge, during which he must leave the property and remove his personal belongings, depends on the type of decree in which the warrant for ejection has been granted. However, the practice is to serve notice in cases where a charge is not required. On expiry of the days of charge or notice, the heritable proprietor may instruct an officer of court to implement the warrant. Failure to comply with the decree within the days of charge entitles the pursuer to eject the occupier from the heritable property.

5.318 An ejection may not be carried out at night, although the hours which constitute night are unclear. The practice is for the royal initials, date of ejection and the initials of the officer to be chalked on the outside door of the premises. This indicates that the ejection has taken place and that the premises may not be re-entered. The officer of court will ensure that the property is cleared of possessions and made secure, if necessary with the assistance of a locksmith. If the occupier's possessions are not handled with care, it may give rise to liability for any avoidable damages occurring during the ejection. Wrongful ejection may also render the heritable proprietor liable in damages to the occupier of the property.[519] Unlawful eviction is a criminal offence.[520]

Use of Ejection

5.319 The extent to which this method of enforcement is used is not known as no statistics are recorded. Neither are records kept of the total numbers of decrees granted in the different types of action. However, the number of actions initiated by mortgage lenders is recorded and is shown in the table below. It is not known how many of these decrees require to proceed to enforcement action.

***Table VI* Actions initiated by mortgage lenders to recover possession of heritable property**

Year	No. of actions initiated by mortgage lenders to recover possession of heritable property
1995	5,183
1996	5,444
1997	5,381
1998	6,241
1999	7,790
2000	6,597

Source: Civil Judicial Statistics.

518 Maher & Cuisine, para 9.91.

519 (Or wrongous), *Stair Memorial Encyclopaedia*, Vol 13, para 471.

520 *Ibid*, para 472.

Policy Issues and Proposals for Reform

5.320 It is not appropriate to consider the merits of the several property laws and civil court procedures which give rise to ejection or their rationalisation. The Scottish Law Commission considered aspects of this in its 1989 *Report on Recovery of Possession of Heritable Property*[521] and made recommendations for reforming some of the types of action available. The Commission's recommendations have not been implemented.

5.321 In the context of the diligence of ejection, service of a charge is an important step in bringing to an occupier's attention the existence of the decree against him and that the heritable proprietor's intention to eject him has been formalised. It is the final step before ejection takes place and represents the occupier's final opportunity to resolve the matter. Prior to raising the types of action mentioned, statutory periods of notice require to be given in order to give fair warning to an occupier of heritable property of the proprietor's intention to seek possession of it. Further intimation of the action itself is given, except in an action for ejection. Other steps may also have been taken, for example the Council of Mortgage Lenders has a voluntary code of practice which its members follow prior to applying for and enforcing decrees.

5.322 The requirement for service of a charge and period given may vary with the different type of court procedure. Officers of court have indicated that there can be difficulty in differentiating between the different types of decree to be enforced and, therefore, the appropriate period of charge to be served on the occupier. It is considered appropriate, for reasons of clarity and transparency, to apply a charge and consistent days of charge in all cases. The period of charge for summary cause decrees for recovery of possession was reviewed recently by the Sheriff Court Rules Council as part of its general review of the summary cause and small claim rules of court. A period of 14 days will be specified in the summary cause rules.[522] This, together with the other pre-decree requirements for notice which take place prior to the enforcement stage, should give occupiers adequate time to arrange for alternative accommodation and removal of their possessions from the property. The general issue concerning service of a charge is discussed in Part 7, however, it is thought that this would always be necessary in cases of ejection irrespective of its necessity prior to other types of enforcement.

5.323 The requirements to chalk the doors or post a notice of ejection is, in practice, achieved in different manners. However, it is doubtful whether this remains necessary in a modern enforcement system and it is the intention that this practice should be abolished. In the event that the premises are appropriately secured, such notification will not be necessary as a warning to prevent others from re-entering the property and, in the event that the occupier is to remain in the locality, it may cause unnecessary distress. The hours during which ejection may not be carried out are unclear and should be clarified. It may also be appropriate to exclude certain days, such as Sunday and Christmas day.

5.324 It may be that developments in other areas, including the Mortgage Rights (Scotland) Act 2001[523] and the mortgage to rent initiative will mean that there may be a reduction in the need for recourse to this method of enforcement. Nonetheless, ejection remains a necessary means of enforcement for the protection of the interests of heritable proprietors. Yet, it is undoubtedly a traumatic experience for occupiers ejected from premises in the vast majority of cases. Accordingly, all possible means of assistance, advice and support should be brought to the occupier's attention. It is considered appropriate to review the forms

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[521] Scot Law Com No 118.

[522] A.S. 2002/ 132, rule 23.7.

[523] 2001 asp 11.

served on occupiers, including the charge, in order to direct occupiers to sources of assistance and support. It is intended to do so in consultation with relevant advice agencies.

5.325 When enforcing a warrant of ejection, the officer of court is required to leave the premises 'void and redd' which may require clearing the premises of any possessions which may have been left behind. Many years ago it was common practice to place any such items in the public street, although this has not been so for many years for a number of reasons.[524] The court may give direction as to the preservation of the occupier's goods and effects. It is understood that in many cases heritable proprietors make arrangements whereby occupiers can retrieve their possessions at a later date or arrange for their storage. This relies on the good will of individual heritable proprietors and making this a requirement would place a substantial and unreasonable burden on heritable proprietors. Consultees' views are sought on the need for any formal provision in this regard and any arrangements which should be made regarding possessions which may have been left behind.

Q. 5E.4 Should service of a charge prior to execution of a warrant for ejection:

(a) be necessary in all cases,

(b) if so, should there be a uniform period of charge of 14 days, and

(c) should the form of charge be revised to include information about sources of assistance and support?

Q. 5E.5 Should the procedure for executing a warrant for ejection be reformed to:

(a) dispense with the requirement to chalk the doors or post a notice of ejection,

(b) clarify the hours during which an ejection may take place, and

(c) prohibit ejection on specified days such as Sundays, Christmas day or any other day?

Q. 5E.6 Should provision be made for:

(a) disposal of any possessions left in the premises, and

(b) if so, what requirement should be introduced?

Q 5E.7 To what extent does the need to clarify and modernise the law and procedures in relation to recovery of possession of heritable property, identified by the Scottish Law Commission, remain necessary and appropriate?

524 Including public health and safety reasons, the Environmental Protection Act 1990.

(F) ATTACHMENT OF MONEY

Current Law

5.326 It is not clear under current law whether money held by a debtor may be subject to diligence. Reform of the law is necessary in order to put the matter beyond doubt.

Scottish Law Commission Consideration

5.327 The Scottish Law Commission considered this and proposed that a new diligence of money attachment in its *Report on Diligence*.[525]

5.328 The new diligence recommended is a money attachment. It would enable a creditor holding a decree or other enforceable document to attach money, including foreign currency, held in business premises in the same manner as for diligence against corporeal moveable property. The Commission noted that consideration was being given to alternative arrangements for attachment of corporeal moveable property on the abolition of the diligence of poinding and warrant sale. It recommended that a new diligence of money attachment should follow in similar manner to any such alternative arrangements which may be put into place.

Proposal for Reform

5.329 As noted in paragraph 5.58, the Executive intends to implement recommendations made by the independent Working Group on that subject to the Executive in its Report *Striking the Balance - a new approach to debt management.* In addition to recommending that a new diligence of money attachment should follow in similar manner to any such alternative arrangements which may be put into place, the Commission recommended that money attachment should be subject to service of a prior charge for payment and time to pay arrangements. Subject to consultation on the question of service of a charge generally discussed in Part 7, the Executive intends to implement the Commission's recommendations.

Q 5F.1 Consultees are invited to comment on the reforms for attachment of money.

[525] Scot Law Com No 183, Pt 5.

(G) CIVIL IMPRISONMENT

Summary of Current Law

5.330 The availability of civil imprisonment, as an enforcement measure, has been restricted over the years. In particular, the abolition of imprisonment for civil debt, except in relation to aliment, was one of the reforms introduced by the Debtors (Scotland) Act 1987.

5.331 The Scottish civil courts have power to order civil imprisonment in the following circumstances:

- contempt of court and/or failure to pay a fine imposed for contempt of court,[526]
- breach of an order for specific performance of a statutory duty made under section 45 of the Court of Session Act 1988,[527]
- failure to obtemper a decree *ad factum praestandum* in accordance with section 1 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940,[528]
- failure to keep caution or a bond granted under the Lawburrows Acts 1429, 1581 and 1597,[529]
- failure to pay child support,
- failure to pay aliment, and
- breach of a sequestration for rent order.

Authority of the Civil Courts and Performance Obligations

5.332 Most of these powers are available to the judiciary to enable order to be maintained and to ensure that the authority of the civil courts may be upheld. It is clearly essential that the courts have such powers available to them. It is not considered appropriate to consider these powers as part of this exercise.

5.333 However, some of these powers, which relate to failure to perform obligations in the nature of making payment of monies owed, are considered further.

Enforcement of Payment Obligations

5.334 Civil imprisonment, which can be regarded as an enforcement measure in respect of sums owing, remains available in cases of failure to pay child support, failure to pay aliment for a child or spouse and breach of a sequestration for rent order.

Failure to Pay Child Support

5.335 Non-payment of child support may be enforced by civil imprisonment. The Child Support Act 1991 introduced a new mechanism for the assessment and enforcement of the contribution of an absent parent or parents towards the maintenance of a child. The Act enables a person responsible for the care of a child, an absent parent or a child over the age of 12 to apply for a child support maintenance assessment to the Secretary of State for

[526] Civil Imprisonment (Scotland) Act 1882 c42, s4.
[527] c36.
[528] c42.
[529] c20, c22, c40.

Social Security. The Secretary of State may issue and enforce liability orders in respect of child support. He may apply to the Sheriff for enforcement of non-payment of liability orders by civil imprisonment where the liable person has wilfully refused or culpably neglected to pay.

5.336 Until recently, civil imprisonment for such a failure was permitted by section 40 of the 1991 Act by treating a sum payable under a liability order as aliment.[530] However, the Child Support, Pensions and Social Security Act 2000, passed by the Westminster Parliament, brought civil imprisonment for non-payment of child support squarely within the social security legislation.[531]

5.337 Social Security is a matter which is reserved to the UK Parliament [532] and is not a matter on which the Scottish Parliament may legislate. Accordingly, the merits of civil imprisonment for non-payment of child support have not been examined in this work. It is clear, however, that the UK Parliament considered civil imprisonment for this purpose necessary when legislating for this recently.

Failure to Pay Aliment

5.338 Civil imprisonment, as a sanction for failure to pay aliment, is permitted by the Civil Imprisonment (Scotland) Act 1882. Aliment is an obligation to support or maintain a dependent. The obligation is owed between spouses or to a child by a parent or a person who has accepted the child as part of the family.

5.339 Where the Court has made an award of aliment, and the person owing that duty wilfully fails to pay the sum due in aliment, the person to whom aliment is owed may apply, by minute, for a warrant to imprison. The Sheriff may order the warrant for imprisonment at his discretion and there is no appeal against his decision. Failure to pay is deemed to be wilful unless the debtor can satisfy the court that he has no means to pay. Certain state benefits are not taken into account when establishing means.[533]

5.340 The period of imprisonment ordered may not be for more than 6 weeks. Imprisonment may be ordered on a subsequent occasion after a period of at least 6 months. The warrant for imprisonment is implemented by officers of court.

5.341 Imprisonment does not extinguish the aliment debt owed, nor does it prevent the creditor from using other methods of enforcement to recover the debt.

5.342 Statistics for applications for a warrant to imprison under a decree of aliment are published annually in the Civil Judicial Statistics. The statistics do not record the number of occasions when imprisonment actually occurred. From the statistics which are available, it would appear that the number of applications for a warrant to imprison for failure to pay aliment has decreased year on year. This can be seen in table *VII*. Another relevant factor may relate to the use of the child support legislation mentioned in paragraph 5.335. Statistics specifically for applications for civil imprisonment under that legislation have been recorded only in recent years as shown in table *VIII*

[530] By importation of the Debtors (Scotland) Act 1880, c34 and the Civil Imprisonment (Scotland) Act 1882, c42.

[531] s17 of the 2000 Act amended the 1991 Act by inserting a new s40A for civil imprisonment for non-payment of child support in Scotland.

[532] 1998 Act, Sch 5 sF1.

[533] Social Security Administration Act 1992, c5, s187(3). Any increase of disablement benefit in respect of a child or of industrial death benefit.

Table VII **Applications for Commitment to Prison for Failure to Pay Aliment**

Year	No. of applications in respect of Aliment
1995	41
1996	32
1997	11
1998	13
1999	9
2000	4

Source: Civil Judicial Statistics

Table VIII **Applications for Commitment to Prison for Failure to Pay Child Support**

Year	No. of applications in respect of Child Support
1999	46
2000	32

Source: Civil Judicial Statistics

Breach of a Sequestration for Rent Order

5.343 Sequestration for rent has been considered as a separate issue, in Part 5E, where it has been recommended that this enforcement method be abolished. Accordingly, the merits of civil imprisonment for breach of a sequestration for rent order have not been examined.

Policy Issues

5.344 As a matter of longstanding general principle, it has been considered unduly harsh to imprison for failure to pay debts. Exceptions to the general principle have gradually been restricted and few now remain. Accordingly, it is appropriate to examine whether there remains a case for retaining this enforcement measure in the limited circumstance of failure to pay aliment.

5.345 Aliment is an obligation which may be owed to a former spouse or to a child. The nature of the obligation to aliment a dependent child may be considered more compelling than that to aliment a spouse. Although recent trends in family law reform and the current social climate have seen a reduction in continuing commitment of financial support between former spouses, for whom self-reliance is now expected, the same may not be said for the obligation to maintain children.

5.346 It is thought by some that the onerous nature of the obligation to maintain dependants, particularly children, merits civil imprisonment as a final sanction to ensure that the duty is complied with. It is regarded by others as a containing an element of punishment for failure to maintain dependants and it is not the aim of the diligence system to be punitive. Even current penal policy is moving towards alternatives to imprisonment. Other methods of enforcement available under the diligence system may be open to the aliment creditor where the debtor has assets or is in employment. However, where these have proved

unsuccessful, civil imprisonment might be more accurately regarded as an incentive to pay aliment or a final sanction against those who can, but refuse to, meet their obligations since it may only be ordered by the Court when the person owing the duty to aliment does have the means to pay but wilfully refuses to do so.

5.347 The statistics available show that the number of applications for warrants to imprison for aliment debt has declined in recent years and, of the warrants for commitment to prison granted, it is thought that few are executed. Clearly few creditors resort to the sanction but the reason for the decline in use is not known. This may equally call into question whether there is a need for it or suggest that the threat of the ultimate sanction is an effective incentive to pay in most cases. An increase in non-payment should the sanction be lifted is a possibility although the risk cannot be qualified.

5.348 A parallel may be drawn between enforcement of child maintenance obligations due to a failure to pay child support under the child support legislation and a failure to pay aliment for a child under common law. At present parity exists and it would be undesirable if these obligations, although similar in purpose, were enforceable by different means.

5.349 Article 5 of the European Convention on Human Rights provides that the liberty of an individual may not be deprived unless to do so falls within a number of prescribed cases and is in accordance with a procedure prescribed by law. Civil imprisonment for failure to pay aliment falls within the terms of Article 5(1)(b) which permits "the lawful detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law". Any such deprivation of liberty must be in the public interest. Whilst Article 5(1)(b) appears not to have been considered directly within this context, it is almost certain that a measure to secure the fulfilment of obligations for the maintenance of dependants, particularly children, would be considered a matter in the public interest.

Proposals for Reform

5.350 Civil imprisonment is a severe method of enforcement which has been restricted over the years. It would be further restricted should sequestration for rent be abolished. The current social climate and developments in family law now appear to militate against its retention for failure to aliment between spouses, although a stronger case exists for its retention for failure to aliment children given the onerous nature of that obligation. [534]

Q. 5G. 1 Should civil imprisonment continue to be available for failure to pay aliment for a child?

Q. 5G. 2 Should civil imprisonment continue to be available for failure to pay aliment for a spouse?

[534] See also para 5.125.

(H) DELIVERY

5.351 Enforcement of a court order for delivery has not been addressed substantively in this exercise as it is understood that this operates well in practice. One related matter has, however, been raised.

5.352 A warrant for delivery may be granted by the courts in a number of different contexts, for example in an action which seeks a decree *ad factum praestandum* in relation to delivery of moveable property or in family proceedings. A matter of concern which has been brought to the Executive's attention involves delivery of a child. Delivery of a child may be necessary where the court has granted an order about the care of a child with which the unsuccessful party is reluctant to comply or in cases determined under the rules of international child abduction. The court also has power to make an order for the protection of the identity of young persons under the age of 17 which imposes a reporting restriction as to the proceedings in the case on the press and media.[535] The power is discretionary and an order is not automatically made unless the court considers it necessary or either party to the proceedings moves for such an order.

5.353 In one particular instance, the media were invited by the unsuccessful party, who was resisting the court's order for delivery, to be present during the execution of the order by officers of court. This would undoubtedly have been distressing for the child and contrary to the child's welfare. Whilst issues and points of law may arise in cases of delivery which will be of public interest, the identification of a child involved in such proceedings is not a matter of public interest. It is equally undesirable that officers of court should be impeded in the execution of their duty by such actions of an unsuccessful party to an action. This type of difficulty does not appear to be widespread, but some concern has been expressed regarding the potential for its growth, particularly given an increase in trans-border relationships and marriages. Accordingly, consultees' views are sought on whether, in all cases where a warrant for delivery of a child is granted, the court should automatically grant an order for the protection of the child's identity.

Q. 5H. 1 Should an order protecting the identity of a child always accompany an order granted by the court for delivery of a child?

[535] Children and Young Persons (Scotland) Act 1937, c37, s46.

(I) HIERARCHY OF ENFORCEMENT

5.354 The enforcement system provides a range of measures which enable legal rights to be asserted and those owing legal obligations to be held to account. In order that this should be as effective as possible, one aim of the review of the enforcement system was to ensure that it offers a comprehensive range of enforcement measures.

5.355 Different forms of enforcement have varying effects on individuals and their property. In discussing existing and new methods of enforcement it has been considered how and when they should each be applied, as well as their interaction with other methods of enforcement. It is generally recognised that it is desirable for the least intrusive means of enforcement to be attempted in the first instance. This raises the question as to whether there should be any formal hierarchy of enforcement, whereby it would be compulsory to attempt each method in turn.

5.356 Each enforcement measure within the range available is designed for use in a specific set of circumstances or in relation to different types of property. The user selects the appropriate form according to the particular circumstances pertaining to the obligation to be enforced or to the person against whom it is to be applied. It is necessary to maintain the element of choice to enable the most appropriate and effective means of enforcement to be selected. It is equally important that necessary safeguards are built in to the relevant procedures in order that such freedom of choice may not be abused for unscrupulous purposes. The opportunity for this will be reduced by fiscal reality, since those pursuing enforcement action will not wish to incur expenditure needlessly. Nonetheless, it has been a feature of the proposals in this paper to develop arrangements which provide any necessary safeguards. A difficulty of gaining access to information regarding debtors' circumstances and the nature and location of property held by them was identified, and the manner in which it is intended to address it, was mentioned in Part 3.

5.357 It is considered that it would be unduly restrictive and, indeed unnecessarily costly, to introduce a hierarchy of enforcement. The Executive does not, therefore, intend to do so.