

MORE AND LESS COERCIVE WAYS OF
SETTLING DEBTS*

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Debt is the corollary of credit and, without the latter, the former would largely cease to exist. However, in our consumer-oriented society, a number of factors have combined to encourage the growth of credit. Many people appear to obtain goods and pay for them on a regular instalment basis rather than save up enough to make an outright cash payment. In many cases, goods are priced at such a level, that, without availability of credit, the average consumer could simply not afford to buy them. Credit facilities have thus been developed in order to promote and sustain the high level of consumption which individuals appear to want and which our society appears to require. In other cases, bureaucratic convenience may encourage the provision of credit: this is the case with public utilities such as electricity and gas, where pre-payment meters are only allowed in exceptional cases. Most people willingly undertake to pay later — problems arise for some people when they find

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that they cannot afford to pay, either because their resources will not stretch that far or because their circumstances have changed, possibly because the breadwinner loses his job, falls sick or leaves the household. All too often, the persons concerned cannot avail themselves of such useful income-stretching devices as the bank overdraft or the credit card.

When we think of individuals who are in debt we usually have in mind their failure to pay for goods bought on credit sale or hire purchase from private retailers. This may have been the case 100 years ago but this century has seen a very significant growth in "public" as distinct from "private" debt — i.e. in money owed to central government, local authorities and public utilities. However, although the nature of debt may have changed radically over the last 100 years, the law relating to the enforcement of default debts in Scotland has not been satisfactorily adapted to meet modern conditions.

The inappropriateness of the law and legal procedures to modern conditions should not imply that there have been no changes in the law over the last 100 years. The use of imprisonment as a general remedy to pay debts was restricted by the Debtors (Scotland) Act 1880 to failure to pay taxes, rates, aliment and fines. Since then, imprisonment for most tax debts has been abolished (under the Crown Proceedings Act 1947); imprisonment for failure to pay rates is now non-existent and it is quite uncommon for failure to pay aliment (in fact it is considerably less common than in England). Thus imprisonment is, in effect, only used for the non-payment of fines.² Earnings of up to £1 per week were protected from arrestment under the Wages Arrestment Limitation (Scotland) Act 1870. This level has, however, only been raised twice since then and the present position, following the Wages Arrestment Limitation (Amendment) Scotland Act 1960, is that a creditor may arrest half a person's earnings above £4 per week, except in respect of unpaid aliment, rates or taxes where the whole of a person's wages may be arrested. Finally, as a result of the passing of the Law Reform (Diligence) Scotland Act 1973 (a Private Member's Bill introduced by Gregor Mackenzie MP) an embargo was placed on the pouncing (valuation) and sale of certain basic household necessities.³

In spite of these changes in the law, the statutory procedures for debt enforcement (which are collectively known as *diligence*)

are still essentially those that were developed to deal with the problem of debt in the early nineteenth century. These procedures, which are graphically described in the 1854 Hill Burton Report⁴ and are represented in bare outline in Figure 1, do

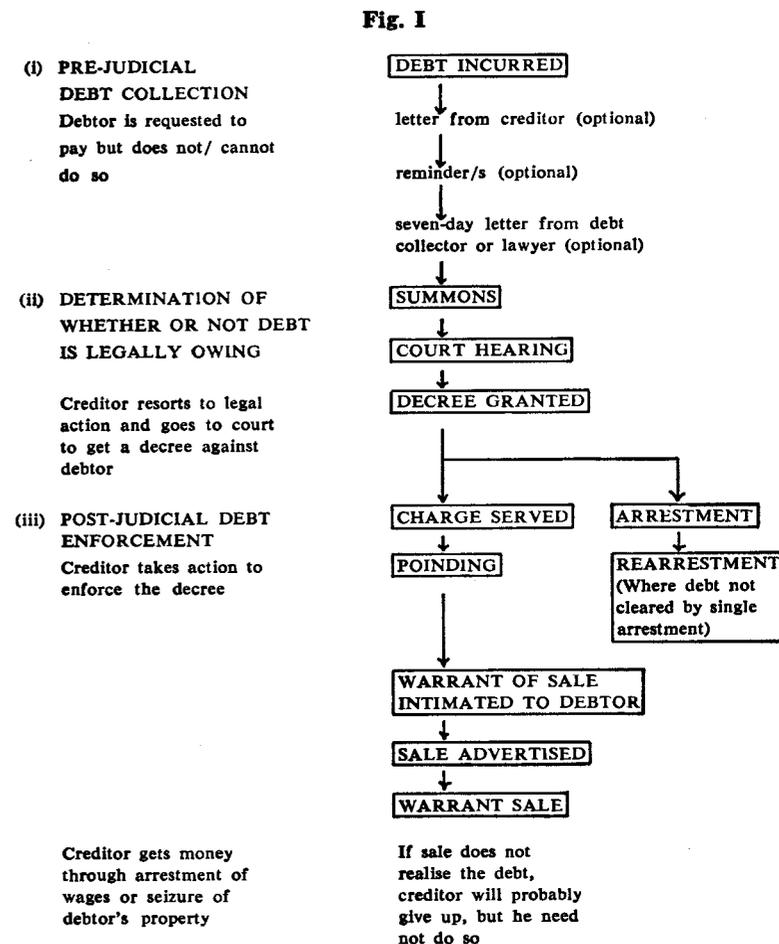


Figure 1. Stages in the Process of pre-judicial Debt Collection Determination of Whether Debt is Legally Owing and post-judicial Debt Enforcement (Diligence)

not take any account of the debtor's individual circumstances or the factors which give rise to the debt. Since September 1976, actions for debts of up to £500 have been dealt with under the new "summary cause" procedure in the Sheriff Court,⁵ while actions for debts of more than £500 are known as "ordinary" actions and are dealt with somewhat differently.⁶ In either case, the Sheriff has only to decide two issues: is the money legally owing and, if so, what kind of decree should be awarded to the creditor. In the great majority of summary cause actions, the debtor does not attend or put forward any defence or make an offer to repay the debt.⁷ The Court therefore assumes (usually correctly) that a debt has been incurred and grants the creditor an open decree which allows him to decide how the amount which is owing (which will now include Court expenses) should be repaid. Less often, and usually only where the debtor has offered to repay in this way, the creditor is granted an instalment decree which fixes the rate at which the debt is to be repaid. However, if the debtor defaults on a single instalment, for whatever reason, the instalment decree may subsequently be treated as an open decree. Both decrees allow the creditor to use all lawful means of enforcement. The Court does not inquire into the debtor's financial or other circumstances and leaves the creditor to select the most effective means of enforcement and, in most cases, the terms of repayment.

If a decree is granted by the Sheriff, the Court has largely ended its part in the proceedings. The creditor or his agent will then instruct a Sheriff Officer to enforce the decree. The official duties of a Sheriff Officer mainly revolve around the enforcement of Sheriff Court decrees relating to debt or eviction from rented accommodation. Unlike Bailiffs who perform a similar set of functions in the County Courts in England and Wales, Sheriff Officers are not employed by the Court. Although a Sheriff Officer must have an appointment from the Sheriff Principal for the Sherifdom in which he is to act, he functions as an independent contractor. While Sheriff Officers are usually organised into partnerships under a firm's name, many Sheriff Officers are also directly involved with firms of commercial debt collectors.⁸ This arrangement has given rise to a good deal of criticism on the grounds that a Sheriff Officer, as an officer of court, should never have a personal interest in the decrees he enforces. However, from a strictly commercial point of view,

a firm that is able to offer a combined debt collection and debt enforcement service must have obvious attractions for a large creditor. Where the firm can also offer the services of a lawyer to issue summonses and appear in Court the attractions are still greater.

The creditor or his agent has a choice between several modes of diligence but the two most common types of diligence are pouncing and sale, and arrestment.⁹ *Pouncing and sale* is the appropriate procedure for property owned by the debtor and in his possession. It is the oldest form of diligence in Scotland and has been in use since the Middle Ages. It involves the valuation and, if necessary, the sale of certain of the debtor's possessions to satisfy the debt. *Arrestment* is the appropriate procedure for property which is in the hands of a third party. The most important kind of property which is normally held by a third party is money. This can be in the form of wages held by an employer or money deposited with a bank or building society. Arrestment of wages is by far the most common form of arrestment, especially in the case of summary cause actions, and we shall therefore concentrate on it to the exclusion of other forms of arrestment. We should note that arrestment of wages can only be used against people who are in employment while pouncing and sale are not restricted in this way. Other forms of arrestment, e.g. arrestment of a bank account, are not restricted in this way either but are rarely appropriate.

Once a decree is granted, the creditor or his agent may write to the debtor saying a decree has been awarded and asking for payment. If payment is not obtained, the creditor may then instruct a Sheriff Officer to enforce the decree. This cannot be done until fourteen days have elapsed, because an "extract" (or copy) of the decree, signed by the Sheriff Clerk will only be issued after fourteen days. An extract intimates that the Sheriff has granted decree and grants warrant to the creditor to use all lawful means of enforcement if the debtor fails to pay. In the case of pouncing and sale, the first step is the serving of a *charge* on the debtor. This involves the delivery to the debtor of a letter ordering implementation of the decree. This is usually accompanied by a photocopy of the extract decree and is delivered by hand. If the charge does not result in payment within the allotted time (fourteen days) the creditor can proceed to select goods for sale. He can do this at any time within one

year of the date of the charge. The Sheriff Officer, accompanied by one witness (who is almost always an employee from the Sheriff Officer's firm) visits the house and proceeds to value the debtor's personal effects. If no one is in the house, the Sheriff Officer is encouraged to make enquiries and to return at another time but if, after two or three visits, he is still unsuccessful, he will make a forced entry. As we have already mentioned, basic household necessities are now exempt from poinding and the kinds of items which are most likely to be poinded are washing machines, refrigerators, TV sets, radios, hi-fi sets, three-piece suites, sideboards, wardrobes, carpets etc. Goods being paid for on hire purchase, rented items or articles belonging to another member of the household are also exempt from poinding.

The Sheriff Officer will normally attempt to poind articles to the value of the outstanding debt, together with accumulated expenses. Once the goods have been selected, they are listed on a document called a poinding schedule which is left with the debtor or in the house and it becomes an offence to dispose of the items listed. The Sheriff Officer then has eight days to report the execution of the poinding to the Sheriff Court. If the poinding does not result in satisfactory arrangements for payment, the Sheriff Officer must present a *Warrant of Sale* to the Sheriff for his signature. Most Sheriff Officers would again inform the debtor that they had such a Warrant and that, if no satisfactory arrangements are made, they will advertise a sale in the local newspaper. The sale then must take place between eight and twenty-eight days after the *advertisement* has appeared. Most sales take place within the debtor's own home and must be attended by the Sheriff Officer (who supervises the sale in his capacity as Judge of the Roup) and a professional auctioneer. The price at which the goods are sold must not be less than their appraised value and if they are not sold they are adjudged to the creditor for this value. The Judge of the Roup then has a further eight days to report the Sale to the Sheriff.

The procedure for arrestment of wages is much simpler. The extract of the decree authorises immediate arrestment and arrestment can take place without a charge being served first. It is usual for a Sheriff Officer, accompanied by a witness, to call at the office of the debtor's employer and deliver the schedule of arrestment.¹⁰ This document, which is signed by the Sheriff Officer, is directed at the employer and has the effect of freezing

wages due but not yet paid over to the debtor to the extent permitted (normally half of wages less £4 but the entire weekly wage in the case of alimentary debts, rates and taxes).¹¹ The employee must sign a mandate authorising his employer to pay the arrested wage to the creditor. If the employee refused to do this, the creditor would have to raise a further court action, known as an action of *furthcoming*. However, this happens very rarely with arrestment of wages. If a single arrestment does not clear the debt and the debtor does not make satisfactory arrangements for paying what he still owes, the Sheriff Officer may serve one or more further arrestments.

The purpose behind both poinding and sale and arrestment is clearly to shock the debtor into settling the matter with his creditor. In the case of poinding and sale, each stage in the process (serving the charge, poinding, intimating a warrant, advertisement and the sale itself) involves an escalation of coercion and if the proceeds of the sale do not wipe out the debt, the creditor can still attempt to pursue the debtor for the outstanding sum. In many cases diligence must achieve its primary objective of bringing about a settlement between the creditor and the debtor. This is suggested by the reduction in the amount of diligence as diligence proceeds to later stages. However, part of the drop must also be due to creditors writing off the debt on the grounds that continued actions will not result in payment or that the expenses incurred relative to the amount of debt do not justify further pursuit.¹² The number of sales executed has fallen considerably in recent years to a total of 149 in 1977.¹³

If the amount of the more extreme forms of diligence is so limited and the number of repeated arrestments on the same debt is so small, what can be wrong with the procedures for debt enforcement in Scotland? The theory of diligence is very unsophisticated — it assumes that by hitting the debtor hard (where it hurts) and then threatening to hit him again (harder this time), he will be forced to make a satisfactory arrangement with the creditor to pay off his debt. However, the two parties can hardly be construed as equals and it is entirely up to the creditor to decide whether an offer from the debtor to pay by instalments is acceptable. Of course, as Paul Rock showed in his study of debt enforcement in England,¹⁴ creditors have to balance intimidation with persuasion — if their conditions are

too harsh they may get nothing out of the debtor at all and they may prefer to settle for something, however small, rather than nothing. However, the complete absence of control over the conditions of repayment by the Courts effectively grants licence to the strong creditor to exploit the position of a weak debtor if he wishes to do so. Under threat of further diligence, a debtor may agree to terms which are wholly outwith his capacity to meet and by doing so, create further problems for himself and his family. Thus the law serves to enforce a rather primitive commercial morality and to legitimate the power of the creditor over the debtor and the actions taken by the creditor to recover his debts. There is no equivalent in Scotland of the English procedure known as *attachment of earnings*, where the Court rather than the creditor decides, after an examination of the debtor's circumstances, whether and how much of the debtor's earnings should be attached.¹⁵ And the Courts are clearly in no position to make the kinds of arrangements with creditors that the DHSS and local authority social work departments can make on behalf of social security claimants and social work clients who are in arrears with the Electricity and Gas Boards or with their rent.¹⁶

Poining, advertisement and sale have been criticised for being degrading and unnecessarily stigmatising for the debtor. Sheriff Officers have been criticised for their heavy-handed methods of harassing debtors and for the low valuations¹⁷ which they place on the debtor's poinded goods.¹⁸ Poining is likely to be most resented where it is accompanied by forced entry but advertising the items to be sold in the local newspapers is thought to be the most humiliating, and therefore the most resented, aspect of the whole process. The staging of the sale in the debtor's own home is thought to be particularly embarrassing and to yield lower prices than could be obtained if the sale took place in a public saleroom. All in all, the process is seen to hurt those most who can least afford it. Many of the Warrant Sales which are carried out yield pathetically small sums which frequently do not even cover the expenses of diligence, let alone the principal sum.¹⁹ Thus, some debtors may be even more in debt after diligence has taken its full course than they were when they originally incurred the debt. It would seem that some people are required to suffer in order to serve as an example to others.

Arrestment has likewise been criticised on a number of

grounds. First, for imposing a quite unjustifiable degree of financial hardship on the debtor. This is especially so in the case of low-paid workers with large families. Thus, a man who, after paying tax and national insurance contributions, has net earnings of £50 per week could have half (£50 - £4) = £23 arrested and be left with £27. Fortunately for him, social security payments (e.g. child benefit and family income supplement) cannot be subject to arrestment. This can, of course, lead to the acquisition of further debts. Secondly, pressure may be put on the debtor to leave his employment,²⁰ but, even if it is not, the debtor may choose to leave voluntarily in order to escape a further arrestment. Finally, arrestment is quite inappropriate as a means of enforcing continuing financial obligations, such as aliment (maintenance), since it can only be used once arrears have been incurred.

A further criticism of both types of diligence is that they are unnecessarily expensive. Expenses are incurred at each stage of what may be a long and drawn-out process. Where a decree is awarded against the debtor, he will have to pay Court fees, Sheriff Officer's expenses, the expenses of a solicitor (where the creditor has instructed a solicitor) and possibly the creditor's expenses in addition to the principal sum. As a result, particularly in the case of small debts, the expenses incurred often exceed the sum owed. It is often argued not only that the expenses are excessive but also that they could be avoided if a more effective system of debt enforcement could be devised. It is not even clear that the present system is particularly effective from the creditor's point of view. An analysis of all summary cause actions in the Sheriff Court in Edinburgh during November 1976, reveals that 41% of the actions that were brought were dismissed.²¹ Dismissals mainly result from debts which were settled before the summons was issued and errors on the part of the creditor. Where a case is dismissed, the creditor has to meet the costs of his action. Where the debt is settled after receipt of the summons, a decree for expenses only is likely to be awarded. In this case the costs are passed on to the debtor. In addition, there is a good deal of attrition throughout the enforcement process and a substantial amount of debt gets written off when creditors and their agents decide that the costs of further attempts at enforcement cannot be justified in terms of the likely returns to the creditor.²²

It would be wrong to assume from this discussion that debt, default debt, or procedures for statutory debt enforcement are matters about which people in Scotland know a great deal. As Paul Rock demonstrated in his survey of attitudes to debt collection, one of the main characteristics of debt enforcement is its "low visibility" — people supposedly don't know much about the processes of debt collection or debt enforcement or the officials who carry them out. Nevertheless, there has been a good deal of public criticism of the procedures of debt enforcement and the activities of enforcement officers. Because Scots law and procedure is, at least in this respect, so rigid and inflexible and because, to a greater extent than English law and procedure, it is still rooted in the strict commercial morality of a bygone era, it has been under considerably greater attack. MPs have asked questions in the House of Commons²³ and called for a total ban on Warrant Sales,²⁴ newspapers have run feature articles on debt enforcement²⁵ and on the involvement of Sheriff Officers with firms of debt collectors,²⁶ a Sheriff has issued a string of judgements against one particularly notorious firm of Sheriff Officers,²⁷ social workers have drawn attention to the social problems created for families by the insensitivity of debt enforcement procedures²⁸ and the Scottish Legal Action Group ran a very successful Conference on Debt²⁹ which was followed up by an excellent series of articles in the *Scottish Legal Action Group Bulletin*.³⁰

In 1971, the Scottish Law Commission set up a Working Party, consisting of lawyers, Sheriff Officers and a Sheriff Clerk, to examine the then present law and practice of diligence in Scotland and to identify what changes, if any, in the law were required. The Working Party, in spite of being in existence for several years, never produced a report. This failure meant that, by 1976, there was considerable pressure on the Scottish Law Commission, not least from those quarters noted above, to do something about the procedures for statutory debt enforcement in Scotland. The Working Party was disbanded and, on the grounds that so little was known about the practice of diligence in Scotland, the Central Research Unit in the Scottish Office was asked to identify those areas in which research could broaden our knowledge of the present system of debt enforcement and contribute to the process of law reform. Eight areas of research

were identified and an extensive programme of research in each of these areas is now in progress.³¹ At the same time, the Scottish Law Commission has now begun to consider possible reforms to the law and practice of diligence and to produce a series of consultative memoranda on diligence in its widest sense. At some point in the future, the Scottish Law Commission will produce a report for Government based on the research results and the consultative memoranda mentioned above. In this paper, we have decided not to refer explicitly to the research we ourselves have undertaken but rather to speculate, in a general way, about possible models for reform.

Characteristically, there has been more concern among social reformers with the problems of debt enforcement than with the prevention of default debt. Perhaps this is not surprising since the existence of debt is so closely dependent on the availability of credit and since credit fulfils such an important role in stimulating consumption in our society.³² Nevertheless, there are parallels between this concern with debt enforcement (rather than the prevention of default debt) and the dominant concerns of many other social reforms. Thus, to take two recent examples, the Supplementary Benefits Review attempts to strengthen the rights of people who are already poor without in any way concerning itself with preventing them from becoming poor while the Housing (Homeless Persons) Act 1977 likewise attempts to strengthen the rights of homeless families without in any way attacking the causes of homelessness.

What kinds of solutions can we expect from the Scottish Law Commission? Their latest Annual Report gives a number of important clues about their thinking.³³ The Commission is to issue seven consultative memoranda dealing with various aspects of diligence. It is clear from the synopses that the proposals will attempt to "liberalise" the existing modes of diligence. There may well be an extension of those items that are currently exempt from poinding and an increase in the amount of money which is exempt from arrestment. The advertisement of Warrant Sales may be discontinued and their venue may be changed from the debtor's house to a public saleroom. An *extended arrestment order* and an *earnings transfer order* (similar to attachment of earnings and designed to deal with continuing financial obligations) may be introduced, as well as *debt arrangement schemes* (comparable to administration orders in England)

and designed to deal with wage earners in multiple debt situations. Debtors may be given more information about what is happening to them and more advice and the Courts may even assume some measure of control over Sheriff Officers at certain points, e.g. prior to a Warrant Sale. Nevertheless, the system for making and enforcing debt decrees is likely to remain largely unaltered — decisions will continue to be made in Court in the absence of the majority of debtors, creditors will retain the right to determine the mode of enforcement and the rate of repayment, while debtors will continue to be caught up in a system of enforcement which they do not properly understand, in which they are subjected to the authority of the law and a high degree of coercion by agents of the law. Sheriff Officers will continue to enforce decrees on behalf of creditors, with very little control by the Courts.

The reason for this is that the Scottish Law Commission by its very constitution, is almost bound to regard debt as a legal problem which is amenable to a legal solution. But should it be regarded in this way? Philip Lewis has written:

“If certain problems are spoken of as legal ones and official support is given to legal methods of solving them, that is to take a particular attitude to problems of that kind, problems which may be capable of solution in some other way and which may be seen by those most closely concerned as best solved in that way”.³⁴

The vast majority of debtors against whom decree is granted admit to their debts.³⁵ What is more, nearly all of them accept that they are personally responsible for the debt and that they ought to repay the creditor.³⁶ The only real point at issue for them are the terms on which those debts should be repaid. A civil court may be the most appropriate forum for disputing debts — it is extensively used as a forum for asserting rights and disputing claims. However, it is not an appropriate forum for deciding how debts should be repaid — that ought to be a matter of good judgement and commonsense made in the light of the debtor's circumstances and should be decided elsewhere, perhaps through some new form of arbitration procedure. Before considering this possibility it is necessary to look at an alternative model for dealing with debtors, the *welfare model*.

In this model, people with debts are referred to welfare agencies who, after a thorough investigation of the debtor's needs and circumstances, decide whether to make a grant out of public funds to clear the debt or to intercede on behalf of the debtor by making arrangements (at least if the person is drawing social security) for bills to be paid directly (at source) to the creditor or for more convenient modes of payment in future. Examples of this model in action are the procedures which have recently been established whereby people who have fuel debts or are in arrears with their rent are referred to local authority social work departments or to the DHSS. We think there are several objections to this model. First, we ought not to require people to become social work clients before they can get help with their debt problems.³⁷ Secondly, it is hard to justify, however parsimoniously they are used, the existence of special facilities for social security claimants.³⁸ In any case, the system does not work very well and it is not at all clear that, unless there are special circumstances, people actually want cash handouts. Most of the debtors we interviewed in our study of default debtors were anxious to pay off their debts providing suitable arrangements for repayment were made.

We would like to propose for serious consideration procedures based on arbitration which, at least in the majority of cases, would neither resort to the institutions of law nor to the institutions of welfare. Under these arrangements, a creditor would seek to register debts owed to him with the new arbitration service. If the debtor admits the debt, his case would be considered by the arbitration service; if not his case would still go to Court for proof. Once proof of the debt has been established his case would, however, be referred back to the arbitration service. The arbitration service would first establish how the debt arose. The creditor would be asked to give a written account of how the debt arose and of his efforts to recover the sum owed. The debtor would likewise be asked to give a written account of how the debt arose and why he had been unable to repay it. The debtor would be required to furnish evidence of his income, outgoings (including any other debt repayments) and family commitments. Employers (in the case of people at work) or the DHSS (in the case of those who are dependent on social security) might be required to verify statements of income and the arbitration service could even check

to see that debtors were in receipt of their full entitlement to social security and other related benefits. Where it is thought appropriate or where it is requested by the creditor or the debtor, either or both parties could be asked to attend a hearing. Whether or not there is a hearing, the task of the arbitrator would be to decide on an appropriate rate for repayment. Creditors would be asked what they would accept and debtors what they could afford. The appropriate rate of repayment would not necessarily reflect a compromise between the debtor's offer and the creditor's demands. It would, rather, reflect a decision which was thought to be appropriate in the light of all the circumstances. Although agreement between the parties would, of course, be desirable, it would neither be necessary nor sufficient.³⁹ A fixed level of income would have to be protected but we would not want to rule out paying small sums out of social security. After all, many claimants already do this and most of the debtors we interviewed were in favour of it. Where the creditor contravenes the Consumer Credit Act 1974 or, in the case of private creditors, fails to ascertain whether the customer is in a position to repay the debt, e.g. by ascertaining whether the customer is in employment or has any current repayment orders against him, the arbitration service would have the power to reduce or even waive the amount to be repaid. In most cases, the arbitrator would issue a *repayment order* which would be binding on employers or the social security authorities, for the agreed sum to be repaid from source. Where one or more repayment orders are already in force, the arbitrator would be empowered to alter these when imposing a further order. Multiple debts could be handled in this way and, for such people, advice on bankruptcy could be given. In appropriate cases, where debt was clearly a manifestation of deeper personal problems, the debtor could be referred to a social work agency which would still be empowered to pay off the debt out of public funds in appropriate circumstances. Debt counselling and advice with budgeting could be made available and the arbitration service could take the initiative in negotiating more convenient modes of payment, e.g. in relation to housing departments or fuel boards. Thus, some of the facilities which are currently offered only to recipients of social security would be extended to the much larger class of default debtors. Debtors subject to a repayment order whose circumstances changed could seek

to have their repayment order adjusted accordingly and there might even be an obligation on employers and the social security authorities to report significant changes in circumstances. If a register of active orders was kept (possibly in a computerised data bank) the debtor's name could be removed as soon as the debt was repaid. Creditors might be enabled, or even required, to ascertain whether a potential customer has any active order against him before granting credit.⁴⁰ And, lest this be thought of as an invasion of privacy, we should point out that such an arrangement would be a considerable improvement over the blacklists which currently circulate in Scotland, which list all default debtors against whom a decree has been obtained.⁴¹ Until recently it has been extremely difficult for anyone to get their name erased from the blacklists, even where the debt has been repaid.

The procedures adopted by the arbitration service would need to be kept simple and straightforward and it is important that they should not require an unrealistic level of "civil competence"⁴² from the debtor.

Requests for information would be written in terms that people could understand. A debtor who wished to do so would be encouraged to appear and argue his case for himself, accompanied perhaps by his wife or by a friend. No legal or other expert representation would be allowed.

The description we have just given is no more than a sketch and many, if not most, of the details remain to be worked out. Although there is no reason in principle to restrict these procedures to debt of a certain size, it would probably be sensible to apply them in the first instance to debts that are recoverable under summary cause, i.e. to debts of less than £500. It is not clear who would most appropriately staff the new arbitration service or on what principles the level of repayment should be fixed. Both as a means of increasing community participation and a means of reducing costs, we are attracted to the idea of using lay arbitrators. However, even if this was possible (doubts have certainly been raised about whether people would volunteer for such a task) they would need quite a considerable back-up staff if the debt itself and the debtor's circumstances were to be fully investigated, contact maintained with employers, the DHSS and banks as well as debtors, creditors and the Courts, and the wide range of ancillary services outlined above were to

be provided. We can, however, see no reason why the arbitrators, or the back-up staff, would need to be legally qualified and would prefer to see the arbitration service divorced from the Courts. For practical reasons, however, it may be sensible for the Sheriff Clerk's department to staff the services. Presumably it would be necessary to devise a set of rules which would relate the rate of repayment to family requirements and resources on the one hand and to the number and size of their debts on the other, and then to allow some discretion to depart from the rules on account of the circumstances in which the debt was contracted and the personal situation of the debtor. It is also not clear whether there should be some right of special appeal and if so on what grounds and to what body. If such a right of appeal was introduced, we hope that it would be used very sparingly. Although the arbitration service would have to be financed out of public funds, it is not clear that this should be through a direct grant from the Exchequer. It might well be more appropriate if it were financed through a special levy on those who grant credit in much the same way as redundancy payments are financed through a special levy on employers. Finally, it is unclear whether some, perhaps only symbolic, charge should be made for a repayment order as a means of encouraging voluntary repayments.

It would be dishonest not to acknowledge that a scheme of this kind would obviously encounter problems. Originally we thought that it would not be able to cater for the self-employed debtor but there is no reason in principle why the self-employed person should not be required to produce his annual profit and loss account, which he has to produce for the Inland Revenue, or why a repayment order should not be binding on a bank or a building society or on any third party which holds assets belonging to the self-employed debtor.⁴³ Likewise we thought that creditors might rush to use the new procedure without first attempting to secure voluntary repayments. If this were to happen, the number of applications to the arbitrator service could be greatly in excess of the 143,091 summary cause actions which were heard in 1977. However, this could be avoided by requiring the creditor to take certain steps before approaching the arbitration service and possibly also by requiring a certain amount of time to elapse between the date on which the debt is incurred and the date on which applica-

tion to the arbitration service can be made. Similarly, we thought that cost might be an obstacle until we thought of the special levy on the providers of credit. Since they would, no doubt, pass on these costs, this would put up the cost of credit but it would probably not be increased very much. Our proposal that a debtor's name should be removed from the register of active enforcement orders, which those who grant credit would be required to consult before doing so, as soon as his debt is repaid could prevent credit-granting agencies from properly establishing the credit-worthiness of potential customers. Whether or not this proposal is acceptable would seem to depend on the relative importance attached to the prevention of default debt (for which evidence of previous debts is highly relevant) and to the civil liberties of the debtor. We have concluded that the most difficult problem raised by our proposals will be to ensure participation in the new procedures. These require minimally that the debtor acknowledges the debt (or denies it and elects to go to Court), and provides details of his income, outgoings and family commitments. What if he does not do so? Attendance may not be necessary for the success of the new procedures but it could be encouraged if meetings of the arbitration service took place in the evening as well as during the day and/or if the expenses of attending the hearing were paid by the service. This would, however, raise many problems. On the other hand, it is absolutely essential that the debtor does acknowledge his debt and does provide the personal information mentioned above. Without some form of sanction, participation might well be very low and it would defeat our objective of removing debt enforcement from the ambit of the Courts if the new procedures were only voluntary, since those who did not participate could then be dragged through the Courts and subjected to diligence as at present. Under *attachment of earnings* proceedings in England, a debtor is required to provide evidence of his income and outgoings and to attend a Court hearing under threat of punishment. However, this is only possible because the debtor already has a Court order against him and can be held to be in contempt of court for failing to adhere to its terms. One sanction which could certainly be used would be to place the name of the non-respondent or the person who fails to supply the relevant information on a special register of unpaid debts but it will almost certainly be necessary to impose

stronger sanctions if the new system is to work. We have reluctantly concluded that the arbitration service will have to be able to demand a minimal level of participation under threat of punishment — a fine of £10 would probably be sufficient.

There are two obvious objections to this proposal. First, it might be thought rather bizarre to suggest that debtors should be fined for not participating in debt enforcement procedures, since that would only magnify their debts. However, it must be remembered that debts would no longer be compounded by the addition of Court and diligence expenses. Second, imposing a fine allows for the possibility that a debtor might be imprisoned for failing to pay the fine. Although we think this would happen very rarely, it can certainly be argued that this would be a very high price to pay for the abolition of diligence. However, to seek a wholly non-coercive mode of repaying debts is to seek the impossible. It should be clear though, the question of sanctions notwithstanding, that the procedures we have proposed will involve considerably less coercion for the vast majority of debtors than those currently in operation.

In spite of the problem just described there would seem to be considerable advantages to the new procedure. For the debtor it would be cheaper and more intelligible, it would have regard to his circumstances and would spare him the indignity and humiliation he undoubtedly suffers at present. It might well be more efficient for creditors than the present system and enable them to recoup a larger proportion of unpaid debts.⁴⁴ If this was the case, there would be much less incentive for creditors to sell their outstanding debts. How debts are repaid would become a question of public policy rather than private licence. There would be no need for diligence, since the repayment orders could all be served by post, and thus no need for Sheriff Officers. Pounding and sale, and lump sum arrestments would be abolished as the repayment order became the sole means of statutory debt enforcement. The DHSS and the local authority social work departments would be relieved of some of those responsibilities they have only taken on with great reluctance.

The proposals outlined here are in some ways modelled on the Children's Hearing system which replaced Juvenile Courts in Scotland in 1971. Just as the Children's Hearing system was designed to take the problem of dealing with child offenders,

most of whom pleaded guilty, out of the ambit of the criminal courts, so the arbitration service is designed to take the problem of dealing with debtors, most of whom admit to their debts, out of the ambit of the civil courts. And just as the Children's Hearings are concerned to promote the welfare of the child but, at the same time, uphold conventional social norms and values, e.g. in relation to compulsory school attendance and respect of property, so the arbitration service would be concerned to protect the welfare of the debtor and his family while at the same time upholding the dominant contractual morality of the market place and ensuring that creditors are fully recompensed for money owing to them. How the debt should be repaid, rather than whether it should be, would be the dominant issue. The aim of the new procedure would be to come to a reasonable decision by balancing the well-being of the debtor against the right of the creditor to repayment. The shift away from a mode of debt enforcement in which the debtor is seen as a guilty person who is blamed for his debt and deserves whatever "punishment" he gets from an aggrieved creditor towards a mode of debt enforcement which is less concerned to attribute blame and more concerned to reach a solution which is in the interests of both parties also has analogies with the shift away from the concept of the "guilty party" in divorce and its replacement by the "irretrievable breakdown of marriage" and the shift in delict from the concept of fault towards "no-fault insurance".

The three models of debt enforcement outlined in this paper (the dominant *diligence model*, the alternative *welfare model* and the proposed *arbitration model*) are based on different "models of man" and different assumptions about the motives, attitudes and capabilities of debtors. Each of these sets of assumptions entails an explanation of why non-payment occurs and suggests a very different enforcement strategy.⁴⁵ Each is likewise associated with a set of enforcement difficulties.

The main characteristics of each model are set out in Figure 2.⁴⁶ The *diligence model* assumes that all debtors are "amoral calculators" who refuse to repay their debts because the advantages of non-payment exceed the costs (to them) of the sanctions that are applied. The model assumes that by gradually increasing sanctions, a point will be reached where the debtor will repay but problems arise where the person objects to the

	DILIGENCE MODEL	WELFARE MODEL	ARBITRATION MODEL
assumptions about debtor	"amoral calculator"	"inadequate" or unfortunate	unfortunate
assumed reason for non-payment	"benefits" of non-payment exceed costs (to debtor) of sanctions applied	debtors cannot repay debt without considerable costs to themselves or their families	debtor doesn't repay because terms are unrealistic or unacceptable
enforcement strategy	increase sanctions	pay debt out of public funds	agree terms of repayment
characteristics of enforcement agent	policeman	counsellor/social worker	arbitrator
associated problems	<ol style="list-style-type: none"> debtor may object to creditor's terms and refuse to pay for that reason debtor may be unable to pay enforcement is both inefficient and excessively harmful to debtor 	<ol style="list-style-type: none"> costs if applied on large scale inflation of client population help may be seen as stigmatising 	<ol style="list-style-type: none"> ensuring participation of some debtors ("amoral calculators") in the proceedings cost of proceedings

Figure 2. Main Characteristics of Three Alternative Models of Debt Enforcement.

creditor's terms (and refuses to pay for this reason) or simply cannot afford to pay. Problems arise from the costs to such debtors of the sanctions which creditors are largely at liberty to apply. The *welfare model* assumes that all debtors are either "inadequate" or so unfortunate that they cannot repay the debt without considerable costs to themselves or their families. This model therefore assumes that their debts should be paid for them out of public funds and that they themselves should be given professional help to resolve their problems. Problems of cost would arise if this type of debt enforcement were applied to more than a small minority of debtors. Problems would also arise for the welfare agencies if being in debt transformed a large number of people into welfare clients, and problems do arise because this form of help can be seen as humiliating and may be strongly resented. The *arbitration model* assumes that debtors have simply been unfortunate, perhaps because their circumstances have changed in some way, but that they want to repay their debts and will repay them if suitable terms can be agreed. The model therefore assumes that some form of compromise should be sought either through mediation or, where this does not produce satisfactory results, through arbitration. The main problems here are that of ensuring the participation of those debtors who can perhaps best be described as "amoral calculators" and the likely cost of the new procedures.

As we argued earlier in this paper, public pressure forced the Scottish Law Commission to review the law practice of diligence. Public pressure must now attempt to get the Government to think about ways of preventing default debt as well as reforming procedures for dealing with it and to question some of the basic assumptions of diligence. It is clear that none of the models outlined above can apply to all default debtors but we hope we have made out a case for the arbitration model to become the dominant model of debt enforcement in Scotland. It most closely fits our understanding of the motives, attitudes and capabilities of the large majority of default debtors and we believe that its introduction would be welcomed by everyone, except perhaps by those who have a personal stake in our present antiquated procedures.

REFERENCES

2. In 1977, 5,631 people were imprisoned for non-payment of fines. They comprised 30% of receptions of prisoners under sentence — see *Prisons in Scotland Report for 1977*.
3. The Act provides that beds, bedding material, chairs, tables, equipment providing facilities for cooking, eating or storing food and for heating may not be poinded if they are *reasonably necessary* to enable the debtor and his family to live without undue hardship.
4. "Report on the Arrestment of Wages, the Effect of Abolishing Imprisonment for Small Debts and the Practice of Truck in Scotland." Parliamentary Papers 1854 LXIX.
5. The Sheriff Court is the principal local court of civil and criminal jurisdiction in Scotland — its civil jurisdiction is similar to but somewhat more extensive than the County Court in England and Wales.
6. In 1977, 143,091 "summary cause" actions and 21,000 "ordinary" actions were disposed of in the Sheriff Courts. The large majority of these were debt actions.
7. Of 117,592 summary cause decrees awarded in 1977, 113,988 were awarded in the absence of the debtor.
8. Examples of direct involvement are T. C. Gray Ltd. (debt collectors) and Gray and Donald (Sheriff Officers); Lawrence Jack Collections Ltd. (debt collectors) and Jack Lewis and Son (Sheriff Officers). Assured Collections Ltd. (debt collectors) and Arthur S. Kidd & Co. (Sheriff Officers).
9. Other modes of diligence are *ejection* (eviction) and *sequestration*. The former is used for the recovery of heritable property and the latter for arrears of rent.
10. Some Sheriff Officers post this document to the employer as a matter of routine. This is clearly advantageous for the debtor since it is cheaper, but its legality is questionable.
11. There is some confusion about whether arrestment should be made on gross or net wages. The legislation (Wages Arrestment Limitation (Scotland) Act 1870) refers only to earnings but that is not surprising since there was little difference between gross and net wages for the working man in 1870. Today it would appear that arrestments are usually but by no means always made on net wages.
12. There are no published statistics of diligence. The figures below were obtained through a special exercise carried out through the Society of Messengers at Arms and Sheriff Officers and refer to a six-month period, September 1974 - March 1975.

Charges	31,291	Arrestment of which	13,006
Poindings	17,900	Arrestment of wages	12,000
Sales Instructed	7,252	of which	
Sales Advertised	3,676	Repeated Arrestment	3,400
Sales Executed	386*	for same debt	

* This is now known to have been overstated.

13. Corrected official figures for the number of sales executed in recent years reported in *Civil Judicial Statistics (Scotland) 1977* are as follows:

1972	416 sales	1975	223 sales
1973	305 sales	1976	219 sales
1974	226 sales	1977	149 sales
14. Paul, Rock, *Making People Pay*. Routledge and Kegan Paul, 1973.
15. Under the Attachment of Earnings Act 1971, a creditor who is successful in a Court action for debt but who fails to obtain payment can make a further application to a County Court for an order of attachment. The Court fixes a date for the hearing, informs the debtor and orders him, under threat of punishment, to provide information about his income and outgoings. His employer is also required to provide information about his earnings. The Court is then empowered to fix a "protected earnings level" (related to supplementary benefit scale rates) below which earnings cannot be attached. A deduction rate (representing the amount which the Court decides the debtor should pay each week) is then fixed. This is binding on the employer and remains operative until the debt is cleared. 54,662 attachment orders were granted in 1977.
16. For details, see the two Joint Memoranda of Guidance for Scotland, *Assistance in Cash 1978* and *Fuel Debts 1978*. Both are available from the Social Work Services Group.
17. Part of the problem is that these valuations necessarily reflect the exchange value of the articles concerned. This is likely to be considerably less than the use value of the articles or their replacement cost. According to Michele Myers ("A Study of Warrant Sale Procedures." Unpublished M.Sc. thesis, University of Glasgow 1976) the valuations are often considerably less than what the articles could fetch on the open market.
18. For a recent critique, see the series of articles in the *Glasgow Herald*, 27-29/10/77.
19. David Lassels (Faculty of Law, University of Aberdeen) has analysed the records of all Warrant Sales carried out in Aberdeen between 1970 and 1976. Out of ninety-six Sales, only six produced a net surplus for the debtor (by a net surplus is meant a sum exceeding the total of the creditor's claim, together with Court expenses and the expenses of poinding and sale) while in thirty-nine cases the proceeds of the Sale were less than the expenses incurred in poinding and Sale alone.
20. It is very doubtful that even repeated arrestments would, on their own, justify dismissal under the Employment Protection (Consolidation) Act 1978, but an employer might be prepared to risk a finding of unfair dismissal and pay compensation if he really wished to get rid of an employee.
21. A total of 1195 actions were brought. Of these 490 (41%) were dismissed, 100 (8.5%) resulted in decrees for expenses only and 605 (50.6%) in decrees for the debt and expenses. Offers to pay by instalments were made in ninety-one cases and accepted in the majority

- of cases. See *Interim Report on Social Aspects of Diligence*, Scottish Office Central Research Unit, May 1977, Vol. 1. Table 6.
22. The small number of actions raised in the Court for sums of less than £20 can also be attributed to the high costs of debt collection and enforcement.
 23. See, for example, HC-Deb 30th November 1977 Cols. 501-502.
 24. Actively supported by Dennis Canavan, Labour MP for West Stirlingshire, James Dempsey, Labour MP for Airdrie and Coatbridge and Willie Hamilton, Labour MP for Central Fife.
 25. See the series of articles in *Glasgow Herald*, *op. cit.*
 26. See *The Sunday Times*, 11/7/76.
 27. Sheriff Nigel Thompson, then of Hamilton Sheriff Court. See, e.g. *John Temple Ltd. v Logan* (1973 S.L.T. (Sh.Ct) 41 at 47), *British Relays vs Keay* (1976 S.L.T. (Sh.Ct) and *Lawrence Jack Collections vs Hamilton* (1976 S.L.T. (Sh.Ct) 18).
 28. See statements of British Association of Social Workers, *Scottish Social Policy and Social Action Group*.
 29. Scottish Legal Action Group, Debt Conference 15th May 1976.
 30. See R. A. McCreadie, "Debtors 1" *Scolag Bulletin*, 5/6/76; "Debtors 2" *Scolag Bulletin*, 6 August/September 1976; "Debtors 3: Poinding and Sale" *Scolag Bulletin*, 7 Oct./Nov. 1976; "Debtors 4: Arrestment" *Scolag Bulletin*, 9 March/April 1977; "Debtors 5: Conclusions" *Scolag Bulletin* 10 May/June 1977. Anyone who has read these articles will see how heavily we have drawn on them in this paper.
 31. An account of this programme of research can be found in the *Interim Report on Social Aspects of Diligence*, *op. cit.*
 32. The Consumer Credit Act 1974 does impose some controls on the granting of credit and gives some protection to customers — it is now a criminal offence to provide credit without a licence and consumers must be given full details of the cost of any credit offered to them. Although this legislation may succeed in curbing the most flagrant abuses of power by creditors, it will not substantially alter the scope of credit or the terms on which it is offered. Providers of credit are not required to ascertain whether the customer can afford the terms offered or to insure themselves against loss.
 33. *Scottish Law Commission Thirteenth Annual Report, 1977-78*.
 34. Philip Lewis "Unmet Legal Needs" in Pauline Morris et al. *Social Needs and Legal Action*, Martin Robertson, 1973, p. 79.
 35. Very few debtors dispute their debts in Court. Equally, few debtors from the sample of default debtors whom we interviewed disputed their debts in practice.
 36. Most default debtors would thus appear to subscribe to the dominant value system, based on the commercial morality of the market place, while relatively few seem to be committed to subordinate or radical value systems. See Frank Parkin *Class Inequality and Political Order*, Paladin, 1972.
 37. This point has been very forcibly made by Bill Jordan in *Poor Parents*, Routledge and Kegan Paul, 1974 and elsewhere.

38. This argument has frequently been made by David Donnison. See, for example, "Supplementary Benefits: Dilemmas and Priorities" *Journal of Social Policy* 5:4, October 1976.
39. Under present procedures, creditors are often granted instalment decrees based on unrealistic offers of repayment on which the debtor subsequently defaults.
40. Members of the public would be able to check whether their name is on the register and, if so, whether the entry is correct.
41. Scottish editions of *Stubbs Weekly Gazette* and *Kemp's Mercantile Gazette* are published weekly and circulated privately to banks and other organisations granting credit.
42. Phillippe Nonet *Administrative Justice*. Russell Sage 1969.
43. No doubt some self-employed people do keep their money under their beds, but they are probably a very small minority.
44. The claim that our proposals would benefit debtors *and* creditors has been received with some incredulity. However, reform of procedures for debt enforcement is *not* a zero-sum game — we maintain that debtors would benefit from our proposed procedures even if they had to repay more of their debts.
45. This analysis owes a great deal to an unpublished paper by Robert Kagan and John Scholtz of the University of California, Berkeley, entitled "The 'Criminology of the Corporation' and Regulatory Enforcement Strategies". This paper can be obtained from Michael Adler on request.
46. Although each model of debt enforcement has its defining characteristics, individual enforcement agents nevertheless discriminate between default debtors. Default debtors whose circumstances are seen to conflict with the assumptions made by the system of debt enforcement may be "cooled out". See Paul Rock *op. cit.*