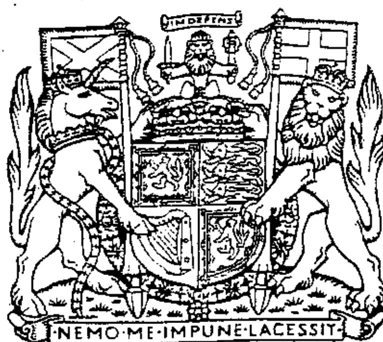

SCOTTISH LAW COMMISSION

MEMORANDUM NO. 51

FIFTH MEMORANDUM ON DILIGENCE:
ADMINISTRATION OF DILIGENCE

October 1980

This Memorandum is published for comment and criticism, and does not represent the final views of the Scottish Law Commission.

The Commission would be grateful if comments were submitted by 30 June 1981. All correspondence should be addressed to:

Mr. N.R. Whitty
Scottish Law Commission
140 Causewayside
Edinburgh EH9 1PR

(Telephone: 031-668 2131)

RE 77238/2 BL(3)

SCOTTISH LAW COMMISSION

Memorandum No.51

Fifth Memorandum on Diligence: Administration of Diligence

Table of Contents

	Para.
PART I: INTRODUCTORY	
Purpose and context of Memorandum	1.1
Arrangement and summary of Memorandum	1.5
Officers Survey	1.13
PART II: A TWO-TIER SERVICE AND SUPERVISORY AND RULE-MAKING AUTHORITIES	2.1
(1) Control of officers by courts rather than Government or central authority	2.2
(2) Regulatory powers of Court of Session, and Officers of Court Council as advisory body	2.11
(3) Retention of separate offices of messenger-at-arms and sheriff officer	2.18
(4) Demarcation of functions as between messengers-at-arms and sheriff officers	2.21
PART III: APPOINTMENT, ORGANISATION, CONTROL ETC OF SHERIFF OFFICERS	
Preliminary	3.1
(1) Appointment and training of sheriff officers	3.2
(2) Aspects of the organisation of sheriff officers	3.7
(3) Disciplinary proceedings	3.15
(4) Supervision of execution of diligence and of charging of fees etc	3.19

RE 77238/2 BL(5)

	Para.
(a) Existing arrangements for supervision	3.19
(b) Improved arrangements for audit of fees	3.26
(c) Supervision of execution of diligence and officers conduct	3.30
(5) Territorial competence of sheriff officers	3.35
PART IV: APPOINTMENT, ORGANISATION, CONTROL ETC OF MESSENGERS-AT-ARMS	4.1
(1) Qualifications for appointment as messenger-at-arms	4.2
(2) Powers of appointment, supervision and control of messengers-at-arms	4.6
PART V: REGULATION OF STANDARDS OF CONDUCT	
Preliminary	5.1
(1) The duty to execute citation and diligence when instructed	5.5
(2) Restrictions on extra-official employment for a wage or salary and other extra-official activities incompatible with office	5.6
(3) Prohibition on officer of court enforcing debt in which he or a relative etc has an interest	
(a) The existing law	5.10
(b) Proposed rules defining disqualifying interests in debts	5.12
(i) Debt due to officer as an individual	5.13
(ii) Debt due to company etc in which officer has interest	5.15
(iii) Debt due to business associate, spouse or near relative etc	5.16
(iv) Debt due to company etc in which officer's associate etc has interest	5.20
(4) Debt collection by officers before decree	5.21
(a) Officer of court purporting to act as such when collecting debts	5.25
(b) Connivance by officer of court in fraudulent impersonation	5.28
(c) Debt collection before decree by officer of court not purporting to act as such	5.30
(5) Debt collection by officers after decree	5.36

	Para.
(6) Separation of functions as between officers of court and solicitors	5.46
(7) Regulation of standards of conduct in respect of miscellaneous matters	5.50
(a) Collusive sale of poinded goods	5.51
(b) Specific duties and rights of officers on receipt of instructions	5.53
(c) Advertising and soliciting for business by sheriff officers and messengers-at-arms	5.57
(d) Enforcement of child delivery orders etc	5.58
PART VI: MISCELLANEOUS TOPICS	6.1
(1) Liability of officers of court for wrongful diligence etc	6.2
(2) Official identity cards	6.8
(3) Statistics on diligence	6.11
(4) Membership of Society of Messengers-at-Arms and Sheriff Officers	6.16
PART VII: SUMMARY OF PROPOSALS AND QUESTIONS FOR CONSIDERATION	

SCOTTISH LAW COMMISSION

Memorandum No.51

Fifth Memorandum on Diligence: Administration of Diligence

PART I: INTRODUCTORY

Purpose and context of Memorandum

1.1 In this consultative Memorandum,[1] we review the system of administration of officers of court (messengers-at-arms and sheriff officers), that is to say, the legal and administrative arrangements for the appointment, training, organisation, discipline, supervision and control of officers, the regulation of their standards of conduct and cognate matters.

1.2 The present system is in part founded on the principle that messengers-at-arms and sheriff officers on the one hand hold a public office with the exclusive power of executing court warrants for citation and diligence, yet on the other hand are independent contractors who receive instructions for diligence from creditors in like manner as agents in commerce receive instructions from their principals. In our First Memorandum on Diligence (Memorandum No. 47) we considered whether the independent contractor system should be replaced

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[1] This Memorandum is the last in a group of five Memoranda (Nos. 47-51) on diligence issued on the same date. The scope and thrust of these Memoranda and future Memoranda on diligence are briefly explained in our First Memorandum on Diligence: Memorandum No. 47.

either by a public enforcement agency (called a Court Enforcement Office) on the model of the Enforcement of Judgments Office in Northern Ireland, or by salaried officers of court employed within the Scottish Court Service, on the model of the county court bailiffs in England and Wales. Our provisional conclusion in that Memorandum was that neither of these options should be adopted, provided however that provision were made for reform of the independent contractor system on the lines discussed in detail in this Memorandum. In this Memorandum, therefore, we presuppose the continuance of the independent contractor system.

1.3 The proposals in this Memorandum complement the proposals outlined in previous Memoranda for reform of the diligences of poinding and warrant sale, and arrestment of earnings, and for the introduction of new remedies precluding diligence in appropriate circumstances.

1.4 The administration of the system of diligence was last officially reviewed by the McKechnie Report on Diligence in 1958.[1] At that time, the inadequate provision of officers of court in the remote areas was regarded as the main problem.[2] Opinions differ as to how acute that problem is today. We consider that problem, together with related problems of the cost of diligence, in our First Memorandum on Diligence.

Arrangement and summary of Memorandum

1.5 If the present system of administration of officers of court can be said to be founded on any one principle, it is that each court or group of courts is responsible for the appointment, discipline and control of the officers who execute its decrees. This principle seems to us to be sound, and we propose that it should be strengthened in various ways.

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[1]Cmnd. 456, especially Chapter 5 (Officers of Court).
[2]Ibid., Chapter 6.

1.6 In Part II we suggest that officers of court should be appointed, disciplined and controlled by the courts rather than by government or a central authority.[1] We suggest, that the Court of Session should have power to make rules with respect to a whole range of matters relating to the administration of sheriff officers as well as messengers-at-arms.[2] A new standing advisory body should be established to advise the Court of Session on the making of these rules and generally to keep under review all matters relating to the administration of officers of court.[3]

1.7 We reject the view that the separate offices of messengers-at-arms and sheriff officer should be abolished,[4] and suggest that there should be a clear demarcation of functions between messengers-at-arms and sheriff officers: thus, as a general rule, sheriff court decrees should be executed only by sheriff officers and Court of Session decrees only by messengers-at-arms.[5]

1.8 In Part III we discuss sheriff officers, who would continue to be appointed by the sheriffs principal. To establish national standards of training, new rules should be enacted regulating the training and qualifications of sheriff officers and the issue of certificates of competence which would be conclusive evidence of competence in applications for appointment as sheriff officer.[6] We briefly review the organisation of sheriff officers in firms and the policy considerations in granting commissions.[7] We consider that sheriffs principal should retain their existing disciplinary powers and in addition should have power to initiate in appropriate cases new and formal procedures for the discipline of sheriff officers.[8]

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[1] Paras. 2.2-2.10.
[2] Paras. 2.11-2.17.
[3] Idem.
[4] Paras. 2.18-2.20.
[5] Paras. 2.21-2.26.
[6] Paras. 3.2-3.6.
[7] Paras. 3.7-3.14.
[8] Paras. 3.15-3.18.

1.9 We consider it necessary for the maintenance of public confidence in the system of independent contractors that the system should not simply leave the sheriffs principal, as disciplinary authorities, to react to complaints from members of the public, and accordingly we favour the introduction of arrangements for the inspection or supervision of sheriff officers as well as improved arrangements for the audit of fees chargeable to creditors and recoverable from debtors.[1] Finally, we reject the suggestion that a sheriff officer should be entitled to act throughout Scotland and discuss the limits of his territorial competence.[2]

1.10 In Part IV, we suggest that messengers-at-arms should be recruited from the ranks of sheriff officers,[3] that control of messengers-at-arms should be exercised by the Court of Session rather than the Lyon King of Arms, and that the Court of Session should possess powers in relation to discipline and inspection or supervision similar to those proposed to be conferred on the sheriffs principal.[4]

1.11 In Part V, we seek views on a range of detailed proposals for rules regulating the conduct of messengers-at-arms and sheriff officers, including the retention and clarification of the rule precluding an officer from enforcing a debt due to himself or his spouse or business associate.[5] As regards the collection of debts for remuneration, we suggest that a distinction should be drawn between the collection of debts before the debts have been constituted by court decrees, and the collection of debts after they have been so constituted. We suggest that officers should be specifically

[1] Paras. 3.19-3.34.

[2] Paras. 3.36-3.41.

[3] Paras. 4.2-4.5.

[4] Paras. 4.6-4.9.

[5] Paras. 5.10-5.20.

prohibited from purporting to act as such in collecting debts before decree[1] and we seek views on whether the prohibition should extend further to cases where the officer acts as collection agent for a commission and does not purport to act in his official capacity, as where he acts through the medium of a debt collection agency.[2] We further suggest that debt collection by officers after the debts have been constituted by court decrees should be an official function of the officers guaranteed by their bonds of caution.[3] Apart from these relatively controversial matters, we seek views on a number of other possible rules in Part V.

1.12 Part VI deals with miscellaneous matters among which we would especially emphasise the need to improve the machinery for collecting and publishing statistics on diligence.

Officers Survey

1.13 We are grateful to the sheriffs principal for circulating to officers of court a questionnaire to establish certain basic facts about officers (e.g. the numbers of officers, the date of their appointment, their previous employment, the territorial scope of their commissions).[4] For convenience, we refer to this as the Officers Survey at places where we use the answers to the questionnaire.

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[1] Paras. 5.25-5.27.

[2] Paras. 5.30-5.35.

[3] Paras. 5.36-5.43.

[4] We are also grateful to the Lyon Clerk for providing information on messengers-at-arms and for advising us as to the practice of the Lyon Court in appointing messengers and other matters.

PART II: A TWO-TIER SERVICE AND SUPERVISORY AND RULE-MAKING AUTHORITIES

2.1 If the present system of administration of officers of court can be said to be founded on any one principle, it is that each court, or group of courts, is responsible for the appointment, discipline and control of the officers who execute its decrees.[1] In this Part we suggest that the principle should be retained and indeed strengthened in various ways: in particular, we suggest -

(1) that the control of officers of court should continue to be exercised by the courts and should not be transferred to the executive branch of government or to a central authority;

(2) that the rule-making functions of the Court of Session should be widened to ensure greater control of messengers-at-arms and sheriff officers, and that a new body (which we call the Officers of Court Council) should be established to advise the Court of Session on the exercise of those functions;

(3) that the separate offices of messengers-at-arms and sheriff officers should be retained and not fused into one service; and

(4) that as a general rule messengers-at-arms should execute only Court of Session decrees and sheriff officers only sheriff court decrees.

(1) Control of officers by courts rather than Government or central authority.

2.2 In our provisional view, control of messengers-at-arms and sheriff officers should not be vested in the executive branch of government. The enforcement of court decrees may be treated in some countries as primarily an executive function but, in

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[1]This principle is not however given universal effect, since messengers-at-arms can execute some sheriff court decrees and since the Lyon King-of-Arms has a much larger role in the control of messengers-at-arms than has the Court of Session: see para. 2.24 and Part IV below.

Scotland, diligence has long been treated as a form of judicial proceeding. First, the object of diligence is to secure the implementation of court orders. Second, the authority for executing diligence is the warrant of a court. Third, attachment of property by diligence brings the property within the control and protection of the court so that breach of a poinding or arrestment is punishable by the court in judicial proceedings. Fourth, the submission of a report of poinding to the court creates a pending court process and the courts supervise poindings and warrant sales and recall or restrict arrestments. Fifth, the procedures in diligence may be changed by rules of court made by act of sederunt. Sixth, diligence fees are prescribed by act of sederunt. In any event, officers of court execute citation which is undoubtedly a step in judicial proceedings.

2.3 In addition, there may be constitutional arguments against a transfer of control of enforcement from the courts to the government. The leading case of <u>Stewart</u> v. <u>Reid</u>[1] shows that the Scottish courts have in the past regarded control of sheriff officers by central or local government as a dangerous encroachment on the independence of the courts. At root was the fear that if the government assumed control of diligence, it could in effect render any court impotent to enforce its orders. Moreover, the enforcement of court orders should not be affected by political considerations.

2.4 It has to be recognised that where the activities of officers of court are subjected to scrutiny and debate in Parliament, difficulties can arise with respect to ministerial responsibility.[2] These difficulties are not, however, insuperable. The sheriffs

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[1] 1934 S.C. 69.

[2] As regards ministerial responsibility for enforcement elsewhere in the United Kingdom, the Lord Chancellor, who is both a Government minister and head of the judiciary, is responsible for the county court bailiffs in England and Wales and the Enforcement of Judgment Office in Northern Ireland. Formerly that Office was accountable both to the Lord Chief Justice of Northern Ireland and a minister of the government of Northern Ireland.

principal have long possessed administrative functions of various kinds and the Court of Session has always exercised rule-making functions in respect of civil procedure. These functions come under Parliamentary scrutiny or political debate from time to time and any difficulties caused by the absence of direct ministerial responsibility appear to be overcome.

2.5 Another method of centralising control would be to give a central body executive, supervisory and adjudicatory functions as well as functions in relation to the making and review of rules regulating officers of court. Such an authority might (i) make appointments of individual officers and delimit their territorial competence; (ii) make arrangements to ensure that standards of training and qualifications are observed; (iii) entertain complaints and adjudicate, perhaps through a committee, in disciplinary cases; (iv) make rules and arrangements for the audit of business accounts and of fees charged by officers of court to creditors and especially to debtors; and (v) assume responsibility for the collation and publication of statistics on diligence.

2.6 The case for centralisation of executive, supervisory and adjudicatory functions rests mainly on the following arguments:-

(i) The present system allows multiple commissions to such an extent that a sheriff officer can hold commissions in a very large number of court districts so that he must delegate the actual execution of diligence to employees and can only hope to keep a loose control over them. There have been cases where an officer has applied for or obtained an appointment merely to supervise the local officers in his branch office. The operations of some firms of sheriff officers already transcend the boundaries of sheriffdoms and sheriff court districts, and accordingly centralisation of control might be seen as a natural corollary of this trend.

(ii) There is a need for standardisation of training and qualifications and arguably this requires regulation by a central body.

(iii) Multiple commissions may mean multiple disciplinary proceedings and these could be avoided if there were a single tribunal to hear complaints emanating from anywhere in Scotland. Multiple commissions also mean that a disqualifying interest in a debt collection agency could have simultaneous repercussions in several sheriffdoms with the risk of conflicting decisions in separate disciplinary proceedings on the same set of facts.

(iv) A central authority would ensure uniformity of approach in the control of all officers of court.

(v) Already sheriff court ordinary action decrees are enforced by messengers, and many sheriff court decrees may be executed by officers of the court of the place of execution over whom the sheriff principal of the court of origin has no control. While the former practice can be abolished, the latter practice is too convenient to admit of abolition.

(vi) One central authority would exercise the same functions in respect of messengers-at-arms and sheriff officers.

While on one view, centralised arrangements for the supervision, regulation and control of messengers and sheriff officers would be "top-heavy", on another view, the very fact that there are so few officers might suggest that they should be subject to one authority rather than seven or eight authorities (the six sheriffs-principal, Lyon King of Arms and/or the Court of Session).

2.7 On the other hand, while it may be conceded that the organisation of sheriff officers now transcends the boundaries of sheriffdoms, so also has the organisation of sheriff courts. It has been represented to us that the establishment of the Scottish Courts Administration, the staffing of sheriff courts by officials who serve in a number of courts in the course of

their careers and the creation of full-time sheriffs principal who frequently consult one another on matters of common interest, have destroyed, or gone far towards destroying, the individual characteristics and different practices which sheriff courts tended to develop twenty years ago. The centralisation of control of the sheriff courts has probably proceeded further than the centralised organisation of sheriff officers and it seems likely that the present structure of sheriff courts is capable of coping with any problems thrown up by the existence of large firms of sheriff officers.

2.8 Moreover, the standardisation of training and qualifications and the problems of disciplinary offences by officers holding commissions in different areas do not require the establishment of a central body with executive functions and can be dealt with in other ways.[1] It has also been represented to us that the general adoption of common policies in the administration of diligence is not necessarily a recipe for efficiency.

2.9 In our provisional view, a convincing case has not been made for the establishment of a central authority to exercise the functions of appointment, supervision and discipline of officers of court. We suggest that these functions are likely to be better exercised locally in the sheriffdoms where the sheriff principal can take primarily into consideration the need to provide an efficient service to the public in his locality by officers of appropriate character and ability who are familiar with the community within which their commissions require them to operate. Similarly, since messengers-at-arms execute Court of Session warrants for diligence and citation, it seems appropriate that the Court should itself decide how many messengers should be appointed, and who should be appointed, and should also be responsible for disciplining any messenger-at-arms who abuses his office or infringes any disciplinary code.[2]

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[1] See paras. 3.6 and 3.7.

[2] We suggest below that control of messengers-at-arms should be transferred from the Lyon King of Arms to the Court of Session.

2.10 We suggest, therefore, that the functions of appointment, supervision and discipline of officers of court should not be transferred to a government department or a central authority but should continue to be exercised by the sheriffs principal in relation to sheriff officers and, in accordance with Proposition 12 below, should be exercised by the Court of Session in relation to messengers-at-arms. (Proposition 1).

(2) Regulatory powers of Court of Session, and Officers of Court Council as advisory body.

2.11 At present, the Court of Session regulates by act of sederunt the fees of sheriff officers[1] and (with the consent of the Lyon King of Arms) messengers-at-arms.[2] There is no obligation on the Court to consult the Sheriff Court Rules Council nor (as is required in the case of court fees) to obtain the concurrence of the Treasury. It is understood that changes in the fees are usually made following representations to the Lord President of the Court of Session by the Society of Messengers-at-Arms and Sheriff Officers. Officers' fees are now regularly varied to keep pace with inflation.[3]

2.12 There are rules regulating the standards of conduct of messengers-at-arms and related matters in the Rules of the Court of Session[4] most of which derive with few modifications from the Regulations of the Lyon King of Arms (sanctioned by the Court of Session) of 11 March 1772.[5] There are no similar enactments applying to sheriff officers although to some extent the gap is filled by the common law. We consider, however, that both the

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[1]Sheriff Courts (Scotland) Act 1907, s.40.

[2]This is an inherent common law power.

[3]Changes were made for messengers in 1960, 1964, 1970, 1975,(twice), 1977 and 1978 and for sheriff officers in 1960, 1963, 1970, 1975, (twice), 1977 and 1978

[4]R.C. 47-62.

[5]See Campbell on Citation, p.485.

enacted rules of court and the common law rules regulating the standards of conduct of messengers-at-arms and sheriff officers should be codified and in Part V we discuss in detail the matters with which such a code would or might deal.

2.13 We note that in a recent Bill by a private member of Parliament providing for a code of conduct for sheriff officers, the Bill provided that the code should be enacted by statutory rules made by the Secretary of State which would be laid before Parliament.[1] We suggest, however, that such a code should be enacted by act of sederunt made by the Court of Session acting on the advice of a new statutory body. Acts of sederunt are statutory instruments, and although it is unusual for them to be laid before Parliament for affirmative or negative resolution of either House,[2] an exception might be made in the case of rules on the conduct of officers of court.

2.14 The McKechnie Committee recommended that there should be statutory provision for the appointment by the Lord President of the Court of Session of a standing advisory committee, representative of various interests involved in diligence.[3] The Report envisaged that the primary duty of the committee would be to review the scales of fees charged by officers of court[4] but also suggested that it should advise the Lord President on an act of sederunt prescribing rules on the training of officers of court,[5] and on the state subsidies for diligence in the remote areas which they considered should be regulated by act of sederunt.[6]

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[1] See the Sheriff Officers and Warrant Sales (Scotland) Bill, 1980 [Bill 125] (introduced by Mr Dennis Canavan, M.P. and ordered to be printed on 22 January 1980) clause 6, which provided: "The Secretary of State shall lay before the House of Commons an order outlining a training scheme and a code of conduct for Sheriff Officers, and such order shall be made by statutory instrument, subject to approval by resolution of the House of Commons."

[2] See, however, Sheriff Courts (Scotland) Act 1907, s.40 (in terms of which an act of sederunt regulating fees under that section is subject to negative resolution by either House of Parliament.)

[3] McKechnie Report, op.cit. paras. 211-212.

[4] Idem.

[5] Ibid, para. 213.

[6] Ibid. para. 248. In the event the Remote Areas Diligence Payments Scheme was established by Scottish Home Department circular on a non-statutory basis: see our Memorandum No. 47, Part III.

2.15 We suggest that a standing advisory body should be established to advise the Court of Session on the making and revision of rules of conduct to be observed by officers of court, and generally on matters relating to the administration of diligence as well as the review of fees and the arrangements for training of officers. Officers of court are virtually excluded from the official organs for controlling the service: they undertake the functions of training new officers but have no control over qualifications or examination standards. We do not think that the case for instituting a self-regulating or self-disciplining "profession" is made out, but we do think that there is a strong case for a standing council in which matters of concern to the administration of diligence can be debated, to which problems which have been identified can be referred and in which policy can be formulated by representatives of the Court of Session and sheriffs principal, the officers of court and other interested groups including representatives of creditors' and consumers' organisations. In the absence of such a body, it will continue to be difficult to respond quickly and authoritatively to criticisms of the officers of court service.

2.16 One difficulty in determining the functions of such a body is that citation and diligence in connection with sheriff court proceedings are subject to regulation by act of sederunt on the advice of the Sheriff Court Rules Council, but it should be possible to demarcate the functions of the two bodies satisfactorily.

2.17 In the light of these remarks <u>(1) it is suggested that the Court of Session's existing powers to make rules regulating messengers-at-arms and prescribing fees for citation and diligence should be replaced by wider statutory powers to make rules regulating and controlling the service of messengers-at-arms and sheriff officers and generally the administration of the system of citation and diligence. These rule-making powers might cover the following specific matters (including matters discussed in more detail elsewhere in this Memorandum) so far as not already regulated by statute, namely</u>:-

(a) the training and qualifications of officers of court and the award of commissions to them;

(b) the organisation of officers of court in partnerships, associated firms or otherwise;

(c) the procedure with respect to the discipline of sheriff officers;

(d) the keeping of records and accounts by officers of court and the audit and inspection of these records and accounts;

(e) if an inspector of officers of court were appointed, the regulation of his functions;

(f) the standards of conduct to be observed by officers of court in the performance of their functions and the prohibition or regulation of extra-official activities;

(g) the prescription of fees chargeable for diligence or citation;

(2) It is further suggested that a new standing advisory body (which might be called the Officers of Court Council) should be established by statute to advise the Court of Session on the making and amendment of the foregoing rules and generally to keep under review all matters relating to the administration of citation and diligence. The Court of Session should be required to consult the Officers of Court Council and the sheriffs principal before making rules under the foregoing powers.

(3) It is suggested that members of the Officers of Court Council should be appointed by the Lord President except for lay members appointed by the Secretary of State. A judge of the Court of Session should be chairman and the Council should include persons representing the sheriffs principal, the officers of court and the legal profession as well as lay members representing the interests of creditors and debtors. (Proposition 2).

(3) Retention of separate offices of messenger-at-arms and sheriff officer.

2.18 The McKechnie Report rejected a proposal that there should be "one service of fee-paid diligence officers competent to execute the decrees of all courts in Scotland".[1] Fusion does not necessarily mean that all officers should execute decrees in all courts in Scotland, as the McKechnie Report assumed, since it would be possible to have one service of diligence officers and yet impose limits on their territorial competence. The arguments for and against "fusion" turn largely on what new arrangements would be made on such matters as the appointment, training, discipline, control and territorial competence of officers in a fused service and the level and mode of regulation of fees.

2.19 By itself, therefore, the question of fusion is not of great importance, but we can see no compelling reason in favour of fusion. First, the distinction between messengers-at-arms and sheriff officers provides a convenient means whereby the Court of Session and the sheriffs principal can control their own officers. Second, it can be argued that messengers-at-arms should have a nation-wide competence since the Court of Session has a nation-wide jurisdiction, whereas sheriff officers should have a territorially limited competence corresponding to the territorially limited jurisdiction of the sheriff courts. Third, all practising messengers-at-arms are also sheriff officers[2] so that a wide measure of fusion already exists. Messengers-at-arms are generally recruited from the more senior sheriff officers, and within the service tend to be regarded as having a higher status than sheriff officers, even though, with the exception of inhibitions, there are only minor differences between diligence on Court of Session warrants and diligence on sheriff court warrants.[3] Fourth, since fusion would serve no useful purpose, some weight should be given to history and tradition, and the avoidance of change for its own sake.

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[1] Op.cit., paras. 206-7.

[2] See para. 4.3. We suggest below that messengers-at-arms should be recruited from the ranks of sheriff officers.

[3] The differences in citation are more significant.

2.20 To sum up, we propose that the separate offices of messengers-at-arms and sheriff officers should be retained and should not be replaced by one service of citation and enforcement officers authorised to execute the warrants of the Court of Session and sheriff courts. (Proposition 3).

(4) Demarcation of functions as between messengers-at-arms and sheriff officers

2.21 The scope of the functions of messengers-at-arms and sheriff officers is regulated by a mixture of common law rules, on the powers and duties inherent in each office, statutory provisions and rules of court on the meaning and effect of warrants,[1] and the provisions of the Execution of Diligence (Scotland) Act 1926 relaxing the above rules and enactments to enable officers not otherwise authorised to execute diligence in particular areas (in effect, remote areas) where there is no duly appointed officer authorised to act.[2] The main legal difficulty relates to the powers of messengers-at-arms to execute sheriff court decrees. The common law was uncertain with different views expressed in the Court of Session (obiter) and sheriff court,[3] but mainly as a result of the Sheriff Courts (Scotland) Extracts Act 1892, it was accepted that messengers-at-arms had statutory authority to execute sheriff court diligence,[4] except in the Small Debt Court where a

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[1] E.g. Debtors (Scotland) Act 1838, s.9 and Schs. 1 and 6, R.C. 67, 68 and Form 44; Sheriff Courts (Scotland) Extracts Act 1892, s.8; Summary Cause Rules, rule 6(3).

[2] In addition, the Court of Session has power under the nobile officium to authorise a person to execute diligence in a particular case (e.g. to authorise a sheriff officer to execute diligence on a Court of Session warrant in a district where there is no messenger but it is thought that exercise of this power has not been required since the Execution of Diligence (Scotland) Act 1926.

[3] See Dobie Sheriff Court Practice p.11.

[4] Thornton, Applicant 1967 S.L.T. (Sh.Ct.) 71; the same view was taken (obiter) by the sheriff principal (now Lord Ross) in the unreported case of Meridian Mail Order Co. Ltd. v. Lennox (1 February 1973) Sheriffdom of Ayr and Bute at Kilmarnock.

different rule applied because of the terms of the Small Debt (Scotland) Act 1837.[1] When small debt procedure was replaced by summary cause procedure, the Summary Cause Rules made express provision that writs were to be served by a sheriff officer but not a messenger-at-arms,[2] though it has been suggested that the exclusion of messengers-at-arms is not complete and that an area of doubt remains.[3]

2.22 We find it unnecessary to express a view on this matter since we think that messengers-at-arms should be authorised by their commissions to execute only Court of Session decrees just as sheriff officers are authorised by their commissions to execute only sheriff court decrees. It is undesirable that a person should be refused a commission as sheriff officer, or that a sheriff officer should be dismissed or suspended, in respect of a sheriff court district and yet have authority to enforce warrants of that sheriff court in his capacity of messenger-at-arms. Further, the number of decrees emanating from any one sheriff court is finite and the sheriff principal should be able to control effectively the numbers of officers appointed to execute them. If messengers-at-arms could execute all sheriff court decrees, then the sheriff principal would be unable to ensure that a proper balance existed in rural areas as between officers of local firms and officers of city-centred firms. In short, execution of sheriff court decrees by messengers-at-arms is inconsistent with the principle that decrees emanating from a particular court should be executed by officers appointed by the sheriff principal responsible for supervising that court.[4]

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[1] Electrical Ohms Ltd. v. Scottish Cables Ltd. 1953 S.L.T. (Sh.Ct.) 99; Meridian Mail Order Co. Ltd. v. Lennox, supra (in which the sheriff principal directed the sheriff clerk to refuse to receive a report of sale on a small debt decree where the diligence had been executed by a messenger-at-arms).

[2] Summary Cause Rules, rule 6 as originally enacted and as substituted by the Act of Sederunt (Summary Cause Rules, Sheriff Court) (Amendment) 1980.

[3] T.C. Gray, "The Summary Cause Rules" 1977 S.L.T. (News) 129 at p.132.

[4] See the remarks of the sheriff principal in Thornton, Applicant 1967 S.L.T. (Sh.Ct.) 71.

2.23 As regards special forms of diligence, messengers-at-arms as such are not empowered to execute summary warrants to recover Inland Revenue taxes and VAT,[1] but it is not clear whether they may execute summary warrants to recover rates.[2] We suggest that summary warrants should be executed only by sheriff officers holding commissions for the district of the court which granted the summary warrant. There are special provisions for the enforcement of Exchequer diligence by the sheriffs which appear to us to be anachronistic.[3] We understand, however, that Exchequer diligence is no longer used in practice[4] and shall revert in a later Memorandum to the question whether it should be abolished; meantime we make no proposals.

2.24 The Execution of Diligence (Scotland) Act 1926, section 1 provides that in any county in which there is no resident messenger-at-arms, or in any of the islands of Scotland, a sheriff officer authorised to act there has all the powers of a messenger-at-arms. Section 2 of the Act (which provides for recorded delivery service of arrestments on summary cause decrees,

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[1] Taxes Management Act 1970, s.63(2); Value Added Tax (General) Regulations 1977, reg. 59(b).

[2] See Local Government (Scotland) Act 1947, s.247(2), which refers to "officers of court".

[3] Under the Exchequer Court (Scotland) Act 1856, s.28 and Schedule G, warrants for diligence on extract decrees of the Court of Session as the Court of Exchequer in Scotland are addressed to sheriffs to charge and execute diligence. The warrant is declared to be "a sufficient warrant to any messenger-at-arms or sheriff officer to execute charge, arrestment and poinding" in terms of the decree. Section 29 imposes a duty on the sheriff to execute the extract decree and also to collect the sums due. The McKechnie Committee said (at para.32) that where a sheriff is required to execute Exchequer cause warrants under the 1856 Act, the sheriff grants warrant to one of his sheriff officers to do what is to be done in his name, but the Committee made no recommendations on this matter.

[4] There are doubts about the competence of Exchequer diligence because of section 26(1) of the Crown Proceedings Act 1947 (which provides that orders in favour of the Crown in civil proceedings may be enforced in the same manner as orders in actions between subjects, and not otherwise.)

and of charges more than twelve miles from the court granting a summary cause decree etc) authorises a sheriff officer holding a commission from the court granting the summary cause decree, or a messenger-at-arms resident in the sheriffdom in which the place of execution is situated, to execute the charge or arrestment by recorded delivery. The provisions of section 1 are designed to deal with a shortage of messengers-at-arms in remote areas, and are not affected by our proposals in this Part, but section 2 is so affected.

2.25 Decrees arbitral, awards by tribunals and deeds registered for execution in the sheriff court books may be enforced by sheriff officers and, if registered in the Books of Council and Session, by messengers-at-arms. Some statutes, however, provide for the enforcement of the orders of tribunals or inquiries "in like manner as a recorded decree arbitral",[1] and it is not clear whether messengers-at-arms or sheriff officers or both are authorised to act, since the warrant of a particular court seems to be rendered unnecessary by the statute. This doubt should be resolved.

2.26 To sum up, <u>(1) as a general rule, Court of Session warrants for citation and diligence should be executed only by messengers-at-arms and sheriff court warrants only by sheriff officers. (2) Accordingly, it should be clearly provided by statute that a messenger-at-arms is not authorised by his messenger's commission to execute citation or diligence in connection with sheriff court proceedings or to execute summary warrants for the recovery of rates and taxes, without prejudice, however, to his authority to execute the warrants of a particular sheriff court by virtue of a commission as sheriff officer. (3) These proposals are not intended to affect section 1 of the Execution of Diligence (Scotland) Act 1926 (which confers</u>

[1] See, for example, Town and Country Planning (Scotland) Act 1972, s.267(8); Patents Act 1977, s.93(b); Employment Protection (Consolidation) Act 1978, Sch. 9, para. 7(2); Education (Scotland) Act 1980, Sch. 1., para. 8.

on sheriff officers the powers of messengers-at-arms in certain cases). (4) Where a statute provides for the enforcement of an order of a tribunal or other body "in like manner as a recorded decree arbitral", should the statute be amended to require registration of the order for execution in the Books of Council and Session or sheriff court books or should special provisions be enacted making it clear that, say, a messenger-at arms and a sheriff officer of the district in which the place of execution is situated, are authorised to act? (Proposition 4).

PART III: APPOINTMENT, ORGANISATION, CONTROL ETC OF SHERIFF OFFICERS

Preliminary

3.1 Having suggested in Part II the retention of the separate offices of sheriff officer and messenger-at-arms, we consider in this Part the arrangements for the appointment, training, organisation, discipline, supervision and control of sheriff officers and seek views on possible reforms. The great bulk of decrees enforced by diligence are executed by sheriff officers and we therefore consider sheriff officers first before turning to consider messengers-at-arms in Part IV.

(1) Appointment and training of sheriff officers

3.2 Sheriff officers are appointed by the sheriff principal of the sheriffdom in which the officer is authorised to act.[1] The sheriff officer's commission may extend throughout the sheriffdom, or it may authorise him to act within one or more of the sheriff court districts comprised in the sheriffdom.[2] To procure an appointment, the applicant presents a petition to the sheriff

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[1] The appointment must be made by the sheriff principal and not one of the sheriffs: Stewart v. Reid 1934 S.C. 69; Lewis, Petitioner 1963 S.L.T. (Sh.Ct.) 6.

[2] Or indeed to an area of the sheriffdom defined in some other way: thus some sheriff officer commissions are still based on local government areas. It is not competent, however, to appoint an officer by a commission restricting his acts to acts on behalf of one creditor or employer: Stewart v. Reid, supra.

principal. The procedure, which is not regulated by act of sederunt, is at the discretion of the sheriff principal who may order such intimation and advertisement of the application as he thinks fit. The procedure serves the purpose of enabling the sheriff principal (i) to cause an examination to be made, if necessary, of the applicant's knowledge of the law and practice of citation and diligence; (ii) to make an assessment, on the basis of testimonials or otherwise, of the applicant's character, reputation and general suitability to hold the office; and (iii) to assess whether it is expedient to appoint an additional sheriff officer in the districts or sheriffdom in question. Objections to the application may be lodged, and where contested applications occur, it is usually because other sheriff officers holding appointments in the relevant districts claim that there is already an adequate provision of officers in those districts. The powers of the sheriff principal are wholly discretionary. There is no right of appeal against his decision and no duty on him to give reasons for his decision though often reasons will be given, at any rate in contested cases.

3.3 It will be seen that the question whether the applicant has the requisite technical knowledge of the functions of sheriff officer and the question whether there is a vacancy in the relevant court district are both dealt with in the same application. Normally if the officer has an appointment in another district, no examination will be held; if an examination is needed, the sheriff principal normally makes a remit to a panel of examiners appointed by him which may be composed of solicitors and/or senior sheriff officers. Examinations are usually viva voce. It has been represented to us that this practice gives rise to a diversity in standards. It is relevant to note that the procedure resembles the procedure whereby law agents were appointed as procurators in local sheriff courts in the early 19th century and that this was abandoned because of the

diversity of standards which it allowed to develop.[1] Arguably uniform standards of training should apply throughout Scotland. The imposition of uniform examination standards and training qualifications would, however, require the introduction of written examinations. One practical barrier to developments on these lines has been the continued absence, despite comments by the McKechnie Committee,[2] of an up-to-date manual or text-book which could be used for the training of sheriff officers.[3] Another practical barrier is the lack of provision of any systematic or formal programme of training.[4] The provision of a manual on which written and oral examinations could be based would go far towards achieving uniform standards. Because of

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[1]For this reason, the Colonsay Commission recommended in 1870 that "there should be one general examination applicable to agents throughout all Scotland". The law was changed by the Law Agents (Scotland) Act 1873. The Commission observed that as it was "essential to the proper conduct of the business of any court that the judge have some control of the conduct and character of those who practise in it, any one so qualified who is desirous of being admitted to practise in any sheriff court, should be required to apply for and obtain the sanction of the Sheriff, who should not have power to refuse it on the ground of defective educational qualification". (Royal Commission on the Courts of Law in Scotland, Fourth Report, p.42).

[2]Op. cit, para. 213 where the Committee observed that "it would be most useful if a textbook on the practice of diligence by officers of court could be produced." The last manual for sheriff officers - Gillespie, Powers and Duties of Sheriff Officers - was published in 1852 and the last textbook on diligence in 1898.

[3]We understand that the Society of Messengers-at-Arms and Sheriff Officers have sponsored the preparation of a manual on diligence designed for use in training sheriff officers, which is at an advanced stage of preparation.

[4]Compare the arrangements for training provided for solicitors in Scotland by University Law Faculties or by The Law Society of Scotland, or for sheriff clerks by the Staff Training Centre of the Scottish Court Service which is managed by the Scottish Courts Administration. In France, we understand that a body known as the Ecole Nationale de Procedure provides an extensive course of training for intending "huissiers".

the small number of sheriff officers entering the service at any one time, there would be difficulties in introducing a formal training programme, but ways might be found of overcoming these difficulties, e.g. by the use of correspondence courses. It would be necessary, however, to ensure that the new training requirements did not affect the recruitment of officers in the remoter areas of Scotland which are already inadequately provided with officers. The introduction of uniform training qualifications would mean that the sheriff principal would not be entitled to refuse an application for appointment on the ground of the applicant's defective training if the applicant had the prescribed qualifications but would not affect his power to refuse an application on the grounds of conduct or character, or on the ground that the district was already adequately served by the existing sheriff officers.

3.4 As the McKechnie Committee observed,[1] most new sheriff officers receive their initial training while working with an experienced officer of court. Some officers become 'apprentices' on leaving school, and are sheriff officers for the whole of their working lives; other officers are recruited much later in life and have held other jobs.[2] Table A shows the age of sheriff officers at the date of their first appointment.

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[1] Op. cit, para. 213.

[2] The Officers Survey (see para.1.13) disclosed that of the 126 officers who participated in the survey, 37 entered the service of sheriff officers upon leaving school or shortly thereafter. A further 12 officers had been in H.M. Forces (generally national service), and 29 officers had been previously employed in the police force, the sheriff clerk service, or as an employee (e.g. typist) in a sheriff officer's firm. Insufficient information was available to classify the occupations of the remaining 48 officers.

Table A

Age of sheriff officers at date of first appointment

Age	Number of officers	Percentage of officers
Less than 18	-	-
18-20	8	6
21-24	61	50
25-29	17	14
30-39	16	13
40-49	13	10
50-59	9	7
over 60	-	-
Total	124*	100

*2 not stated

Over half (56%) of the officers obtained their first commission before the age of 25 years. Relatively few officers enter the service as a major second career and only 17% obtained their first commission when over 40 years of age. As Table B shows, there is a wide variation in the length of "apprenticeship" or training served by sheriff officers. 58% of sheriff officers served an apprenticeship or training period of less than 3 years.

Table B

Length of apprenticeship

Length of "apprenticeship" or training	Number of officers	Percentage of officers
1 year or less	24	19
1-2 years	25	20
2-3 years	23	19
3-4 years	16	13
4-5 years	12	10
5-6 years	13	10
6-7 years	3	2
over 7 years	3	2
none	6	5
Total	124*	100

*2 not stated

3.5 Our attention has been drawn to an apprenticeship scheme, originally designed to take effect on 1 January 1951, drawn up by the Soceity of Messengers-at-Arms and Sheriff Officers which provided for a minimum period of three years' training after which the aspiring sheriff officer would sit an examination set by examiners appointed by the Society. The scheme envisaged that the successful examinee would obtain the Society's certificate of fitness which would then be presented to the sheriff principal when an application for appointment was made. So far as we have been able to ascertain, however, the Sheriffs' Association (the precursor of the Association of Sheriffs Principal) did not at that time accept that the Society's certificate of fitness should be a necessary prerequisite of such an application or that it should be automatically treated as conclusive evidence of the applicant's technical expertise and qualifications. It is to be observed in this connection that the Society of Messengers-at-Arms and Sheriff Officers is not a statutory or chartered body, that not all sheriff officers are members of the Society,[1] and that the Society has no formal or exclusive privileges conferred by law, unlike for example, the Law Society of Scotland and similar professional bodies. Subsequently the Society informed the McKechnie Committee that in their view "there should be an apprenticeship for at least three years for sheriff officers and there is a risk that an officer in a remote area who has not been apprenticed will not know his work".[2] The McKechnie Committee suggested "that the Lord

[1]According to the Officers Survey, however, only 13 of the 126 officers who participated in the Survey are not members of the Society.

[2]Op. cit. para. 213. The McKechnie Committee observed that an apprenticeship "may not always be possible, particularly in the most remote districts. It seems desirable that there should be some arrangement whereby a new recruit in a remote area who is unable to serve an apprenticeship could work for a while under the postal instructions of a tutor-officer".

President of the Court of Session, on the advice of the Officers of Court Committee,[1] might be prepared to have prescribed by Act of Sederunt a set of rules governing the training of officers of court".[2] This proposal was not, however, implemented.[3]

3.6 Against this background, we suggest that (1) the Court of Session, acting on the advice of the Officers of Court Council whose establishment we have proposed should be under a statutory duty to prescribe by act of sederunt rules governing the training and qualifications of sheriff officers. (2) In principle, these rules should be applicable throughout Scotland. The rules should regulate the apprenticeship of entrants to the sheriff officers' service, require the holding of written examinations, and the issue of certificates of competence to ensure uniformity of training standards and qualifications at a national level. (3) Consideration should be given by the competent authorities after consulting the Society of Messengers-at-Arms and Sheriff Officers and other interests concerned to the provision or approval of a manual for use in training sheriff officers and its periodic revision. Consideration should also be given to the introduction of a formal programme for the training of sheriff officers using methods appropriate to the small number of persons who enter the service at any one time. (4) A certificate of competence issued in terms of the act of sederunt should be conclusive evidence of competence in an application for appointment as sheriff officer in any court district. (Proposition 5).

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[1]See para. 2.14 above for the McKechnie Report's proposal as to our Officers of Court Committee.

[2]Para. 213.

[3]In submissions to our Working Party on Diligence the Society of Messengers-at-Arms and Sheriff Officers supported the introduction of formal apprenticeship arrangements.

(2) Aspects of the organisation of sheriff officers

3.7 Sheriff officers are either self-employed persons conducting their own sheriff officer's business or partners of a firm of sheriff officers, or employees of a sheriff officer or of a sheriff officer's firm.[1] At the end of 1979, 126 persons who participated in the survey held commissions as sheriff officers of whom 121 were actively working as sheriff officers. Of these, 109 worked full-time, 10 worked part-time and 2 acted as consultants to firms in which they had previously worked. The officers are organised in 34 separate 'businesses' (including in the expression 'business' a group of associated firms and a sole practitioner's business) or 'firms'. In 14 sheriff officer businesses, the work was done by a sole practitioner who did not employ any other officer; in 4 firms, all of the officers (2 or 3) were partners. There was a considerable variation among the other firms, or groups of firms. One group of firms had 3 partners and 19 employees; one firm had one principal and 8 employees; one group of firms had 2 partners and 6 employees; and one group of firms had one principal and 5 employees.

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[1] It has been argued that in law a sheriff officer cannot be the employee of another sheriff officer: see (1976) SCOLAG Bulletin 106 at p.107 which relied on the following observations of Lord President Clyde in Stewart v. Reid 1934 S.C. 69 at p.73:- "But it is a matter of the clearest principle that the person entrusted with a public office must be left to discharge its duties with the independence and impartiality which properly attach to it; and it is utterly inconsistent with the tenure of such an office that its holder should be in the pay of and liable to dismissal by any private employer". In context, however, the Lord President seems to have been concerned to rebut the opinion of the sheriff substitute at first instance that "it is competent to restrict the commission of a sheriff officer to whole time employment under a particular town or county council, whose salaried servant he becomes, and on dismissal by whom his commission falls" (emphasis added). Where a sheriff officer dismisses another sheriff officer whom he has employed, the dismissed officer continues to hold his commission and is in law entitled to continue to practise in competition with his former employer. It is questionable whether the ratio of Stewart v. Reid applies to that case, and in view of the widespread incidence of employee sheriff officers, it is doubtful whether any court would now hold the practice to be illegal.

Each of the remaining twelve firms had no more than 5 officers with an equal or almost equal balance between employers and employee officers. We see nothing wrong in the practice whereby sheriff officers employ other sheriff officers to act. We understand that some officers do not wish to assume the responsibility of partnership status and it would be pointless to require them formally to do so.

3.8 Although creditors and solicitors frequently instruct firms rather than individual sheriff officers, commissions appointing sheriff officers are granted in favour of individuals and not firms. Accordingly, the proper practice is that warrants to execute diligence should be directed, or as the case may be should be treated as directed, to individual sheriff officers and not to firms.[1] It has been suggested that the organisation of sheriff officers in firms is in some way undesirable.[2] It is, however, a long standing feature of the service stemming from at least the 19th century. Organisation in firms is a highly convenient and even essential feature of the independent contractor system. It allows for the sharing of costs, which may be heavy since officers often require to be backed up by a considerable office staff and have to pay for office premises, stationery and equipment, cars for use by officers, and other expensive overheads; in busy firms it allows the continuous manning of the firm's place of business by an officer while other officers are executing citation or diligence; and it permits continuity of business during vacations, sickness and other interruptions in the work of particular officers.

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[1] See, however, Cuthbert and Wilson v. Shaw's Trs. 1955 S.C.8 (where a summary warrant to recover income tax by poinding was treated as directed to a firm of sheriff officers). In practice warrants are often made out "to AB, whom failing CD, whom failing EF, sheriff officer".

[2] In Lawrence Jack Collections v. Hamilton 1976 S.L.T. (Sh.Ct.) 18, Sheriff Nigel Thomson remarked (at p.20) that many sheriff officers "work together in partnership under a firm name, and although this is permissible in terms of the Partnership Act 1890 ss.1(1) and 45, I take leave to question whether it is in the public interest desirable".

3.9 The main pattern of existing appointments was set or confirmed at the time of the reorganisation of sheriffdoms in 1975. Sheriff officers often hold commissions in one or more districts or one or more sheriffdoms. One firm has six branch offices and also what are advertised as five "associated" firms, and thereby has offices in every sheriffdom in Scotland, though not in every court district.

3.10 The pattern of organisation of sheriff officer businesses and the conditions of competition between them are to a considerable extent fixed by the way in which the sheriffs principal exercise their discretionary powers to appoint sheriff officers.[1] In determining an application for an appointment, the sheriff principal must have regard to the interests of the applicant, the interests of the objectors, if any, and the public interest, which is paramount. The following factors may be important in determining the public interest namely:-

(a) that there should be an adequate provision of sheriff officers for the relevant districts, that is to say, sufficient to ensure that the court's decrees are enforced timeously and properly;
(b) that a single officer, or a single firm of officers, should not have a monopoly of business, but a choice of officers or firms should be available to creditors;
(c) that the sheriff officer should be a man of good character who would not only act fairly and impartially in carrying out diligence but would also uphold the reputation of the courts and sheriff officers in the area; and
(d) possibly, that as a matter of preference if not necessity, the officer should have knowledge of the local community.

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[1] Few cases have been reported but see Lewis, Petitioner, 1963 S.L.T. (Sh.Ct.) 6 also reported as Lewis v. McCafferty (1963) 79 Sh.Ct. Reps. 43; Thornton, Applicant 1967 S.L.T. (Sh.Ct.) 71.

3.11 As regards the interest of the applicant, this may vary greatly. The applicant may be a young sheriff officer seeking to establish himself in business as an officer for the first time, or at the other extreme he may be a controlling partner in a city firm, seeking to gain a foothold in the district in question in order, for example, that he may enforce his clients' decrees there himself instead of instructing local firms of officers, or in order that he may exercise greater supervision of a firm which he already controls in the district.

3.12 As regards the interests of the objectors, the relevant considerations may also vary. It is in the public interest that there should be an adequate provision of sheriff officers. It is in the interest of existing officers holding commissions in the district, that the sheriff principal should not appoint too many officers, since the total number of decrees emanating from the local sheriff court is limited and cannot support too many officers. A surplus of officers could result in existing businesses ceasing to be viable. Existing rural firms in some districts might be vulnerable if competition were to be increased.

3.13 As already noted, in one sense the organisation of sheriff officers is beginning to transcend the boundaries of sheriffdoms since one group of associated firms has officers with commissions in all sheriffdoms and provides a national network of offices. While this feature is very different from the original mode of organisation of officers' firms, there seems nothing inherently wrong in such a development provided that the officers in the rural branch offices of city-centred firms know the local community and perform their functions properly, and provided that the centralising trend does not go too far with the result that monopoly situations arise in which creditors have no real choice of firms to instruct. We think that control of the balance between city-centred firms and rural firms is best left to the sheriffs principal to determine in the light of local circumstances. When applications are made for appointment, the

sheriff principal can review the position and, by either making or refraining from making an appointment, he can ensure that there is a balance between there being sufficient work for the officers of court and enough choice for creditors to stimulate efficiency by competition.

3.14 To sum up, (1) the organisation of sheriff officers in firms is an essential feature of the independent contractor system and should be retained. (2) Sheriff officers should continue to be permitted to employ other sheriff officers to execute citation and diligence in areas for which the latter hold commissions. (3) No change should be made in the existing discretionary powers of the sheriffs principal to make appointments granting commissions for sheriffdoms or districts having regard to the public interest, which is paramount, and the interests of the applicant and any objectors. (Proposition 6).

(3) Disciplinary proceedings

3.15 The functions of disciplining and controlling sheriff officers to ensure the maintenance of appropriate standards of conduct are vested in the sheriffs principal. In addition, sheriff officers may be liable in damages to a creditor or debtor for negligence or impropriety in the conduct of their business. The sheriffs principal have wide powers to suspend sheriff officers and to deprive them of office which have not been formally changed since at least the early 19th century when those powers were upheld in an unreported Court of Session case.[1] These powers

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[1]MacLaurin Forms of Process (2nd ed.: 1848) vol i, p.66; Gillespie, Powers and Duties of Sheriff Officers (1852) p.176.

have not previously been examined by any official report. A report in 1818[1] and later text books[2] state briefly that sheriff officers hold their office "during the pleasure of the sheriff principal" or "during their good conduct" or use a like formula. Although the sheriff principal's powers of discipline and dismissal are administrative in character and not subject to appeal, there is authority for the view that these powers must be exercised in a judicial or quasi-judicial manner and, as such, are subject to the Court of Session's inherent jurisdiction to correct abuses of natural justice.[3] We are sure that the powers are in fact exercised in an entirely proper manner.

3.16 The sheriffs principal have brought to our attention defects in the powers available to them in dealing with complaints of misconduct by sheriff officers. The kinds of complaint are extremely varied and the sheriff principal requires to deal with

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[1]Third Report (Sheriff and Commissary Courts) of the Royal Commission on the Courts of Justice in Scotland (Parliamentary Papers; 1818) p.54 refers to sheriff officers as being removable by the Sheriff at pleasure.

[2]MacLaurin, supra; McGlashan, Sheriff Court Practice (4th ed.; 1868) p.89; Dove Wilson, Sheriff Court Practice (4th ed.; 1891) p.44; Wallace, Practice of the Sheriff Court (1909) p.24; Lord Wark, Encyclopaedia of the Laws of Scotland, voce "Sheriff", vol. 13, p.527; Dobie, Sheriff Court Practice (1952)p.10.

[3]Cf. Malloch v. Aberdeen Corporation 1971 S.L.T. 245 (H.L.), in which the majority of the House of Lords held that the power to dismiss a person from an office held during the pleasure of the appointing authority must be exercised only after giving the person an opportunity to be heard, and, in the absence of this safeguard, the dismissal was a nullity subject to reduction by the Court of Session.

them in different ways.[1] In most cases, the complaint can be disposed of without formal procedures but there are exceptional cases in which disputed matters of fact require to be investigated and in which the difficulty of doing so or the seriousness of the complaint make it inappropriate that the sheriff principal should undertake the investigation himself. In such cases, the sheriff principal may experience difficulty in obtaining and verifying the accuracy of information in the absence of powers to appoint a suitable person to take precognitions and prepare a case against an officer and in the absence of any adversary procedure; in the absence of power to cite witnesses or to order the recovery of documents; and in the absence of provision for the recompense of witnesses in respect of travelling expenses. Moreover, in serious cases involving the possible dismissal of the officer and the loss of his livelihood, it seems inappropriate that the sheriff principal should be required to act as investigator, prosecutor and judge. In these respects, the procedures compare unfavourably with disciplinary procedures in the professions.

3.17 We therefore suggest that (1) the powers of the sheriff principal to deal with complaints against sheriff officers of misconduct should be widened to cater for exceptional cases involving disputed matters of fact where the difficulty of investigation or the seriousness of the complaint make it inappropriate that the sheriff principal should both investigate

[1] For example, a complaint that although rates arrears had been paid, a poinding had been carried out under a summary warrant was pursued by writing to the rating authority; a complaint that an officer had poinded too high a sum involved a question of law, whether under an obligation to pay £X per week it was lawful to poind goods to a value of a sum sufficient to cover what would be due by the date of sale; a complaint of assault or misconduct during a poinding may be conveniently dealt with in the first instance by the simple procedure of interviewing the complainer and his witnesses, and the sheriff officer and his witness separately; and a question whether the appraised value of poinded goods is too low might be dealt with by obtaining the opinion of an independent valuer.

and dispose of the complaint himself. (2) Accordingly, the sheriff principal should have power, following a complaint not answered by the sheriff officer to the satisfaction of the sheriff principal, to appoint a solicitor to investigate the complaint and, if the solicitor is so advised, to present the case before the sheriff principal. (3) The hearing of the case should be in private unless the sheriff officer himself wishes a public hearing. The officer should have fair notice of the case and a right to legal representation. (4) It is envisaged that the sheriff principal would give reasons for his decision, at any rate where the sheriff officer is penalised. The decision should not be subject to appeal though it would as at present be subject to reduction by the Court of Session for an abuse of natural justice. The sheriff principal should, however, have power to state a case on a question of law for the opinion of the Court of Session. (5) It is envisaged that in cases involving multiple commissions, orders for suspension or deprivation of office would be intimated to any other sheriff principal from whom the officer holds another commission and that sheriff principal would have a discretion to suspend, or as the case may be, to deprive the officer of his other commission without further proceedings. Similar provision should be made relating to a messenger's commission held by the sheriff officer. (6) Ancillary provision would be needed as respects the payment of expenses and outlays in disciplinary proceedings, the clarification and extension of powers to impose penalties and related matters. (Proposition 7)

3.18 Paragraph (6) of the foregoing Proposition covers a number of matters of detail. For example, as regards expenses and outlays in disciplinary proceedings, the State should probably bear the expenses of any unsuccessful complaint including the expenses of the officer, whereas in a successful complaint the officer would have to bear his own expenses, and if the sheriff principal so decided, the expenses of the investigating solicitor and his witnesses. When a sheriff officer is dismissed or suspended, any diligence executed by him is (or ought to be)

invalid but it is not clear when this takes effect. It seems desirable that formal provision should be made to secure publication of the fact of dismissal or suspension and to secure also that only diligence executed after that time is invalid. Moreover, it is clear that the sheriffs principal can impose penalties of suspension or dismissal, but it is not clear what other penalties can be imposed. It would be desirable to clarify and extend the range of possible penalties; for example powers to fine, or to order repayment of collection charges or fees, might be useful.

(4) Supervision of execution of diligence, charging of fees etc.

(a) Existing arrangements for supervision

3.19 In paras. 3.15 to 3.18 above, we discussed the jurisdiction and powers of the sheriffs principal to discipline sheriff officers for misconduct. Generally speaking, this jurisdiction is exercised only where there has been a complaint by a creditor (e.g. for delay) or more usually by a debtor. The question whether diligence has been regularly executed can also come before the court if the diligence is challenged by the debtor or a third party, e.g. in an application in the process of poinding and warrant sale or in proceedings for reduction (e.g. of an execution) suspension (e.g. of a charge) interdict (e.g. of a sale of a third party's goods mistakenly poinded), or damages for wrongful diligence.

3.20 Broadly speaking, however, automatic checks, or checks made by the court of its own accord on the regularity of the execution of diligence, or on the charging of fees, or on other conduct of sheriff officers, are limited.

3.21 In the diligence of charge, poinding and warrant sale, the execution of a charge on the debtor is not reported to the court unless a poinding follows. (The execution of a poinding is reported to the court, but the report does not specify the state of the debt nor notify the court of the

fee charged by the sheriff officer for the charge and poinding. It is only in those rare cases where the diligence is carried through to a warrant sale that a report giving a full account of the diligence expenses is automatically reported to the court and taxed by the auditor of court.[1] Thus in the great majority of cases, the court has neither the duty nor the opportunity to tax sheriff officers' accounts of the fees charged to creditors and recoverable from debtors.[2]

3.22 Unless a complaint is made, the court does not exercise any supervision over diligence under summary warrants for the recovery of taxes or rates.

3.23 Arrestments in execution are never reported to the court and arrestments on the dependence are only reported in those rare cases when the arrestment is used prior to the service of a sheriff court initial writ.[3] The only check on fees occurs in the few cases when there is a furthcoming or other action in which the fees are claimed.[4]

3.24 The supervision of the court is therefore incomplete in two respects. First, no provision is made for the audit of the vast bulk of fees and outlays charged by sheriff officers for diligence (including solicitors' instruction fees) against debtors or indeed against creditors. No doubt the debtor and the creditor have a legal right to require taxation by the court but few, if any, debtors ever exercise this right. The position contrasts unfavourably with the provision made for the audit of litigation expenses and outlays which are taxed by the

[1] Formerly the remit to the auditor was contained in the warrant of sale. Now under recent Practice Notes in all six sheriffdoms, the remit is automatically endorsed by the sheriff clerk on the report of sale.

[2] As the C.R.U.Diligence Survey shows, there were in 1978, about 46,000 charges, 20,000 poindings, 6,000 intimations of warrant of sale, 3,000 advertisements of sale, and under 300 (289) warrant sales.

[3] Sheriff Court Rules, rule 127: Court of Session arrestments on the dependence are not reported to the court.

[4] John Temple Ltd v. Logan 1973 S.L.T. (Sh.Ct.) 41.

clerks of court before inclusion in extract decrees. If, as we suggest in Memorandum No.47, a decree should include warrant to recover the expenses of the diligence to follow thereon, then there is an even stronger case for improved audit arrangements.

3.25 Second, with respect to irregularities other than the overcharging of fees, the control by the courts is based on written reports of poindings and sales and is thus restricted to irregularities which appear on the face of the report.[1] There have been cases when the sheriff, accompanied by the sheriff clerk, has himself inspected poinded goods to assess the reasonableness of the valuation.[2] There is, however, no provision for random checks on valuations and it is not the practice for the sheriff, or the sheriff clerk or his staff, to make 'unscheduled checks' following reports of poindings.

(b) Improved arrangements for audit of fees

3.26 It is for consideration how improved provision for audit of diligence fees can best be made.[3] Although fees chargeable by officers are based on facts which can be relatively easily checked (e.g. mileage and scale fees based on the appraised value of the poinded goods) it would be unrealistic to expect the average debtor subjected to diligence to check the fees charged to him. It is for the courts to ensure that sheriff officers are not overcharging debtors.

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[1] E.g. valuations in slump, or valuations which are clearly far too low, or internal inconsistencies in reports, or double poinding of the same goods in the same premises for the same debt, or the fact that an application for sale is time-barred.

[2] See Scottish Gas Board v. Johnstone 1974 S.L.T. (Sh.Ct.) 65.

[3] Overcharging of fees can occur, for example, where a fee is charged for an abortive arrestment, or where several creditors or debtors are charged for outlays (e.g. ferry dues), charging a 10% fee for a summary warrant where the debtor pays the debt when the officer arrives to poind, or charging solicitors' fees when the work was in fact done by the sheriff officer's firm.

3.27 One suggestion made to us was that the sheriff court should only issue an extract decree to the sheriff officer where the creditor or his agent required to use it, and that the extract would be issued and returned to the court after each step in diligence (charge, poinding, advertisement of sale, warrant sale, laying of arrestment) had been taken. It would be the sheriff clerk's duty to audit the sheriff officer's fee at each stage of the process in terms of the tables of prescribed fees and to issue a fee certificate to the officer who executed the diligence. We understand that it is the practice of many sheriff officers' firms to return the extract decree to the creditor or his agents with a request for further instructions after each stage of the diligence is executed and not to accept a general mandate to recover the debt failing which to enforce it by diligence. Where this commendable practice is followed, the proposed procedure would not be more cumbersome from the sheriff officer's standpoint.

3.28 The disadvantages of this proposal are, however, that it would add considerably to the work of the sheriff clerks (even though extracts would only be issued where the creditor required to use them). In our Memorandum No.48, however, we suggest, first, that reports of poinding should specify the fees charged for the charge and poinding, and, second, that following the grant of warrant of sale, a report of the subsequent proceedings should be made to the court in every case and not merely when the poinded goods are sold, or delivered in default of sale. This would enable the fees to be audited at two stages in the poinding process and would cause less work for the sheriff clerks than the previous proposal.

3.29 It might be possible to evolve a system of audit of fees which would be more cost-effective and the Commission would be grateful for suggestions. One possibility might be to institute a system of random audit inspections of diligence processes or records held by sheriff officers' firms from time to time to be conducted by an official responsible to the sheriff principal. This might well require regulations requiring officers to

maintain a diligence register containing information relevant to each case so that the information was available to auditors.

3.30 To sum up, (1) new provision is needed to extend the arrangements for the audit and taxation of diligence fees and outlays charged by sheriff officers against creditors and recoverable from debtors. It would not be satisfactory merely to leave it to the debtor to request an audit and taxation. (2) The main options appear to be (a) an audit by the sheriff clerk of the fees charged in respect of each and every step of diligence (including diligence under certain categories of summary warants); or (b) an audit made in the course of poinding at two stages (viz. on lodging the report of poinding and at the end of the proceedings) and in the case of an arrestment, after it has been laid; or (c) a system of inspection or of unscheduled checks of diligence processes to be undertaken by an official responsible to the sheriff principal. It is thought that (b) or (c) would be more cost effective, but views are invited on the question whether either of these solutions or some other solution should be adopted. (Proposition 8).

(c) Supervision of execution of diligence and of sheriff officers' conduct

3.31 Apart from the audit of fees, the question arises whether there is a need for new arrangements enabling the courts of their own accord to supervise more closely the work of sheriff officers in order to prevent irregularities in the execution of diligence, especially charge poinding and warrant sales (where, in contrast to arrestments, the officer enters the debtor's dwelling house or other premises) or other irregularities. Further, if there is such a need, what form should the arrangements take?

3.32 As regards the first question, we have found it extremely difficult to ascertain the extent to which irregularities occur in the execution of diligence. The Edinburgh University Debtors Survey disclosed allegations by debtors.

of breaches of duty on the part of sheriff officers,[1] but since the information given by debtors in that survey was confidential, it was not possible to ascertain the sheriff officer's version of the events. The allegations must therefore be treated with caution. The types of irregularity in existing diligence which can occur are extremely varied, and in addition to legal irregularities in the execution of a poinding[2], there are cases of other types of misconduct not amounting to unlawful acts which may require disciplinary action, such as where an officer executes a child delivery order by taking possession of the child at an inappropriate time or does not behave with due tact and courtesy towards a debtor when executing a poinding. Moreover, the officer's extra-official activities may also require supervision where they are inconsistent with his functions, as where he allows a creditor to use his headed note-paper in making demands for payment from a debtor.

3.33 In raising the question of supervision, we do not intend to imply that irregularities occur on any significant scale. We think, however, that enforcement officers with powers of forcible entry into debtors' houses, powers to take possession of debtors' property, powers to arrest debtors (in civil imprisonment cases) or bankrupts, and powers to take possession of children under child delivery orders, should be subject to independent supervision by the courts, or officials responsible to the courts, whose orders they execute. A reformed system should not simply leave it to debtors to complain to the courts; it is for the courts to act positively and of their accord to ensure that standards of conduct are maintained. The law should give them the powers needed for this purpose.

3.34 Clearly there would be difficulties in carrying out inspection of the work of sheriff officers. If from time to

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[1] These included allegations that the charge had not been served before poinding; that a poinding took place before the expiry of the days of charge; and that a sale was held at a time other than that specified in the advertisement, as well as allegations that goods were undervalued.

[2] Examples in reported cases include gross undervaluation; defects in the mode of serving a charge; failure to note in a report of poinding a claim that goods belong to a third party; misstatement of the balance due to or by the debtor after warrant of sale.

time an inspector accompanied an officer executing diligence, the inspector's very presence might influence the officer's conduct. If the supervisor did not accompany the officer, he would require to interview the debtor, or other eye-witness of the diligence, after it had been executed and would therefore necessarily rely to some extent on an account which often might, understandably, be biassed. Nevertheless, these difficulties could be overcome.

3.35 Having regard to the small number of sheriff officers, there is probably no need for the appointment of a full-time official to inspect the work of sheriff officers on a systematic or continuous basis. We suggest, however, that provision should be made enabling the sheriff principal, from time to time, to appoint a suitable person, or a small committee of persons (e.g. a sheriff clerk, a senior sheriff officer and an accountant or other lay person as appropriate) to inspect the work of particular sheriff officers in executing diligence and citation and in conducting extra-official activities and to make a report thereon to the sheriff principal. This power should be exercisable even in the absence of complaint by any member of the public. The expenses of the inspection and report would be chargeable to the Exchequer. (Proposition 9).

(5) Territorial competence of sheriff officers

3.36 The rules on the territorial competence of sheriff officers are closely connected with the rules determining the area within which sheriff court warrants for citation and diligence may have effect. The basic common law rules are that a sheriff officer is authorised by his commission to act only within the court district or districts for which his commission was granted, and that a sheriff court warrant for citation and diligence may be executed only within the district of the court which granted it. These rules have been extensively modified as follows:

(1) Under the Debtors (Scotland) Act 1838, s.13, a warrant to charge, poind or arrest in execution of an

ordinary court extract decree may be executed "within the territory of another sheriff" if a warrant of concurrence is endorsed on the extract by the sheriff clerk there. The effect of the warrant of concurrence is to enable diligence to be executed "in the same manner as if the said extract had been issued from the books of the ... concurring sheriff", and this seems to mean that a sheriff officer of the concurring court may execute the warrant, as well as an officer of the original court.

(2) By Practice Notes issued in all six sheriffdoms in 1976, it is provided that warrants of concurrence under the 1838 Act, s.13, are not necessary for the purpose of poinding moveables in other sheriff court districts in the same sheriffdom, but no express provision is made for charges or arrestments, and no provision is made clarifying whether execution is to be by the officers of the original court or the court of the place of execution.

(3) Under the Sheriff Court Rules,[1] rule 10, a warrant or precept of arrestment on the dependence in an ordinary action or on an extract registered liquid document of debt may be competently executed in any sheriff court district without endorsation by the sheriff clerk. The rule specifically provides that the warrant may be executed by an officer of the original court or by an officer of the court of the place of execution.

(4) Under the Summary Cause Rules, rule 11, any summary cause warrant for citation or diligence has effect without endorsation in any other sheriff court district and may be executed by officers of the court of the place of execution as well as officers of the court of origin.

3.37 These rules appear unsatisfactory in several respects. First, it is not clear why a warrant of concurrence should be needed for diligence in execution on ordinary court decrees

[1]Sheriff Courts(Scotland) Act 1907, Schedule 1.

(case (1) above) but not for diligence of other kinds, (cases (3) and (4) above).[1] Second, it is not clear why the Practice Notes of the Sheriffs Principal should be limited to poindings. Third, no provision is made to facilitate the extra-territorial enforcement (whether by officers of the court of origin or officers of the court of the place of execution) of sheriff court child delivery orders containing warrants to search for and recover the person of the child. This gap in the law would become important if, as we suggested above, the inherent authority of messengers-at-arms to execute sheriff court orders is abolished.

3.38 In our Memoranda Nos. 48 and 49, we argue that sheriff court ordinary decrees in execution should have effect in other sheriff court districts without endorsation in the same way as summary cause decrees. Assuming that this proposal is accepted, the same rule would apply to all sheriff court decrees and the next question is, who is to execute a decree which requires extra-territorial enforcement? At paragraph 209 of their Report, the McKechnie Committee considered the question whether "sheriff officers should be free to act anywhere in Scotland on any business of the sheriff courts." The Committee thought it desirable, however, that "a sheriff officer should not normally undertake diligence elsewhere than in the county (or counties) in which he holds his appointment." Their reasoning was that a sheriff officer should generally be subject to the control of the sheriff who appointed him and should not normally execute diligence for a sheriff court which has no jurisdiction over him. They therefore recommended no change in the law (which was in substantially the same terms as the present law).

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[1] Wallace, Sheriff Court Practice p.360 calls this "a curious anomaly" and suggests that the exclusion of diligence in execution from rule 10 of the Sheriff Court Rules was "made *per incuriam*".

3.39 We agree with the McKechnie Committee. We think, however, that if all decrees are to be enforceable outside the district of the court of origin without endorsation, then the decree should be capable of execution either by the sheriff officers of that court or by sheriff officers of the court of the place of execution.

3.40 It has to be conceded that this solution breaches the principle of local control which we adduced above as the main reason for abolishing the authority of messengers in sheriff court diligence. Considerations of convenience and expense, however, suggest that an officer residing near the place of execution should be capable of executing the warrant. Moreover, we understand that warrants of concurrence are not very common and, if so, the proposal is a less serious infringement of the principle of local control than the rule whereby messengers execute sheriff court ordinary decrees. Provision should be made to make it clear which sheriff principal should deal with a complaint and to cater for cases where an enquiry may be required outside the jurisdiction of the sheriff principal dealing with the case.

3.41 Accordingly (1) we reject the suggestion that sheriff officers should be entitled to act anywhere and everywhere in Scotland on any business of the sheriff courts. (2) Where, however, sheriff court warrants for citation or diligence have effect (with or without endorsation) and require to be enforced outwith the district or sheriffdom of the court granting the warrant, the warrant should in all cases be capable of execution either by a sheriff officer of the court granting the warrant or a sheriff officer of the court of the place of execution. (3) Where a complaint arises about a sheriff officer's conduct in executing a warrant of his own court outside his district, or in executing in his own district a warrant of another court, the complaint should (as at present) be dealt with in the first instance by the sheriff

principal from whom the sheriff officer holds his commission, but where this would require a sheriff principal to conduct an enquiry in another sheriffdom, he should have power to refer any part of the enquiry to the sheriff principal of that sheriffdom so that the enquiry may be conducted locally.
(Proposition10)

PART IV: APPOINTMENT, ORGANISATION, CONTROL ETC. OF MESSENGERS-AT-ARMS

4.1 We suggested above that the separate office of messenger-at-arms should be retained but that messengers-at-arms should be authorised by their commissions to execute citation and diligence on Court of Session warrants only and not on warrants of the sheriff court. We now turn to other aspects of the appointment, organisation and control of messengers-at-arms.

(1) Qualifications for appointment as messenger-at-arms

4.2 The power to appoint messengers-at-arms is vested in the Lyon King of Arms, who is bound by statute "to discharge the duties of his office personally, and not by deputy."[1] The procedure for appointment is governed by the practice of the Lyon Court.[2] A candidate who petitions the Lyon King of Arms for a commission as messenger is referred for examination to the Lyon Macer or another senior messenger-at-arms, who reports the results of the examination to the Lyon King of Arms.[2] If the report is favourable to the applicant, the Lyon King of Arms personally interviews the applicant before administering the oath and issuing a commission. Messengers are bound to find caution,[4] which is usually granted by a reputable insurance company.

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[1] Lyon King of Arms Act 1867, s.2. In the event of absence from illness or other necessary cause, the Lord President of the Court of Session may appoint someone to discharge the Lyon's duties ad interim, and even without an interim appointment, the Lyon clerk is "empowered to admit to the office of messenger-at-arms persons properly qualified according to the present law and practice".

[2] See Encyclopaedia of the Laws of Scotland (1930) vol. 9, voce "Messengers-at-arms", at p.618 (article by Sir Thomas Innes of Learney).

[3] The Lyon Macer is normally a senior messenger-at-arms with a place of business in Edinburgh, and is appointed by the Lyon King of Arms. If the applicant resides at a considerable distance from Edinburgh, he may be referred for examination to a local messenger-at-arms of standing and long experience.

[4] There are provisions for an official check on the cautioner every year and for replacement of the cautioner on his death or bankruptcy (R.C. 54 and 55).

4.3 No apprenticeship or professional qualification is required for appointment as a messenger-at-arms.[1] There are currently 74 messengers-at-arms and all practising messengers-at-arms are also sheriff officers. For many years, all applicants for appointment as messenger-at-arms have also been sheriff officers, and we suggest that this practice should be put on a formal basis by requiring that all persons seeking appointment as messenger-at-arms should hold a commission as a sheriff officer. It is unlikely that any officer of court would be able to earn a living from executing only Court of Session warrants of citation and diligence. We think that to recruit messengers-at-arms from the ranks of sheriff officers would consist well with the establishment of national standards of training for sheriff officers and would enhance rather than diminish the standing of messengers-at-arms.

4.4 Messengers-at-arms, like sheriff officers, are either sole practitioners or organised in firms, and the same firms operate and advertise as both messengers-at-arms and sheriff officers. Many messengers-at-arms are employees of other self-employed practising messenger-at-arms. On a literal interpretation, this practice infringes rule 52 of the Rules of the Court of Session which provides that "No Messenger shall be the servant of any particular master during the time he continues in office, under the pain of deprivation." As originally enacted, the rule prohibited a messenger from being "a menial servant of any particular master",[2] and the

[1] Encyclopaedia, supra, p.618. The McKechnie Report's statement (op. cit., para. 213) that a six years' apprenticeship is required before appointment as a messenger-at-arms, is an error.

[2] See Regulation 6 of the Lord Lyon's Regulations of 11 March 1772 (set out in Campbell on Citation p.486); Codifying Act of Sederunt 1913, A.ix.6.

purpose of the rule was probably in part to uphold the dignity of the office of messengers-at-arms[1] and in part to prevent a messenger-at-arms from becoming the employee of a local authority or other body, a status which was held in Stewart v. Reid to be incompatible with the office of sheriff officer.[2] Perhaps for this reason, Rule 52 is not in practice enforced so as to prevent messengers-at-arms employing other messengers-at-arms. We understand that some messengers-at-arms prefer to be employees rather than partners in firms, and since the distinction between a salaried partner and an employee is somewhat fine, there seems little point in requiring them to be self-employed practitioners.

4.5 We suggest therefore that (1) a person should be eligible to apply for, and to hold, a commission as messenger-at-arms only if he holds a commission as a sheriff officer. (2) Rule 52 of the Rules of the Court of Session should be amended to make it clear that a messenger-at-arms may be an employee of another messenger-at-arms. (Proposition 11).

(2) Powers of appointment, supervision and control of messengers-at-arms

4.6 While the appointment of messengers is within the exclusive jurisdiction of the Lyon King of Arms, their control and discipline has, following a checkered history, become vested concurrently in the Court of Session and the Lyon King of Arms.[3] The Lord Lyon has a common law jurisdiction to suspend or deprive messengers from their office.[4] The procedure,which is governed by act of sederunt,[5] is as follows:

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[1]Cf. Mackay v. Henderson 20 Dec. 1832, F.C.

[2]1934 S.C. 69.

[3]Encyclopaedia, voce "Messengers-at-arms" (supra) at pp.622-7.

[4]Clyne v. Murray (1831) 9 S.338

[5]R.C. 56.

> "When the Lord Lyon King of Arms is of opinion that the conduct of any messenger-at-arms is such as to render it expedient that he should be suspended from or deprived of his office, the Lyon Clerk shall send notice to the messenger by registered or recorded delivery letter that unless he shows cause to the contrary within fourteen days from the date of the said notice, sentence of suspension or deprivation will be pronounced by the Lyon Court; and if the messenger intimates his desire to be heard, he shall be cited to a diet of the Lyon Court, and shall have reasonable opportunity of showing cause why he should not be suspended or deprived of his office."

Provision is made requiring publication of the suspension or deprivation in the Court of Session and the sheriff court of the county where the messenger resides,[1] and Lyon's decree takes effect from the date of publication.[2] There is a penalty of £10 for each occasion on which the offending officer acts as messenger during his period of suspension or deprivation. Before the enactment of these rules in 1897, the Court of Session had assumed power to suspend or deprive messengers,[3] but there are doubts about the appropriate procedure[4] and it has been observed that the 'safer practice' is for the Court to remit a case to the Lyon King of Arms to pronounce decree of deprivation or suspension.[5] An appeal to the Court of Session against suspension or deprivation is competent.[6]

4.7 In our view, the main justification for retaining the distinction between messengers-at-arms and sheriff officers is that each court, or group of courts, should control its own officers. This has led us to consider whether the jurisdiction to appoint, control, suspend and dismiss messengers-at-arms should be transferred from the Lyon King of Arms to the Court of Session. There is a wide divergence between the jurisdiction

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[1] R.C. 57.

[2] _Encyclopaedia_, _supra_, p.627.

[3] _Monro_ v. _Ross_ (1738) Mor. 8889; _Maclachlan_ v. _Black_ (1821) 1 S.217.

[4] Maclaren, _Court of Session Practice_ (1916) p.1114.

[5] Mackay _Practice_ (1893) p.233; Innes, _supra_, p.626.

[6] R.C. 61 saving the common law.

of the Lyon King of Arms in respect of messengers-at-arms and his other functions. Sir Thomas Innes of Learney, in an article on the Lyon King of Arms in the Encyclopaedia of the Laws of Scotland,[1] listed sixteen functions entrusted to the Lyon King of Arms. Fifteen of these functions relate to heraldry, genealogy and public ceremonial. The remaining function, the appointment, control and discipline of messengers-at-arms, does not seem to bear much relation to these functions except perhaps that, historically, the messengers-at-arms were, and perhaps still are in theory, members of a Corps of Officers of Arms. It may be doubted whether supervisory functions in relation to debt enforcement officers of the supreme court would in modern times be entrusted to an authority whose functions relate to heraldry, genealogy and public ceremonial. While we would not wish to break unnecessarily with tradition, we suggest that the powers of appointment, control and discipline of messengers would be more appropriately exercised by some other authority whose functions are more closely related to debt enforcement. On this view, it is arguable that applications for appointment of messengers should be entertained by a judge of the Court of Session nominated by the Lord President and that the Principal Clerk of Session or one of the clerks of the Court of Session should keep the Roll of Messengers. Disciplinary powers should be assumed exclusively by the Court of Session.

4.8 It might often be appropriate if an inspection ordered by the sheriff principal into the work of a particular sheriff officer or firm of sheriff officers were to cover diligence and citation on Court of Session warrants. The Court of Session should have the same powers to order such investigations, so that joint appointments of inspectors could be made with joint reports submitted to the Court of Session and the sheriff principal in question.

[1] Vol. 9., pp.335-6.

4.9 (1) It is suggested that the powers and jurisdiction to appoint, discipline and control messengers-at-arms presently vested in the Lyon King of Arms should be transferred to the Court of Session. (2) The Court of Session should have powers (similar to those proposed to be conferred on sheriffs-principal at Proposition 7 above) backed by suitable financial provisions to appoint a solicitor to investigate complaints against a messenger-at-arms and to present the case before a judge of the Court of Session (nominated by the Lord President). (3) Where a sheriff officer who is also a messenger-at-arms is dismissed or suspended by the sheriff-principal from whom he holds a commission, that fact should be intimated to the Court of Session who would consider whether he should be allowed to retain the office of messenger-at-arms. By the same token, a decision by the Court of Session to suspend or dismiss a messenger-at-arms should be intimated to any sheriff principal in whose sheriffdom the messenger holds a commission as sheriff officer. (4) The Court of Session should also have the same powers as are proposed for sheriff principals in Proposition 8 to appoint suitable persons to inspect the work of particular messengers-at-arms and it is envisaged that joint appointments covering the execution of Court of Session and sheriff court warrants could be made, with reports to the Court of Session and sheriff principal concerned. (Proposition 12).

PART V: REGULATION OF STANDARDS OF CONDUCT

Preliminary

5.1 In Part II above, we suggested that the Court of Session, acting on the advice of a new standing advisory body called the Officers of Court Council, should have power to enact rules regulating the standards of conduct of messengers-at-arms and sheriff officers. In this Part, we discuss the possible content of rules on standards of conduct having regard in particular to the recent public expressions of concern about the undertaking by officers of court, or their relatives or associates, of debt collection activities.[1] The principal aims of the rules should be:-

(a) to clarify the practical implications of the principle that officers of court hold a public office whose functions they must perform in an independent and impartial manner;

(b) to ensure that the execution of diligence to enforce debts in which officers of court or their relatives or associates have a personal interest, is prohibited or regulated in such a way as to maintain public confidence in the impartiality of officers; and

(c) to prohibit or regulate debt collection and other extra-official activities of officers of court so as to ensure that no officer engages in activities which are incompatible with his office.

There are two main reasons why specific regulation of standards of conduct is needed. First, such formal standards as exist[2]

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[1] See, for example, the Sheriff Officers and Warrant Sales (Scotland) Bill 1980 [Bill 125], clauses 4 and 6.

[2] These standards are prescribed by a variety of provisions, including common law rules on the delictual liability of officers of court for wrongful diligence, and on the maintenance of the impartiality, and independence of officers of court together with certain specific rules of the Court of Session (R.C. 48-62) applying only to messengers-at-arms. In addition the Solicitors (Scotland) Acts exclude officers of court from certain activities in litigation, and the provisions of the Consumer Credit Act 1974 on the licensing of ancillary credit businesses require debt collectors to be licensed under that Act.

are in certain respects so vague that clarification is required to give officers of court a more certain guide than exists at present as to the standards to which they should conform. Second, certain practices in diligence and debt collection which have been accepted in the past, have recently been publicly questioned, and it seems desirable that these and other practices should be regulated by rules which have been subjected to comment and criticism by responsible and interested bodies.[1]

5.2 Three further points may be noted. First, the rules should be specific and mandatory and this means that a comprehensive code is not possible since many provisions of such a code would be so general and hortatory as to be of little value in many circumstances. New rules can be added as new problems are identified and if, in the meantime, complaints arise about unregulated matters, they can be determined as at present by the sheriff principal in the exercise of his disciplinary powers. Second, in our view one enactment on conduct should apply to messengers-at-arms and sheriff officers. We leave for future consideration the question of what rules should be embodied in statute and what rules in subordinate legislation. Third, breach of a rule would be treated as a disciplinary matter but in the case of some rules, the debtor would be entitled to claim that the diligence is invalidated by the breach.

5.3 The rules which we propose cover the following matters:

(i) the duty of officers to execute citation and diligence when instructed;

(ii) the prohibition or restriction on the extra-official employment of officers for a wage or salary and on

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[1]The need for some regulation of standards of conduct of messengers and sheriff officers has been recognised by the Society of Messengers-at-Arms and Sheriff Officers who have adopted a short "Code of Professional Ethics". The Society also have a Complaints and Disciplinary Committee: see (1972) 17 Journal of the Law Society of Scotland 44. Although the Society's Code has no official standing, the Society has considerable persuasive powers and will assist solicitors and others who do not wish to take the more extreme step of a complaint to the sheriff principal.

other extra-official activities incompatible with their office;

(iii) the prohibition on an officer enforcing a debt in which he has a direct interest or an indirect interest through a company, relative, or associate;

(iv) the prohibition of or restriction on the collection of debts not yet constituted by court decrees for payment;

(v) the collection by officers of debts after decree;

(vi) separation of functions as between officers and solicitors; and

(vii) certain miscellaneous matters.

5.4 Although the principle is implicit or has been asserted in several cases since the 18th century that officers of court (messengers-at-arms and sheriff officers) hold a public office whose functions they must perform in an independent and impartial manner,[1] the implications of the principle have not been worked out in modern times in any great detail so as to establish a sure guide to officers of court as to appropriate standards of conduct. The principle of impartiality and independence can be applied in two quite different contexts - viz impartiality as between creditors, and impartiality as between creditors and debtors - so that there are really two different subsidiary principles to be considered.

(1) The duty to execute citation and diligence when instructed

5.5 From the first subsidiary principle, that of impartiality as between creditors, at least two practical rules have been deduced. The first is that the officer must act impartially for any or all creditors who instruct him if they tender his prescribed fees. This duty is the counterpart of the officer's exclusive privilege of executing diligence. As regards a messenger-at-arms, the duty is imposed by Rule of

[1] See e.g. Monro v. Ross (1738) Mor. 8889; Munro v. Macpherson (1772) Mor. 8891; Mackay v. Henderson 20 Dec. 1832 F.C.: McLachlan v. Black (1821) 1 S.217; Dalgliesh v. Scott (1822) 1 S.506; Stewart v. Reid 1934 S.C.69.

of Court 48,[1] but in the case of a sheriff officer, it flows from the common law and is reflected in his bond of caution and in the declaration de fideli which the sheriff officer makes when he receives his commission. In Stewart v. Reid[2] the matter was discussed obiter but the opinions of Lord President Clyde and Lord Sands may be taken as representing the law. Lord Sands[3] gave two reasons for the duty to serve all the lieges impartially: first, to ensure that court orders, however unpopular locally, are enforced without delay or interference, and, second -

> "the circumstance that he is fulfilling a duty which he cannot refuse to execute may be a great protection to the sheriff officer, as it undoubtedly is to the policeman who is called upon to take unpopular action by way of arrest or otherwise. Reasonable persons, however strong their feelings, recognise that the officer is only engaged in the impersonal discharge of an official duty which he cannot refuse to perform, just as reasonable criminals recognise that the judge who sentences them is but fulfilling his duty and accordingly bear no malice."[4]

We think that the duty to execute diligence and citation should be preserved as fundamental subject to certain necessary qualifications. We therefore suggest that the provisions of Rule of Court 48 (duty of messengers to serve lieges in the way of their office) should be replaced by a new statutory rule applying to both messengers and sheriff officers requiring them to execute diligence and citation when instructed, but entitling the officer to refuse to act if -

(a) his prescribed expenses, or a reasonable estimate thereof, are not tendered or secured by the instructing party, or his agents; or

(b) the proposed provisions on disqualification require him to refuse to act;

or

[1] This provides: "No messenger shall refuse to serve any of the lieges in the way of his office, upon their reasonable expenses either from respect of persons or other frivolous excuses, as he shall be answerable in any court competent." This rule derives unaltered from the Lord Lyon's Regulations of 11 March 1772, regulation 2.

[2] 1934 S.C. 69.

[3] At p.74.

[4] Idem.

(c) it is not reasonably practicable for the officer to carry out the instructions timeously because of pressure of other business or for other reasonable cause, and the officer intimates this to the instructing party without delay.

(Proposition 13).

(2) Restrictions on extra-official employment for a wage or salary and other extra-official activities incompatible with office

5.6 The second rule based on the need to act impartially for all creditors is the provision prohibiting officers from being in employment for a wage or salary. We think the law is unsatisfactory in a number of respects. First, we have already indicated at para. 4.5 above that Rule of Court 52 requires amendment to make it clear that a messenger may be the employee of another messenger. Second, in the case of sheriff officers the prohibition derives from the common law which is however uncertain. The leading case of Stewart v. Reid is authority for the proposition that it is not competent for a person employed for a wage or salary to become a sheriff officer under a commission in terms of which dismissal by his employer would entail dismissal from the office of sheriff officer.[1] In Mackay v. Henderson[2] a messenger who was also a sheriff officer entered into a contract of employment with a person who held neither office on terms whereby the officer was to act as messenger and sheriff officer under the other party for a small salary in lieu of his fees which he was to pay over to his employer. This agreement was held to be unlawful (pactum illicitum) and thus unenforceable.[3] The officer was under a legal duty to give his services if required to a party opposed to his employer and the agreement was inconsistent with that duty. On the basis of these cases, it is sometimes asserted that a

[1] See para. 3.7, footnote 1.

[2] 20 Decr. 1832 F.C.

[3] The Lord Justice Clerk also held that "the tendency of such a covenant was to create an interest to raise diligence, which a court of law ought not to sanction."

sheriff officer can never be in extra-official employment for a wage or salary. The question however, has never arisen in a pure form whether a contract of employment, which does not in fact affect a sheriff officer's official functions, is lawful or not. The law therefore requires clarification. Third, it seems irrational to prohibit an officer from employment and at the same time to permit him to engage in a profession, trade or business as a self-employed independent contractor. Historically the reason for the prohibition was partly that employment is inconsistent with the duty of serving all the lieges and partly that 'menial' employment was inconsistent with the dignity of the office of messenger. But an officer's business as an independent contractor may be as objectionable on either ground as employment for a wage.

5.7 We think therefore that the law requires to be made clearer and more rational. Leaving aside debt collection which we discuss below, we suggest that officers of court should be entitled to engage in non-official activities, whether as employees or self-employed contractors, provided that the activities are not incompatible with their office.[1] At present, a wide range of activities are open to officers of court: though we have not conducted a survey of extra-official activities, we understand that for example, officers in one firm act as auctioneers and an officer in another firm is a director of a firm of builders, while many officers have in the past undertaken work as private enquiry agents.

[1] As already indicated, of 121 officers of court who are actively involved as sheriff officers, 109 stated that they worked full-time as officers, 10 worked part-time and two as consultants. According to the Officers Survey, there was considerable variation in the number of hours worked each week by the part-time officers. Some stated that they worked whenever they were needed, while others worked for a specified number of hours each week ranging from 12 to 40 hours per week. The Survey does not show how many officers operate other businesses outwith normal 'office hours' or in conjunction with their 'full-time' business as sheriff officers.

If the independent contractor system is to be retained, then officers of court should not be prevented from carrying on extra-official activities if not incompatible with their office. We think, however, that a sheriff officer should not be entitled to enter into employment or engage in a profession trade or business without the authorisation in writing of the sheriff-principal. The authorisation should be refused if the employment or business is incompatible with the nature of the office, e.g. if it would be likely to infringe the impartiality and independence of the officer or if it is not in the relevant sense respectable. The sheriff principal should also have power to revoke the authorisation if experience shows that the extra-official activity is incompatible with the officer's functions, or perhaps if it interferes with the performance of his functions, or on some other reasonable ground.

5.8 It may be that certain kinds of business or employment should be prohibited by rules though it has been represented to us that this would be inappropriate because conditions vary so much in different parts of Scotland. The extent to which extra-official activities should be allowed may vary between the cities and rural areas. Further, the desirability of limiting extra-official activities in order to secure the integrity of officers may be greater in the cities than in the country areas and small towns where complaints against officers in the past have been few.

5.9 To elicit comments, we suggest that (1) a new rule should be enacted prohibiting a sheriff officer from entering into employment for a wage or salary or from undertaking a profession, trade or business except with the written authorisation of the sheriff principal having disciplinary authority over him. (2) The sheriff principal should be empowered to refuse or to revoke an authorisation on the ground (a) that the extra-official activity in question is incompatible with the nature and functions of the office of sheriff officer, or (b) that it would or does interfere, with

the officer's performance of his official functions. (3) Rule of Court 52 (prohibition of messengers-at-arms from acting as employees) should be revoked. If (as suggested in Proposition 10) all messengers-at-arms were also sheriff officers, it would be unnecessary to provide for authorisations being granted by the Court of Session, and an officer would seek authorisation in his capacity as sheriff officer. (4) Views are invited on the question whether any extra-official activity (other than debt collection which is dealt with below) should be specifically prohibited as incompatible with the office of messenger or sheriff officer. (5) It is for consideration whether penalties for the unauthorised performance of extra-official activities should be prescribed by the rules or should be within the discretion of the sheriff principal. (6) Records should be kept by sheriff clerks of authorised extra-official activities in respect of each officer. (7) Nothing in the rules should prevent a sheriff officer from being in the employment of another sheriff officer or a messenger from being in the employment of another messenger. (Proposition 14).

(3) Prohibition on officer of court enforcing debt in which he or a relative etc has an interest

(a) The existing law

5.10 There is a long established common law rule that a messenger-at-arms is not entitled to carry out diligence to enforce a debt due to himself and that any diligence so executed is null.[1] In the case of messengers-at-arms the common law is supplemented by Rule of Court 50 which provides:-

> "No messenger in executing diligence of any kind shall exact, take or receive on his own account from the person against whom such diligence is executed or meant to be executed any sum whatever, under any name

[1] Dalgliesh v. Scott (1822) 1 S. 506. We are concerned at this stage with the case where the officer (or a relative or associate) has an interest in the debt itself rather than merely an interest in the expenses of collection, to which we revert at para.5.21 below.

or pretence whatsoever, other than his recognised fees as he shall answer in any court competent."[1]

In the recent past, some sheriff officers set up companies or agencies which purchased bad debts at a discount from commercial organisations and thereafter enforced them. This was however disapproved in a series of sheriff court cases[2] as a result of which it is clear that where a sheriff officer is a director of a creditor company, then diligence effected by him on behalf of the company is invalid. Whether interests other than a directorship in the creditor company (eg a controlling interest or a substantial pecuniary interest) would be treated in the same way is not clear.

5.11 There is also doubt whether a sheriff officer is entitled to execute diligence on behalf of a company where the company is owned or managed by a relative or associate of the officer, such as a spouse or business partner, rather than by the officer himself. It would seem clear, however, that if a sheriff officer had an interest in a debt he could not evade the rules on disqualifying interest by getting an employee-officer to execute diligence instead of personally executing it himself.[3]

(b) Proposed rules defining disqualifying interests in debts

5.12 We suggest that the rules on whether a messenger or sheriff officer may execute diligence to enforce a debt in

[1] When this rule was first enacted in the Lord Lyon's Regulations of 1772 (regulation 4), the words "other than his recognised fees" were omitted, but were inserted in the successive acts of sederunt which replaced the regulations. The words reflect the practice whereby officers may recover from debtors their prescribed fees, but the officer must look to the creditor for payment of his fees and does not become a creditor in his own right of the debtor for payment of those fees: see Cuthbert and Wilson v. Shaw's Tr. 1955 S.C. 8. Thus the officer does not receive payment "on his own account" of his prescribed fees but rather on the creditor's account.

[2] John Temple Ltd v. Logan 1973 S.L.T. (Sh.Ct.) 41; Lawrence Jack Collections v. Hamilton 1976 S.L.T. (Sh.Ct.) 18; Lawrence Jack Collections v. Dallas 1976 S.L.T. (Sh.Ct.) 21 at p.23; British Relay Ltd v. Keay 1976 S.L.T. (Sh.Ct.) 23; Lewis, Petitioner (unreported, 3 February 1978, Sheriffdom of North Strathclyde at Paisley).

[3] See Lawrence Jack Collections v. Hamilton 1976 S.L.T. (Sh.Ct.) 18 at pp.20-21.

which he has a direct or indirect interest should be codified and clarified. An interest in the debt itself (as opposed to an interest in the expenses of collection) may arise when the debt is due to:

(i) the officer himself or herself as an individual;

(ii) a company, partnership or other corporate or unincorporated body in which the officer has an interest as director or shareholder or otherwise;

(iii) a spouse, near relative, business associate, employer or employee of the officer; or

(iv) a company, partnership or other corporate or unincorporated body in which a spouse, near relative, business associate, employer or employee of the officer has an interest.

The interest may be financial or based on family relationship and the categories of interest range from a direct and substantial interest to an indirect or minimal interest. In the following paragraphs we seek views on where precisely in that range the line should be drawn.

(i) Debt due to officer as an individual

5.13 It seems essential to preserve the rule that an officer of court may not enforce a debt due to himself as an individual. We suggest therefore that (1) Rule of Court 50 (no sum other than fees to be exacted by messenger) should be replaced by a rule applying to sheriff officers as well as messengers which would prohibit officers from collecting or enforcing by diligence debts due to themselves as individuals. (2) Nothing in the foregoing rule, however, should prevent an officer from recovering on the creditor's account the fees and expenses of diligence recoverable from the debtor. (Proposition 15).

5.14 While the prohibition under discussion is not controversial, it is necessary to be clear about the principles which underlie it since these are very relevant to the more difficult questions of whether the prohibition should extend to more indirect and remote interests in the debt. Unfortunately there is no reported

Court of Session case directly in point which expounds these principles.[1] From other cases, the rationale seems to be that an officer of court ought to perform his functions in such a way that he is merely "engaged in the impersonal discharge of an official duty which he cannot refuse to perform"[2] and that "there should be no possibility ... of the debtor or other members of the public even thinking that there might be excessive diligence done as a result of an interest in the debt itself."[3] Excessive diligence would occur, for example, where the fees incurred were out of all proportion to the debt, thereby increasing the debtor's liability and the officer/creditor's profits. The administration of justice is special in the sense that it must not only operate in fact without bias but must be above suspicion. Thus, even if some sheriff officers would act with detachment in enforcing their own debts (just as a judge would conceivably act with detachment in his own cause) nevertheless an officer should not be in a position where his actings are liable to misconstruction by debtors and members of the public.

(ii) Debt due to company etc in which officer has interest

5.15 It would be pointless to prohibit an officer from enforcing by diligence debts due to himself if he could avoid the prohibition by setting up a company or partnership to purchase debts which he then enforced by diligence. We suggest that an officer should be disqualified from enforcing debts due to a company of which he is a director or if the company acquires bad debts for enforcement. It would be difficult to cast the net wider so as to prohibit the officer from enforcing debts on behalf of a company or other body in which he has a substantial pecuniary interest. Unfortunately the rules requiring judges to decline jurisdiction in cases in which

[1] The leading case of Dalgliesh v. Scott (1822) 1 S.506 does not set out the rationale of the Court's decision.

[2] See the dictum of Lord Sands quoted at para. 5.5 above.

[3] See British Relay Ltd v. Keay 1976 S.L.T. (Sh.Ct.) 23 quoted at para. 5.23 below.

they have a financial interest are not an appropriate model.[1] As a starting point for discussion, we suggest that (1) an officer should also be disqualified from enforcing by diligence debts due to a company or firm (a) if the officer is a director of the company or a principal or partner in the firm; or (b) the business of the company or firm includes the purchase or acquisition of debts for enforcement by the company or firm as creditor and the officer has a pecuniary interest, however small, in that company or firm. (2) It is for consideration whether in addition a substantial pecuniary interest in other types of company should disqualify the officer from enforcing debts due to the company as creditor and, if so, whether and how that substantial interest should be defined. (Proposition 16).

(iii) Debt due to business associate, spouse or near relative etc

5.16 It is suggested that an officer should not be entitled to enforce debts due to a business partner, employer or employee.

5.17 It is thought that debts due to an officer's spouse must also be treated on the same footing as debts due to the

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[1] It is, at common law, a general rule of declinature of a judge's jurisdiction that a pecuniary interest in a case, if direct and individual, will disqualify, however small it may be. This rule has been relaxed by act of sederunt and statute so that it is not a ground of declinature that the judge holds a share in his own right in a chartered bank, or a joint life and fire or life assurance company or holds shares as trustee in an incorporated company. But it is a ground of declinature if he holds shares in his own right in other companies or as trustee in an unincorporated company, or if he is an ordinary director of a bank. See Encyclopaedia of the Laws of Scotland voce. "Declinature", vol.5, p.454 et seq. These rules have been trenchantly criticised by judges as too restrictive; and in modern conditions it seems anomalous to exempt bank and insurance company shares, but not for example other "blue chip" shares.

officer himself (or herself).[1] Though in law, the officer and his spouse are separate persons whose property is not by law owned in common, the funds and income of spouses are often mingled and usually applied for the joint benefit of the family: it normally does not matter which spouse pays what bills with which spouse's money. So each spouse normally benefits from the other's income. Therefore an officer will often in reality have as great an interest in a debt due to his wife as in a debt due to himself unless his marriage has broken down.

5.18 Where the officer's interest in the debt is based on a different family or blood relationship, the question arises of where and how the line is to be drawn. An officer could easily evade the prohibition on personal interest by setting up a son daughter, near relative or other person in a debt purchase business. It would be possible to prohibit enforcement on behalf of "near relatives" as defined by a statutory list for which precedents exist.[2] It is however difficult to know where to draw the line, and the relationship may be unimportant.

5.19 We suggest that (1) <u>an officer should be disqualified from executing diligence to enforce debts due to his business partners, employers or employees or to his spouse</u>. (2) <u>An</u>

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[1] In one case which received some publicity (<u>The Sunday Times</u>, 11 July 1976), an officer of court stated that he had transferred to his wife his share as partner or owner in an agency which purchased debts so that he could continue to enforce these debts by diligence without infringing the rules on disqualifying interest. It is understood, however, that this arrangement was subsequently terminated.

[2] See, for example, the Declinature Act 1594 (c.22) and the Declinature Act 1681 (c.79) which require a judge to decline jurisdiction in a case in which any of the following relatives have an interest, viz.: a parent, son, brother and sister, parent-in-law, brother-in-law, sister-in-law, uncle, aunt, nephew and niece. See also Consumer Credit Act 1974, s.184 which includes, in addition to the foregoing, lineal ancestors and descendants, former and reputed spouses, step-children, and illegitimate and adopted children.

officer should be disqualified from enforcing debts due to a near relative or other person only if it is established that he thereby derives pecuniary benefit, other than by way of diligence fees or possibly a commission for collecting the debt. (Proposition 17).

(iv) Debt due to company etc in which officer's associate etc has an interest

5.20 Since the rules on disqualifying interests could also be evaded by an officer placing a debt purchase business in the name of a business associate or wife, it would be necessary for the new statutory rules to extend the prohibition to some at least of the cses where the debt is due to a company, partnership or unincorporated body in which a spouse, partner, employer, or employee of the officer has a pecuniary interest, at any rate if that interest is substantial. To focus discussion therefore we suggest that an officer's disqualification should also extend to debts due to a company (including a partnership or other corporate or unincorporate body) in which a business partner, employer or employee or spouse of the officer has an interest of a kind which(in terms of Proposition 16 above) would have disqualified the officer himself from acting if the interest had belonged to him. (Proposition 18).

(4) Debt collection by officers before decree

5.21 In paragraphs 5.10 to 5.20 above, we considered cases where the officer enforced debts due to himself or to an associate or relative etc, or a company in which he has an interest. We now turn to the controversial subject of debt collection, i.e. cases where the officer does not have an interest in the debt itself but has an interest in the expenses of collection.

5.22 Debt collection as such is, as a general rule, not part of the official functions of a messenger-at-arms or

sheriff officer.[1] Since a sheriff officer[2] has no implied authority by virtue of his office to accept payment of the creditor's debt, a debtor acts at his own risk if he pays to a sheriff officer without first ascertaining that the creditor has authorised the officer to receive payment. Thus if the sheriff officer embezzles the debt, the debtor can be compelled to pay again to the creditor[3] and the creditor cannot recover from the sheriff officer's cautioner the loss arising from the embezzlement.[4] Embezzlement, of course, very rarely occurs.

5.23 The question whether a sheriff officer may act as debt collection agent for remuneration and as sheriff officer executing diligence in the same case is not free from doubt. In British Relay Ltd v. Keay[5] Sheriff Thomson held that the practice is incompetent: the sheriff observed:[6]

> "What concerns me is that there should be no possibility in such cases of the debtor or other members of the public even thinking that there might be excessive diligence done as a result of

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[1] There is a very limited statutory exception. A sheriff officer is empowered **as** sheriff officer in certain circumstances to receive payment from a debtor after a poinding has taken place in the course of executing the special summary warrants to recover income tax etc and VAT: see Taxes Management Act 1970 s.63(3) and Value Added Tax (General) Regulations 1977, reg. 59(c); see also Ayr County Council v. Wyllie 1935 S.C. 835 at p.843. Collection of the debt before poinding is however deemed to be collection by the officer as creditor's agent and not qua officer.

[2] We use the expression "sheriff officer" in this and the next section since most debt collection for a commission is undertaken in respect of consumer debts due under sheriff court decrees, but the same considerations apply to messengers-at-arms in principle.

[3] Campbell Citation, p.233; Graham Stewart, p.351.

[4] The bond of caution only applies to the sheriff officer's actings qua sheriff officer and not to any actings as agent or debt collector for the creditor in which he may be employed in connection with his official duties: Ayr County Council v. Wyllie 1935 S.C. 835; Bell, Commentaries (7th ed) vol. i p.382.

[5] 1976 S.L.T. (Sh.Ct.) 23.

[6] At p.26.

> an interest in the debt itself even though that interest was limited to the collecting of the debt and the remuneration to be derived therefrom."

On the other hand, in a recent case,[1] Sheriff Principal O'Brien took the view that an interest in a debt collection agency which collects for remuneration as agent rather than as principal is not necessarily a disqualifying interest, but apparently may become so if the practice gives rise to loss of public confidence in the officer's independence and impartiality. The sheriff principal remarked:

> "In recent years the collection of debts has become an expanding industry, with large private companies as well as nationalised corporations giving bulk instructions to debt collecting agencies to collect the debts owed to them; thereafter they appear to lose interest in how and to what extent diligence is pursued on each debt. It is an unfortunate feature of this development that too many cases are arising where the cost of the diligence exercised is out of all proportion to the amount of the original debt. In so far as a debt collecting firm acts as agent and not as principal it has no interest in the debt, although it may well be said to have an interest in the expenses of collection. I do not wish to imply that abuses have occurred, but I am concerned about the position of my Sheriff Officers. They are Officers of Court, and as such should command the respect of the public. If they are to do so they must, in my view, be above suspicion. In other words they must not only be doing their part in the machinery of justice, but must be seen to be doing it impartially. Whether they can do this while retaining a financial interest in an agency which regularly instructs them will depend on the circumstances of each case."

In two sheriffdoms, Practice Notes provide (broadly speaking) that a petition for appointment as sheriff officer must disclose the existence of any interest in debt collection and contain an undertaking to inform the court before such an interest is acquired in the future.[2] The purpose of the Practice Notes is to inform the sheriff principal of debt collection interests, but they do not imply that the sheriff principal will refuse

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[1] <u>Lewis, Petitioner</u> (unreported, 3 February 1978, Sheriffdom of North Strathclyde at Paisley).

[2] See 1978 S.L.T. (News) 289 (Lothian and Borders); 1979 S.L.T. (News) 219 (North Strathclyde).

to appoint, or will dismiss or suspend, any officer having such an interest. Indeed it is understood that the practice of debt collection by sheriff officers, acting as agents for remuneration rather than as principals, continues to be permitted by the sheriffs principal upon the view that the practice is lawful. We suggest that this matter should now be regulated by statutory rules.

5.24 We think that a distinction has to be made between the collection by officers of debts after decree (to which we revert at para. 5.36 below) and the collection by them of debts before decree to which we now turn. In the case of pre-decree collection, a further distinction has to be made between cases where the officer purports to act as such in collecting debts and cases where he does not purport to act in that capacity.

(a) Officer of court purporting to act as such when collecting debts

5.25 As indicated at para. 5.22 above, it is no part of the official functions of a sheriff officer to demand or request payment of a debt (except by service of a charge after decree). There is, nevertheless, no direct authority for the view that a sheriff officer is in breach of the criminal law or any civil law rule if before decree he writes to a debtor demanding payment of the debt in his capacity as sheriff officer. This seems anomalous. A person (not being a sheriff officer) collecting a debt is guilty of the common law crime of fraud if he falsely pretends to act as a sheriff officer, at any rate if the pretence has some practical result eg that the debtor pays the sum demanded.[1] The crime is committed even if the sum is legally due. A sheriff officer who is under

[1] Donald MacInnes and Malcolm MacPherson (1836) 1 Swin. 198.

suspension is also guilty of fraud if he falsely claims to be capable of acting as a sheriff officer.[1] But it seems that it is not fraud if a sheriff officer uses his official status or purports to act in his official capacity for the unofficial purpose of collecting debts.[2]

5.26 In our view, it is objectionable that a sheriff officer should purport to act as an officer of the court when he is in fact acting merely as an agent of the creditor or alleged creditor. Many members of the public do not know the limits of the official functions of sheriff officers. The practice is thus deceptive or misleading and for that reason alone is objectionable. Whenever a sheriff officer uses his official designation, the public should be entitled to assume that he is acting in his official capacity. Moreover, it is likely that many members of the public believe that a sheriff officer represents the sheriff court and, indeed, acts on the court's instructions. The party from whom a debt or alleged debt is demanded before decree may have a justifiable defence and may be discouraged from putting forward the defence where the demand is made by a sheriff officer. Or he may be misled by the sheriff officer's demand before decree into believing that a later stage in the process of debt recovery has been reached

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[1] Rob. Millar (1843) 1 Broun 529.

[2] In some legal systems, (eg Virginia, USA), threatening to raise legal proceedings in order to recover a debt on a third party's behalf is treated as practising as a solicitor. In Scotland, however, the solicitor's monopoly does not extend thus far. While it is a criminal offence under the Solicitors (Scotland) Act 1933, s.36 falsely to pretend to be a duly qualified solicitor, it is clear that a sheriff officer demanding payment and threatening 'legal measures' in a letter signed by him expressly as sheriff officer is acting or purporting to act in that capacity, and there is no wilful pretence of being a solicitor. So held in A.B. v. C.D. (1892) 8 Sh.Ct. Reps. 331. This case concerned the Law Agents and Notaries Public (Scotland) Act 1891 s.2 which, so far as relevant, is in identical terms to section 36 of the 1933 Act which replaced it.

than is in fact the true position. Moreover, until decree has been pronounced, the sheriff officer can never be sure that the debt is really due. The impropriety is made even worse when the sheriff officer lends the authority of his office to a demand for a collection charge, payment of which is not legally enforceable.[1]

5.27 This practice, if it exists, might be eradicated in due course by measures taken under the Consumer Credit Act 1974 by the Office of Fair Trading. Individual sheriff officers who conduct a business of debt collection are required to have a licence.[2] It is understood that the Office of Fair Trading has refused to issue licences to sheriff officers entitling them to engage in debt collection or other ancillary credit businesses using the name "sheriff officer".[3] The practice is, however, primarily an abuse of a public office and should therefore be prohibited by the rules regulating that office. Accordingly, we suggest that <u>the rules on the standards of conduct of messengers and sheriff officers should expressly prohibit them from purporting to act in that capacity when collecting debts before the debts have been constituted by decree</u>. (Proposition 19).

(b) <u>Connivance by sheriff officer in fraudulent impersonation</u>

5.28 As indicated above, impersonation of a sheriff officer is a criminal offence. Impersonation may take the form of a false claim to be a sheriff officer. Arguably, impersonation may also occur where a creditor uses sheriff officer letter-

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[1] Unless the original contract so provided, which is rare. Even then, a contractual collection charge would be enforceable only if not struck at by the law on penalty clauses.

[2] Consumer Credit Act 1974, Part X.

[3] We are uncertain whether these measures have proved effective. The Office of Fair Trading do not have inspectors who actively police the activities of licensees and the effectiveness of the controls depend on complaints from members of the public or interested bodies such as local authority consumer protection departments who happen to identify the practices in question.

head papers. In a recent (1976) case brought to our attention, a sheriff officer in the West of Scotland sold to a firm of retailers a quantity of pro forma letter paper headed by the sheriff officer's name and official designation and requiring payment to the creditor. These were issued by the creditor who charged each debtor 50p as a letter fee, no doubt to cover the cost of purchase of the headed notepaper and its distribution. The letters were signed not by the sheriff officer but by the creditor. Following a complaint to the sheriff principal, the sheriff officer concerned was suspended for four months.

5.29 This case illustrates the narrow line which distinguishes proper from improper conduct under the present system. Following that disciplinary case, the sheriff officer concerned and the creditor altered their practice. The creditor continued to prepare the letters but, before sending them, obtained the signature of the sheriff officer or another sheriff officer in his firm. On a second complaint, the sheriff principal decided that disciplinary action was not appropriate. The normal practice is for a creditor to send a list of debts to a sheriff officer for collection with instructions to the officer to recover those debts. Many sheriff officers first write a warning letter demanding payment to the creditor or his agents (or themselves as the creditor's agent) as a preliminary to diligence. The sheriff principal took the view that no sensible distinction could be made between (a) the situation where a sheriff officer himself prepares a warning letter from the list supplied by the creditor and (b) one in which the creditor inserts in a warning letter signed by the sheriff officer the information which, in the alternative system, appears in the list.

(c) Debt collection before decree by sheriff officers not purporting to act as such

5.30 There appear to be two main ways in which a sheriff officer may collect debts before decree without purporting to act as sheriff officer. One practice is to send letters or demands which do not use the designation "sheriff officer". This is

presumably unlikely to mislead most debtors in the large cities, although in many rural areas, debtors are well aware that the sheriff officer holds that office.

5.31 The other practice is for the sheriff officer to establish a debt collection agency trading under a firm name which is or may be different from the name of the sheriff officer's firm.[1] Demands for payment by the agency before decree are unlikely to mislead debtors into thinking that the demand has the stamp of judicial or official approval, and it is thought that this is one of the factors which have led sheriff officers to set up debt collection agencies trading under a different name from the name of the officer's business.

5.32 It has been said that the question whether officers of court can command the respect of the public and be seen to be impartial, while retaining a financial interest in a debt collection agency which regularly instructs them, depends on the circumstances of each case.[2] There is, however, no clear legal rule differentiating permissible from impermissible involvement in a debt collection agency, and we doubt whether it is possible to draft such a rule. Moreover, there is no legal authority on the sanctions which apply in the case where an officer executes diligence on the instructions of a debt collection agency in which he has a financial interest which is in the relevant sense objectionable. An officer's interest in a debt invalidates diligence by him in enforcing the debt,[3]

[1] For example, it is believed that the following agencies (which advertise in the Scottish telephone trades directories) have sheriff officers as directors or shareholders: Collection Agencies (Scotland) Ltd; Thomas C Gray Ltd; Hutton Trade and Credit Collection Services Ltd; Lewis Debt Services Ltd; and Rutherfords Financial Services Ltd. At least one firm of sheriff officers advertises as debt collectors without adding the designation "sheriff officers". The foregoing list is not necessarily exhaustive.

[2] See para. 5.23 above.

[3] See para. 5.10 above.

but there is no clear authority on the question whether an officer's interest in a debt collection agency can affect the validity of diligence or whether the only remedy is disciplinary action by the sheriff principal. We think there is a need for clear legal rules determining whether and when debt collection by officers before decree is permitted and the sanctions for breach of these rules.

5.33 The arguments in favour of allowing officers of court to continue to collect debts before decree, or to operate debt collection agencies, include the following -

(1) Since collection makes the eventual use of diligence unnecessary, it is convenient and practical to allow diligence officers to undertake collection.

(2) The business of debt collection being one of the main extra-official activities of officers of court, it indirectly subsidises the official function of executing diligence. If officers were prohibited from undertaking unofficial debt collection, some firms would suffer considerable financial loss while others might cease to be economically viable.

(3) If sheriff officers who are actually or potentially subject to strict controls cease to undertake debt collection before decree, the business of debt collection might be diverted to other debt collection agencies who might possibly be less scrupulous and less easily controlled.

(4) Debt collection by specialist agencies is not by itself illegal and indeed may be desirable on the grounds first, that the agencies save creditors and debtors the high cost of debt actions and diligence, and, second, that they provide a valuable service for creditors which the creditors themselves are unwilling or unable to undertake.

(5) In addition to these arguments for allowing officers to engage in debt collection before decree, it may be argued that an officer should be allowed to operate a debt collection agency trading under a firm name because he thereby avoids the use (and abuse) of his official status and does not mislead debtors into thinking that demands for payment have the stamp of judicial approval.

5.34 The disadvantages of allowing debt collection by officers before decree may be summarised as follows.

(1) The participation by sheriff officers in "false front" debt collection agencies may all too easily be seen as an attempt to conceal from debtors and the public the officers' close identification with the creditors' interest. The administration of justice should be open and impartial; the practice of concealing the identity of the sheriff officer is hardly open and therefore is likely to reflect adversely in the public mind on his impartiality.

(2) Where a sheriff officer acts as debt collector before decree, it can no longer be said that he is merely carrying out a function which he cannot refuse to perform;[1] rather he is voluntarily taking the side of the creditor against the debtor.

(3) The activities of some debt collection agencies have tended to damage the reputation of debt collection agencies generally, and by operating debt collection agencies, sheriff officers run the risk of damaging their own reputation.

(4) Where a sheriff officer possesses a debt collector's mandate before court action is commenced, there is far more risk that the

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[1] See the remarks of Lord Sands in Stewart v. Reid 1934 S.C. 69 quoted at para. 5.5. above.

functions of the sheriff officer and solicitor will become blurred in the way described at para. 5.46 below.

(5) Where a sheriff officer collects debts using his own name without the designation "sheriff officer", there is some risk that debtors with local knowledge will think that he is acting in his official capacity.

5.35 We hope that consultation will elicit information on the possible impact of a prohibition of pre-decree collection on the profitability or viability of sheriff officers' businesses. Meantime, views are invited on the following questions and suggestions:-

(1) Should officers of court continue to be allowed to operate, or have an interest in, debt collection agencies whose business consists of or includes the collection of debts before decree?

(2) Should officers of court be allowed to collect debts before decree by demanding payment in their own name as the creditor's agent without use of the designations "messenger-at-arms" and "sheriff officer"?

(3) If the answer to question (1) or (2) is affirmative, it is suggested that (a) the authorisation of the sheriff principal should be required before such business is undertaken; and (b) a record or register of authorisations and of interests in debt collection agencies should be kept by the clerks of court.

(4) A sheriff officer or messenger acting as debt collector before decree should be prohibited by the rules regulating his conduct from demanding payment from the debtor of a collection charge to reimburse himself or the creditor for the expenses of the collection except in those (rare) cases where the charge is legally enforceable (i.e. by virtue of a provision in the original contract constituting the debt).

(5) A sheriff officer or messenger should also be prohibited from having an interest in a debt collection agency collecting debts before decree if the agency requires payment from debtors of collection charges which are not legally enforceable.

(6) It is for consideration whether an interest of an officer's spouse, near relative or business associate in a debt collection agency should disqualify the officer from enforcing debts on the instructions of the agency; or whether the practice should be allowed subject to authorisation by the court and the keeping of records by the courts of those interests.

(Proposition 20).

(6) Debt collection by officers after decree

5.36 The collection of debts by sheriff officers after decree has been pronounced against the debtors in question raises different issues. First, since collection makes diligence unnecessary, it is reasonable and practical to allow sheriff officers to collect as well as to enforce debts.[1] It would be absurd to prevent an officer from taking payment of a debt on the creditor's behalf if the debtor tendered the money in response to a particular step in diligence such as a charge to pay or a poinding. Moreover, the sheriff officer is in touch with both the debtor and the instructing creditor or agent and it may be easier for the debtor to make payment to the sheriff officer than to the creditor or agent who may be remote. It is also convenient from the creditor's standpoint.

[1] See Ayr County Council v. Wyllie, supra per Lord President Normand at p.845: "It is very reasonable that the County Council should authorise the sheriff officer to receive payment by instalments, or to receive payment of the total amount of rates due, so as to make it unnecessary for him to proceed to poind"; Dobie, Sheriff Court Practice, p.9. Cf. however, McLachlan v. Black (1821) 1 S.217; relied on (obiter) in Lawrence Jack Collections v. Hamilton 1976 S.L.T. (Sh.Ct.) 18 at p.20 as authority that officers should not act as creditors' collection agents.

5.37 Second, there is no risk that demands for payment by sheriff officers collecting debts after decree will mislead debtors into thinking that a later stage in the process of debt recovery has been reached than is in fact the true position. There is thus no point in sheriff officers resorting to the device of a 'false front' debt collection agency.

5.38 Third, once decree has been pronounced against a debtor, the debt is legally constituted and the debtor and every one else has the best possible evidence that, unless the debt has been paid, the debtor is liable. Before decree, there is no assurance that the debtor is, or ever was, liable.

5.39 On the other hand, the position is not entirely satisfactory. Where a sheriff officer makes a demand for payment after decree, he acts as the creditor's agent and not in his official capacity as sheriff officer.[1] It is very likely that most debtors are unaware of the difference, and neither they nor the creditors are protected by the sheriff officer's bond of caution.

5.40 It is for consideration whether it should be provided by legislation -

(i) that the collection of debts which have been constituted by decree (including a decree of registration) forms part of the official functions of messengers and sheriff officers;

(ii) that in the absence of contrary instructions a creditor's mandate to execute diligence or a particular step in diligence should be construed

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[1] In Ayr County Council v. Wyllie 1935 S.C. 836 Lord Blackburn remarked (at p.844) that "the determination of whether a sheriff officer is on any particular occasion acting as collector or as sheriff officer may come to depend on distinctions which are almost ludicrous".

as including a mandate to receive payment of the debt (principal, interest, judicial expenses and the expenses of diligence);

(iii) that an officer's bond of caution should be extended to cover debts collected in pursuance of decrees; and

(iv) that rules requiring the keeping of accounts as to clients' money and the audit of these accounts should be made.

5.41 If this approach is adopted, it would presumably be for the officer and creditor to agree on whether the officer would be entitled to a commission for collection in addition to his prescribed fees for diligence. But if officers are to be entitled to charge a commission, it should be made clear that they are not entitled to demand reimbursement of the commission or payment of collection charges from the debtor either on their own account or the creditor's account. The creditor should be liable, as under the present law, to bear the costs of collection.

5.42 Again, if post-decree collection were an official function of officers, then the officers should be permitted to make demands for payment using the designation "sheriff officer" or "messenger-at-arms". This would entail a modification of the current licensing policy of the Office of Fair Trading which, as we have seen, restricts debt collection by sheriff officers to collection in their own name without their official designation.[1] Indeed, if debt collection after decree were to become an official function of officers, there might be a case for excluding the officers' exercise of that function from the licensing provisions of the Consumer Credit Act 1974 in much the same way as some activities of advocates and solicitors are excluded by section 146 of that Act.

[1]See para. 5.27.

5.43 The "Code of professional ethics" of the Society of Messengers-at-Arms and Sheriff Officers provides that all members of the Society "who are self-employed or in partnership must maintain proper business books and a client's account, in accordance with normal accounting procedures". No legal provision is made, however, binding sheriff officers to keep proper accounts of debts collected by them on behalf of creditors or for the audit of accounts. The absence of official provision for audit is perhaps explained by the theory that the collection of debts is generally not part of the official functions of a sheriff officer. The absence of legal provision contrasts with the detailed and strict provisions for the maintenance, inspection and audit of solicitors' accounts.[1]

5.44 On the other hand, it has been represented to us that it would be inappropriate to impose on officers requirements as to accounts and audits which were stricter than the corresponding requirements on debt collecting firms who are not officers of court. We are not aware of any recent cases of misappropriation of funds by officers and if an officer were to embezzle funds, then the creditor and debtor would presumably be protected by the proposed requirements that the officer's bond of caution should cover debts collected by the officer after decree.

5.45 To sum up, we suggest that (1) <u>it should be provided by legislation or statutory rules</u> -

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1 See Solicitors' (Scotland) Accounts Rules 1952 as amended; Accountant's Certificate Rules; Legal aid and Solicitors (Scotland) Act 1949, s.20; Solicitors (Scotland) Act 1958 s.13.

(a) <u>that the collection of debts which have been constituted by decree (including a decree of registration) forms part of the official functions of messengers and sheriff officers</u>;

(b) <u>that in the absence of contrary instructions, a creditor's mandate to an officer of court to execute diligence or a step in diligence includes by implication a mandate to receive payment of the debt (principal, interest, judicial expenses and diligence expenses); and</u>

(c) <u>that an officer's bond of caution should be extended to cover debts collected in pursuance of decrees</u>.

(2) <u>Views are invited on whether the protection of creditors and debtors would be adequately achieved by the proposal at para. (1)(c) above or whether rules would be needed requiring the keeping of accounts as to creditors' money and the audit of these accounts</u>. (Proposition 21).

(6) Separation of functions as between officers of court and solicitors

5.46 The usual conception of debt recovery is that a creditor will instruct a solicitor to raise a debt action and the solicitor will then instruct a sheriff officer to execute citation or diligence if necessary. Where, however, a sheriff officer holds a mandate from a creditor to act as a debt collection agent before a court action has been raised, the officer as the creditor's agent will instruct a solicitor to raise a summary cause or ordinary action, and will if necessary himself execute citation during the action and diligence during the action or after decree, of his own accord without the need for a solicitor's instructions. The officer's powers depend on the terms of his mandate as agent but a general mandate conferring a wide discretion as to the choice of solicitor, and as to citation and diligence may be not unusual.

5.47 At the present time there is nothing unlawful in this practice provided certain conditions are satisfied. First there must be no agreement for the sharing of the solicitor's fees.[1] Second, the sheriff officer's and solicitor's businesses must be kept separate so that the sheriff officer does not prepare the writs which should be prepared by the solicitor, and that the solicitor's expenses are not charged against the debtor when the work has been done by the sheriff officer. Thus, an unqualified person (viz anyone not an advocate or solicitor) who "draws or prepares any writ ... relating to any legal proceedings" is guilty of an offence "unless he proves that he so acted without expectation of any fee, gain or award directly or indirectly."[2] A litigant may not recover expenses for drawing writs where the writs have been drawn by an unqualified person.[3] The solicitors' monopoly of representation may be relaxed in summary cause actions by leave of the court at the first calling or, if the case is not defended on the merits or the amount due, at subsequent diets.[4] A similar relaxation applied in the small debt courts[5] and it was common practice in several districts for sheriff officers to prepare small debt summonses by filling in the blanks in the statutory style. In Dow v. Mitchell and Cram[6] the sheriff held on the authority of the provisions of the Solicitors (Scotland) Act 1933 cited above that when the claim in a small debt summons was drawn by a sheriff officer, the agent's fee could not be recovered from the defender if the sheriff officer in drawing the claim had acted in expectation

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[1] Solicitors (Scotland) Act 1933, s.38.

[2] Solicitors (Scotland) Act 1933, s.39: See also s.37 which makes it an offence for a solicitor to permit his name to be used by an unqualified person drawing writs. It is also a contempt of court at common law for an unqualified person to conduct litigation for a third party.

[3] Solicitors (Scotland) Act 1933, s.42; Litigants in Person (Costs and Expenses) Act 1975.

[4] Summary Cause Rules, rule 17.

[5] Small Debt (Scotland) Act 1837, s.16; Milne v. Leslie (1888) 15 R. 460; A v. B (1923) 40 Sh.Ct.Reps. 25.

[6] (1939) 55 Sh.Ct.Reps. 258.

that in consideration of his having done so, he would be employed to cite the defender. It would seem equally to be a criminal offence for a sheriff officer to fill in the blanks of a summons in a summary cause action, and to pass it to a solicitor for signature, in the expectation that he would be employed to cite the defender or to execute diligence on the decree. The solicitor might well be criminally liable under section 37 of the 1933 Act for allowing his name to be used in this way.

5.48 That the problem may be a real one is illustrated by John Temple Ltd v. Logan[1] where a solicitor and a sheriff officer (acting as debt collector and creditor's agent as well as sheriff officer) shared the same premises and dispensed with formal instructions and fee notes. In that case, the solicitor's fees charged to debtors in a small debt action raised by the sheriff officer were disallowed. Where premises can be shared and formal instructions dispensed with, the possibility that the sheriff officer will prepare writs with a motive of profit in receiving instructions for citation or diligence and that solicitor's fees will be charged which have not been earned by the solicitor can hardly be discounted.

5.49 Accordingly (1) views are invited on the question whether new provision applying to officers of court is needed to ensure that the functions of officer of court and solicitor are kept separate or whether it is sufficient to rely on the provisions of the Solicitors (Scotland) Act 1933 for this purpose. (2) An officer of court should be prohibited from sharing the same business premises as a solicitor whether or not the officer and solicitor regularly instruct each other. (Proposition 22).

(7) Regulation of standards of conduct in respect of miscellaneous matters

5.50 In addition to the foregoing rules dealing mainly with impartiality and debt collection, it is for consideration whether a number of other rules dealing with certain miscellaneous matters should be enacted.

[1] 1973 S.L.T. (Sh.Ct.) 41.

(a) Collusive sales of poinded goods

5.51 Allegations have been made that some sheriff officers have entered into collusive agreements with second-hand furniture dealers whereby at a warrant sale the officer arranges that the goods are sold at a low valuation to a second-hand dealer who then sells them again at a profit.[1] None of these very serious charges have been substantiated, so far as we are aware. Having regard to the fact that sales of household goods rarely take place and the goods are generally adjudged and delivered to the creditor, opportunities for this practice are rare. A different possibility is that the poinded goods might be adjudged and delivered at a low valuation to the creditor who then sells the goods at a profit which he shares with the officer. But again, so far as we are aware, there is no evidence at all that such a practice occurs.

5.52 It is sometimes forgotten that collusive sales are specifically prohibited, so far as messengers are concerned, by Rule of Court 51.[2] The rule provides:

> "No messenger by himself or others commissioned by him for his use and behoof in whole or in part shall, upon the execution of any poinding and the goods poinded exposed for sale by the creditor to whom they have been adjudged, become the purchaser thereof under the pain of deprivation."

Most poindings are executed on sheriff court decrees and if Rule of Court 51 is needed at all, it should apply to sales under sheriff court warrants, in consonance with our view that the same rules on standards of conduct should apply to messengers and sheriff officers alike. We suggest therefore that Rule of Court 51 (no messenger to purchase goods sold under diligence) should be replaced by a rule applying to messengers and sheriff officers and providing a penalty of

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[1] Sunday Mail, July 17, 1977.

[2] Which stems from the Lord Lyon's Regulations of 1772, regulation 5.

dismissal where the officer or any person acting on his behalf purchases at a warrant sale goods which the officer has poinded or where the officer shares in the proceeds of a resale by a creditor to whom the poinded goods have been adjudged and delivered. (Proposition 23).

(b) Specific duties and rights of officers on receipt of instructions

5.53 Although a sheriff officer or messenger has a duty to act when instructed, he may ask for some security for his expenses as a precondition of accepting instructions.[1] The Finer Committee observed that although a wife claiming aliment may in theory arrange herself for diligence to be executed, "it is difficult to proceed without professional assistance since in practice the sheriff officers who carry out the diligence prefer to have instructions from a solicitor in order to give them some security for their expenses in the event of these not being recovered from the defender."[2]

5.54 According to Maclaren[3] it is accepted practice that a solicitor instructing an officer of court becomes thereby personally liable in the first instance for the officer's fees. There seems no need to change this rule.[4]

5.55 A sheriff officer may be liable in damages for failing to execute diligence timeously. In general his liability

[1] The sheriff officer's bond of caution binds the officer to serve the lieges "upon their reasonable expenses" reflecting the wording of Rule 48 of the Rules of the Court of Session (applying to messengers-at-arms).

[2] Report of the Committee on One Parent Families (1974) Cmnd. 5629, para. 4.451.

[3] Court of Session Practice (1916) p.1115.

[4] The question whether "an officer of court ought always to be instructed by a solicitor and always to be paid by the instructing solicitor" was raised in evidence to the McKechnie Committee, but the Committee thought that the matter should be considered by the Officers of Court Committee whose establishment they had recommended: Op. cit. para.212.

depends on proof that he failed to use reasonable care and skill, the test for professional negligence, the standard of which may vary with circumstances. A sheriff officer who, on receipt of instructions to charge or poind etc, delays unduly in acting on the instructions will be liable. Graham Stewart observes[1] that "Undue delay is a question of circumstances but in general the messenger's duty is to execute the diligence at once ... Where the messenger is specially instructed to do immediate execution, he _must_ proceed at once". A different standard will apply where the sheriff officer has a discretion. Rule 49 of the Rules of the Court of Session require a messenger-at-arms to acknowledge to an instructing creditor receipt of his instructions within 24 hours on pain of a fine of £2 (unaltered since 1772) in the event of failure to acknowledge and failure to execute the diligence. There is no equivalent rule applying to sheriff officers.[2]

5.56 We suggest that (1) _consideration should be given to the enactment of uniform rules for messengers and sheriff officers (replacing Rule of Court 49) requiring an officer (a) on receipt of instructions to carry out these instructions without delay and (b) if unable to carry out the instructions to report the situation to the instructing creditor forthwith; and providing a more appropriate penalty than is provided by Rule of Court 49_. (2) _No change should be made in the present rule of practice whereby a solicitor instructing an officer of court becomes thereby personally liable for the officer's fees_. (Proposition 24)

[1] _Op. cit._, pp. 821-2.

[2] The "Code of Professional Ethics" of the Society of Messengers-at-Arms and Sheriff Officers, however, provides _inter alia_ that on receipt of instructions a member of the Society must "(b) attend to the instructions entrusted to him without regard to his personal advantage and to carry out these instructions without delay.
(c) if unable to carry out instructions timeously, report the situation to the client."

(c) Advertising and soliciting for business by sheriff officers and messengers-at-arms

5.57 Another difference between the service of sheriff officers and messengers-at-arms and some professional bodies consists in the fact that there are no formal restrictions prohibiting individual officers of court or firms from informative advertising, or even 'self-promotional' or 'persuasive' advertising, or from overt canvassing or touting for business. Generally speaking advertising by firms of officers seems to us to be unexceptionable. So far as we are aware, the advertisements do not claim for the advertising officer's practice superiority over the practices of other officers; nor do they contain inaccuracies or misleading statements; nor could they reasonably be regarded as likely to bring either officers of court generally or the courts into disrepute.[1] Accordingly, while it is envisaged that the proposed powers of the Court of Session to regulate standards of conduct would include power to control advertising and soliciting for business by officers of court, controls of those matters appear unnecessary at the present time. (Proposition 24).

(d) Enforcement of child delivery orders etc

5.58 It is convenient to deal here with the enforcement by officers of court of child delivery orders[2] though the matter may be regarded by some as pertaining more to procedure than officers' standards of conduct. Messengers-at-arms and sheriff officers have a wide discretion as to the manner in which they execute child delivery orders. Though such orders have often to be enforced in the glare of press publicity, (especially where the child has been "kidnapped" to Scotland from elsewhere

[1] These were mutatis mutandis the criteria suggested for solicitors' advertising in the Report of the Monopolies and Mergers Commission on Services of Solicitors in Scotland (1976) H.C. 558, para.48.

[2] That is to say, an order by the Court of Session or sheriff court ordaining a person to deliver a child to the child's lawful parent or guardian and failing his doing so, granting warrant to officers of court to search for, take possession of and make delivery of the child to the parent or guardian.

in the United Kingdom or abroad) and though the emotions of the parent or other person forced to give up the child are often deeply involved, complaints about the conduct of officers are extremely rare. Some officers intimate their intention to enforce a child delivery order to the local social work department and are accompanied by a social worker when enforcing the order. Some officers follow a similar course when executing an order for the ejection of a family from their dwelling. This affords a protection to the parties and incidentally to the officers themselves. There are, however, cases where this is not done, and cases where errors of judgment occur,[1] as would happen in any system even if social workers were always involved.

5.59 There seems little doubt, however, that the involvement of social workers would minimise the risk of inappropriate action and, for this reason, the Sheriff Officers and Warrant Sales (Scotland) Bill, clause 5, provides:-

> "In the execution of a court order concerning the custody of a child, a Sheriff Officer must have the approval of the Social Work Department of the appropriate Regional Council as to the best method of executing the order, in the interests of the child, and no child may be taken from any dwelling-house or other premises by a Sheriff Officer unless accompanied by a qualified social worker whose duty it shall be to look after the interests of the child."

While we support the general aims of this clause, we think that the social work department or its officials should advise the officer as to the manner of enforcement and should not be empowered to give or withhold approval. Further, we suspect that it would not be practicable to require an officer of court to be accompanied by a social worker in every case. Thus, in an international 'child kidnapping' case, the officer may be

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[1]For example, in one case, an officer of court took possession of three children from the home of a relative at 4.30 am in the morning: see <u>The Glasgow Herald</u> 8 and 9 January 1979; <u>The Scotsman</u> 8 and 9 January 1979.

required, at short notice, to take possession of the child where, for example, the child is being taken to an airport. There may be no time to secure the presence of a social worker. It is possible to conceive of other urgent cases. Moreover, such a rule might cause difficulties in some rural and other areas of Scotland where there is an inadequate provision of social workers.

5.60 For these reasons, we suggest that (1) the rules regulating the conduct of officers of court should provide that in the normal case an officer of court instructed to enforce a child delivery order should intimate his intention of doing so to the local social work department, and should request that a social worker of the department accompany the officer when he takes possession of the child. The foregoing rule should not, however, apply in cases of urgency (such as the imminent removal of the child from the jurisdiction) where the delay caused by making the intimation or securing the attendance of the social worker would be likely to result in failure to enforce the order. (2) It is for consideration whether a similar rule requiring a like intimation and request to the social work department should be applied to the enforcement of warrants for ejection of persons from their dwellinghouses. (Proposition 26).

5.61 We do not think it necessary to impose a specific duty on social work departments to assist officers of court in executing child delivery orders or warrants of ejection. The regional or islands council, through its social work department, has a general duty to promote social welfare in its area under the Social Work (Scotland) Act 1968, which provides the council with authority not only for assisting officers of court but also for paying the travel and other expenses of social workers accompanying officers. Such expenses should not be borne by the parent or guardian enforcing the order.

PART VI: MISCELLANEOUS TOPICS

6.1 We complete this Memorandum by considering a number of miscellaneous issues, namely, (1) the liability of officers of court for wrongful diligence; (2) the provision of identity cards as official credentials for sheriff officers; (3) measures to improve the collection of statistics on diligence, and (4) whether membership of the Society of Messengers-at-Arms and Sheriff Officers should be compulsory.

(1) Liability of officers of court for wrongful diligence etc

6.2 Apart from his accountability to the Lyon King of Arms or the sheriff principal, an officer of court may also be liable to creditors and debtors for negligence or impropriety in the performance of his duties of citation and diligence.

6.3 Liability to creditor: as regards his liability to the creditor, an officer is bound to execute his instructions without delay. The rule evolved in the case of poindings and civil imprisonment is that if an officer disobeys or neglects his instructions, he is liable for the whole amount of the debt, principal, interest and expenses, due to the creditor under the decree which it was the object of the diligence to recover. This rule seems to have been based on the difficulty of assessing the amount of damages in such cases.[1] The rule has been described by the court as very severe in its operation[2] and entails a presumption that the damage is the amount of the debt, when often the blunder of the officer may have caused no or very little loss. For this reason, the court in one case refused to extend the rule to arrestments[3] and the opinion was expressed that "the damage in the case of a dilatory arrestment ought to be measured by the amount of the debt due by the arrestee to the common debtor which was paid by the arrestee between the date when the arrestment should have been executed and the date when it was executed."[4] In the case of

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[1] Chatto & Co v. Marshall 17 January 1811 F.C.

[2] Couper v. Bain (1868) 7 M.102 per Lord Ormidale at p.104.

[3] Monteith v. Hutton (1900) 8 S.L.T. 250.

[4] Ibid. at p.252.

diligence and similar remedies against property (viz arrestments, poindings, inhibitions, interdicts against removal of property from the jurisdiction) the difficulty of assessing the loss seems an inadequate reason for providing a measure of damages which is penal and higher than the normal measure of the loss suffered by the pursuer, especially since the officer may also be penalised in disciplinary proceedings. We think the normal measure of damages should apply in these cases, but make no proposals in relation to civil imprisonment cases which are nowadays very rare and where such a rule would be inoperable.

6.4 Vicarious liability of creditor for officer's actings: the general rule is that a creditor is always liable to the debtor for the improper actings of the sheriff officer in executing diligence[1], although he has a right of relief against the sheriff officer. In the 19th century, this rule was criticised on the grounds that creditors should be entitled to rely on the competence of officers of court who have been regularly appointed; that the creditor has no choice but to execute diligence by the hand of an officer of court so that the officer should not be regarded as an agent for whom the creditor is vicariously liable; and that the officer's actings are in any event guaranteed by his bond of caution against claims by debtors and third parties as well as claims by creditors.[2] The basis of the rule seems to be the protection of debtors since it may often be difficult for a debtor to know whether improper diligence depended on the fault of the creditor or sheriff officer. The creditor is protected by his right of relief against the officer. We think therefore that the principles of the creditor's vicarious liability and right of relief should not be changed.

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[1]Graham Stewart, op. cit., p.761.

[2]Baron Hume's Lectures, vol. III, pp.195-6.

6.5 Extent of sheriff officer's liability to debtor: generally speaking, a sheriff officer is liable only if he is himself to blame, that is to say if he has himself committed an irregularity in executing diligence or if he knows, or ought to know, of an unjustifiable use of diligence (e.g.if he knows that the debt has been paid in full). Though the authority of the sheriff officer depends on the warrant granted by the court, he is not himself liable for the terms or legality of the warrant, except possibly where it is ex facie invalid or irregular, (for example that it has not been duly signed).[1] (Indeed there may be some defects, apparent on the face of the warrant, e.g. erasures, which he is not bound to question.[2]) Thus, if the decree containing the warrant has been recalled,[3] or a decree requiring intimation before execution has not been intimated,[4] and the officer does not know of these extrinsic defects in the warrant, he will not be liable to the debtor though the creditor will. We see no reason to change these rules.

6.6 Sheriff officer's discretion: any discretion as to the extent to which the sheriff officer is bound to give effect to his instructions will depend on those instructions.[5] If he is merely instructed to do diligence he must do so forthwith or return the warrant immediately. If the creditor gives further instructions, e.g. as to making instalment settlements, or giving time to pay, then the officer acts as creditor's agent rather than officer and will be liable according to the law of agency.

6.7 General: the rules on the sheriff officer's delictual liability to debtors and creditors and indeed to third parties

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[1] Dobie, Sheriff Court Practice, p.9.

[2] Graham Stewart, p.806.

[3] Clark v. Beattie 1909 S.C. 299.

[4] Reid v. Clark 1913, 2 S.L.T. 330.

[5] Dobie, op.cit., p.9.

seem to safeguard the interests of the public so far as the law of reparation can provide safeguards. While solicitors can often remedy mistakes at the stage of litigation, subject only to awards of expenses for which they may be liable, a mistake in diligence may be irremediable. It seems doubtful whether these rules could fairly be made more severe and whether increased severity would do any good. The understandable reluctance or failure on the part of debtors to challenge sheriff officers' actings by raising actions of damages,[1] together with the expense and uncertainty of damages actions for wrongful diligence make the remedy an imperfect safeguard for debtors and an inadequate substitute for supervision and control by the courts.

6.8 To sum up, (1) the measure of the damages for which an officer may be liable to a creditor for negligent delay in executing diligence against property should be the loss suffered by the creditor, viz the difference in amount between what would have been attached if the diligence had been executed at the proper time and what was actually attached. (2) No further change need be made in the rules on the personal liability of messengers-at-arms or sheriff officers for wrongous diligence or other fault in the execution of their functions. It should be recognised, however, that these rules are not an adequate substitute for supervision and control of officers by the courts. (Proposition 27).

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[1]Thus, there is good authority for the proposition that a low valuation by an officer of poinded goods is a civil wrong against the debtor for which damages may be obtained: Le Conte v. Douglas (1880) 8 R. 175. Yet for all the recent publicity concerning low valuations, there is no recent reported case in which damages on that ground have been claimed.

(2) Official identity cards

6.9 On his appointment a sheriff officer is given a written commission but it is not the practice of sheriff officers to use their commissions to provide identification when executing warrants for diligence. We think that sheriff officers should be provided with identity cards which they should carry with them when executing citation and diligence and exhibit on request. Such a reform might prevent the disputes which sometimes occur when officers insist on obtaining entry and citizens dispute their right to obtain entry. We understand that disputes of this kind occasionally occur in the context of complaints to the sheriffs principal, many of which turn out to be unjustified but may have been due to the citizen's failure to understand the official standing and powers of the officer.

6.10 A messenger-at-arms is given by the Lyon King of Arms a messenger's wand and blazon. In the event of deforcement, the messenger 'breaks' the wand, a procedure of mediaeval provenance which would certainly puzzle, if not impress, the offending party.

6.11 Accordingly we suggest (1) sheriff officers should be provided with official identity cards which they should be bound to carry with them, and exhibit on request, when performing their official functions. It should be a defence in proceedings for deforcement that the officer in question failed to exhibit his identity card when reasonably required to do so. (2) It is for consideration whether an official identity card should be supplied to messengers-at-arms and whether messengers should be authorised, or possibly required, to us it in the same way as sheriff officers would under the foregoing proposal in place of the messenger's traditional wand and and blazon. (Proposition 28).

(3) Statistics on diligence

6.12 It is for consideration whether measures should be taken to improve the standing machinery for collecting and publishing annual statistics on diligence. The only statistics on diligence collected on annual basis are those collected and returned by the sheriff clerks, compiled by the Scottish Courts Administration and published in the annual Civil Judicial Statistics for Scotland, which are Command Papers.[1]

6.13 It follows that only those steps of diligence which are reported to the court, or which involve judicial proceedings, can be included in the statistical returns. The result is that the information obtained on the execution of diligence is fragmentary and incomplete. This may be illustrated by reference to the two main diligences of arrestment and furthcoming, and charge, poinding and warrant sale. The only arrestments reported to the court are those arrestments on the dependence which are served before the service of the summons,[2], a tiny fraction of the total number of arrestments. No arrestments in execution are reported. Actions of furthcoming can be monitored though in fact they are "lost" in other categories in the annual Judicial Statistics. The main steps in poinding are (1) the charge, (2) poinding, (3) application for warrant, (4) intimation of warrant to debtor, (5) advertisement of impending sale, and (6) execution of sale. It would be possible to compile statistics on (2), (3) and (6) under existing legislation because these are reported to the court. In fact the returns only cover executions of sale.

[1]The enabling statute is the Judicial Statistics (Scotland) Act 1869. Section 2 of that Act requires clerks of court and civil servants who keep records to make statistical returns (in a form prescribed by the Lord Advocate) before the end of March every year to the relevant government department. No duty is or can be imposed by or under the Act on messengers-at-arms and sheriff officers to make statistical returns as to the steps of diligence performed by them.

[2]Sheriff Court Rules, rule 127.

6.14 It appears to us that the enforcement of court orders is sufficiently important to warrant the collation of statistics on an annual basis. Only if this were done would it be possible to obtain a quantitative measure of the way in which the reformed diligences were operating. The experience gained in making surveys in 1974-75 and 1978 would help in providing appropriate statistical frames for the annual statistics.

6.15 To sum up (1) the Judicial Statistics (Scotland) Act 1869 should be amended to enable the competent authorities to require messengers-at-arms and sheriff officers to make annual returns of the diligences executed by them. (2) The administrative machinery for making the returns should preserve confidentiality as to the volume of business undertaken by self-employed officers or firms of officers. (3) In principle, the cost of the work involved in making the returns should be borne by the Exchequer. (Proposition 27).

(4) Membership of Society of Messengers-at-Arms and Sheriff Officers

6.16 As already mentioned,[1] of the 126 officers of court holding commissions, 113 are members of the Society of Messengers-at-Arms and Sheriff Officers.[2] The Society thus represents messengers-at-arms and sheriff officers throughout Scotland. It acts as a channel of communication between officers and the various authorities concerned with the law and practice of citation and diligence, including central government departments

[1] Para.3.5, footnote 1.

[2] The Society (which was established in 1922 by the amalgamation of two local societies of officers) has a constitution whose declared objects are "1. The advancement of the profession. 2. The establishment of a uniform scale of charges. 3. The consideration and discussion of all subjects connected with the profession. 4. The doing of all such other things as are incidental or conducive to the attainment of the foregoing". The Society is a member of the "Union Internationale des Huissiers de Justice et Officiers Judiciaires" whose member societies represent enforcement officers in many European countries.

(e.g. in relation to new legislation), local authorities (e.g. in relation to summary warrants for recovery of rates), the Lord President of the Court of Session and the Rules Councils (e.g. in relation to amendments of acts of sederunt), the sheriffs principal (in relation to a wide range of matters), and tribunals (e.g. in relation to the enforcement of their awards). The Society also provides information (including statistics) and comments on law reform proposals when called upon to do so by advisory bodies appointed by government. Further, the Society represents the interests of its members, and indeed of officers generally, when consulted by the Court of Session on amendments to the scales of fees. The Society has also been active in other respects, for example, in obtaining legal advice on legal difficulties which arise in practice and advising its members on the proper practice; in producing styles for use by officers in executing diligence; and in sponsoring the preparation of a training manual on the law and practice of citation and diligence.

6.17 Having regard to the range and nature of these activities, we think that, if the Society did not exist, it would be necessary in the public interest to create it. We have sympathy, therefore, with representations made to us that all officers of court should be required by law to be members of the Society. We do not think, however, that the Society should have power to expel a member with the effect of depriving him of his commission. Some external controls might also be needed on the level of membership subscriptions charged by the Society and on other matters, if membership of the Society were compulsory.

6.18 To elicit views, we suggest that <u>the powers of the Court of Session to make rules regulating officers of court should include power to require that all officers holding commissions should be members of the Society of Messengers-at-Arms and Sheriff Officers, subject to such conditions as the rules may provide, including a condition that expulsion of such an officer from the Society would not be permitted except by leave of the court.</u> (Proposition 30). We would not, however, regard compulsory membership as a first step towards the establishment of a self-disciplining and self-regulating "profession" or service of officers of court.

PART VII: SUMMARY OF PROPOSALS AND QUESTIONS FOR CONSIDERATION

We invite views on the following proposals and questions:-

Para.

Control of officers by courts rather than Government or central authority

1. The functions of appointment, supervision and discipline of officers of court should not be transferred to a government department or a central authority but should continue to be exercised by the sheriffs principal in relation to sheriff officers and, in accordance with Proposition 12 below, should be exercised by the Court of Session in relation to messengers-at-arms. — 2.10

Regulatory powers of Court of Session, and Officers of Court Council as advisory body

2. (1) It is suggested that the Court of Session's existing powers to make rules regulating messengers-at-arms and prescribing fees for citation and diligence should be replaced by wider statutory powers to make rules regulating and controlling the service of messengers-at-arms and sheriff officers and generally the administration of the system of citation and diligence. These rule-making powers might cover the following specific matters so far as not already regulated by statute, namely:- — 2.17

(a) the training and qualifications of officers of court and the award of commissions to them;
(b) the organisations of officers of court in partnerships, associated firms or otherwise;
(c) the procedure with respect to the discipline of sheriff officers;
(d) the keeping of records and accounts by officers of court and the audit and inspection of these records and accounts;

Para.

(e) if an inspector of officers of court were appointed, the regulation of his functions;

(f) the standards of conduct to be observed by officers of court in the performance of their functions and the prohibition or regulation of extra-official activities;

(g) the prescription of fees chargeable for diligence or citation.

(2) It is further suggested that a new standing advisory body (which might be called the Officers of Court Council) should be established by statute to advise the Court of Session on the making and amendment of the foregoing rules and generally to keep under review all matters relating to the administration of citation and diligence. The Court of Session should be required to consult the Officers of Court Council and the sheriffs principal before making rules under the foregoing powers. (3) It is suggested that members of the Officers of Court Council should be appointed by the Lord President except for lay members appointed by the Secretary of State. A judge of the Court of Session should be chairman and the Council should include persons representing the sheriffs principal, the officers of court and the legal profession as well as lay members representing the interests of creditors and debtors.

Retention of separate offices of messengers-at-arms and sheriff officers

3. The separate offices of messengers-at-arms and sheriff officers should be retained and should not be replaced by one service of citation and enforcement officers authorised to execute the warrants of the Court of Session and sheriff courts. 2.20

Para.

Demarcation of functions as between messengers-at-arms and sheriff officers

4. (1) As a general rule, Court of Session warrants for citation and diligence should be executed only by messengers-at-arms and sheriff court warrants only by sheriff officers. (2) Accordingly, it should be clearly provided by statute that a messenger-at-arms is not authorised by his messenger's commission to execute citation or diligence in connection with sheriff court proceedings or to execute summary warrants for the recovery of rates and taxes, without prejudice, however, to his authority to execute the warrants of a particular sheriff court by virtue of a commission as sheriff officer. (3) These proposals are not intended to affect section 1 of the Execution of Diligence (Scotland) Act 1926 (which confers on sheriff officers the powers of messengers-at-arms in certain cases). (4) Where a statute provides for the enforcement of an order of a tribunal or other body "in like manner as a recorded decree arbitral", should the statute be amended to require registration of the order for execution in the Books of Council and Session or sheriff court books or should special provisions be enacted making it clear that, say, a messenger-at-arms and a sheriff officer of the district in which the place of execution is situated, are authorised to act? — 2.26

Appointment and training of sheriff officers

5. (1) The Court of Session, acting on the advice of the Officers of Court Council whose establishment we have proposed should be under a statutory duty to prescribe by act of sederunt rules governing the training and qualifications of sheriff officers. — 3.6

Para.

(2) In principle, these rules should be applicable throughout Scotland. The rules should regulate the apprenticeship of entrants to the sheriff officers' service, require the holding of written examinations, and the issue of certificates of competence to ensure uniformity of training standards and qualifications at a national level. (3) Consideration should be given by the competent authorities after consulting the Society of Messengers-at-Arms and Sheriff Officers and other interests concerned to the provision or approval of a manual for use in training sheriff officers and its periodic revision. Consideration should also be given to the introduction of a formal programme for the training of sheriff officers using methods appropriate to the small number of persons who enter the service at any one time. (4) A certificate of competence issued in terms of the act of sederunt should be conclusive evidence of competence in an application for appointment as sheriff officer in any court district.

Aspects of the organisation of sheriff officers

6. (1) The organisation of sheriff officers in firms is an essential feature of the independent contractor system and should be retained. (2) Sheriff officers should continue to be permitted to employ other sheriff officers to execute citation and diligence in areas for which the latter hold commissions. (3) No change should be made in the existing discretionary powers of the sheriffs principal to make appointments granting commissions for sheriffdoms or districts having regard to the public interest, which is paramount, and the interests of the applicant and any objectors. 3.14

Disciplinary proceedings

Para.

7. (1) The powers of the sheriff principal to deal with complaints against sheriff officers of misconduct should be widened to cater for exceptional cases involving disputed matters of fact where the difficulty of investigation or the seriousness of the complaint make it inappropriate that the sheriff principal should both investigate and dispose of the complaint himself. (2) Accordingly, the sheriff principal should have power, following a complaint not answered by the sheriff officer to the satisfaction of the sheriff principal, to appoint a solicitor to investigate the complaint and, if the solicitor is so advised, to present the case before the sheriff principal. (3) The hearing of the case should be in private unless the sheriff officer himself wishes a public hearing. The officer should have fair notice of the case and a right to legal representation. (4) It is envisaged that the sheriff principal would give reasons for his decision, at any rate where the sheriff officer is penalised. The decision should not be subject to appeal though it would as at present be subject to reduction by the Court of Session for an abuse of natural justice. The sheriff principal should, however, have power to state a case on a question of law for the opinion of the Court of Session. (5) It is envisaged that in cases involving multiple commissions, orders for suspension or deprivation of office would be intimated to any other sheriff principal from whom the officer holds another commission and that sheriff principal would have a discretion to suspend, or as the case may be, to deprive the officer of his other commission without further proceedings. Similar provision should be made relating to a messenger's commission held by the sheriff officer. (6) Ancillary provision would be needed as respects the payment of expenses and outlays in disciplinary proceedings, the clarification and extension of powers to impose penalties and related matters.

3.17

Para.

8. (1) New provision is needed to extend the arrangements for the audit and taxation of diligence fees and outlays charged by sheriff officers against creditors and recoverable from debtors. It would not be satisfactory merely to leave it to the debtor to request an audit and taxation. (2) The main options appear to be (a) an audit by the sheriff clerk of the fees charged in respect of each and every step of diligence (including diligence under certain categories of summary warrants); or (b) an audit made in the course of poinding at two stages (viz. on lodging the report of poinding and at the end of the proceedings) and in the case of an arrestment, after it has been laid; or (c) a system of inspection or unscheduled checks of diligence processes to be undertaken by an official responsible to the sheriff principal. It is thought that (b) or (c) would be more cost effective, but views are invited on the question whether either of these solutions or some other solution should be adopted. — 3.30

Supervision of sheriff officers' conduct

9. Provision should be made enabling the sheriff principal, from time to time, to appoint a suitable person or a small committee of persons (e.g. a sheriff clerk, a senior sheriff officer and an accountant or other lay person as appropriate) to inspect the work of particular sheriff officers in executing diligence and citation and in conducting extra-official activities and to make a report thereon to the sheriff principal. This power should be exercisable even in the absence of complaint by any member of the public. The expenses of the inspection and report would be chargeable to the Exchequer. — 3.35

Para.

Territorial competence of sheriff officers

10. (1) We reject the suggestion that sheriff officers should be entitled to act anywhere and everywhere in Scotland on any business of the sheriff courts. (2) Where, however, sheriff court warrants for citation or diligence have effect (with or without endorsation) and require to be enforced outwith the district or sheriffdom of the court granting the warrant, the warrant should in all cases be capable of execution either by a sheriff officer of the court granting the warrant or a sheriff officer of the court of the place of execution. (3) Where a complaint arises about a sheriff officer's conduct in executing a warrant of his own court outside his district, or in executing in his own district a warrant of another court, the complaint should (as at present) be dealt with in the first instance by the sheriff principal from whom the sheriff officer holds his commission, but where this would require a sheriff principal to conduct an enquiry in another sheriffdom, he should have power to refer any part of the enquiry to the sheriff principal of that sheriffdom so that the enquiry may be conducted locally. — 3.41

APPOINTMENT, ORGANISATION, CONTROL ETC OF MESSENGERS-AT-ARMS

Qualifications for appointment as messengers-at-arms

11. (1) A person should be eligible to apply for and to hold, a commission as messenger-at-arms only if he holds a commission as a sheriff officer. (2) Rule 52 of the Rules of the Court of Session should be amended to make it clear that a messenger-at-arms may be an employee of another messenger- at-arms. — 4.5

Para.

Powers of appointment, supervision and control of messengers-at-arms

12. (1) It is suggested that the powers and jurisdiction to appoint, discipline and control messengers-at-arms presently vested in the Lyon King of Arms should be transferred to the Court of Session. (2) The Court of Session should have powers (similar to those proposed to be conferred on sheriffs-principal at Proposition 7 above) backed by suitable financial provisions to appoint a solicitor to investigate complaints against a messenger-at-arms and to present the case before a judge of the Court of Session (nominated by the Lord President). (3) Where a sheriff officer who is also a messenger-at-arms is dismissed or suspended by the sheriff-principal from whom he holds a commission, that fact should be intimated to the Court of Session who would consider whether he should be allowed to retain the office of messenger-at-arms. By the same token, a decision by the Court of Session to suspend or dismiss a messenger-at-arms should be intimated to any sheriff principal in whose sheriffdom the messenger holds a commission as sheriff officer. (4) The Court of Session should also have the same powers as are proposed for sheriff principals in Proposition 9 to appoint suitable persons to inspect the work of particular messengers-at-arms and it is envisaged that joint appointments covering the execution of Court of Session and sheriff court warrants could be made, with reports to the Court of Session and sheriff principal concerned. 4.9

REGULATION OF STANDARDS OF CONDUCT

The duty to execute diligence when instructed

13. The provisions of Rule of Court 48 (duty of messengers to serve lieges in the way of their office) should be replaced by a new statutory rule applying to 5.5

both messengers and sheriff officers requiring them to execute diligence and citation when instructed, but entitling the officer to refuse to act if -

(a) his prescribed expenses, or a reasonable estimate thereof, are not tendered or secured by the instructing party, or his agents; or

(b) the proposed provisions on disqualification require him to refuse to act; or

(c) it is not reasonably practicable for the officer to carry out the instructions timeously because of pressure of other business or for other reasonable cause, and the officer intimates this to the instructing party without delay.

<u>Restrictions on extra-official employment for a wage or salary and other extra-official activities incompatible with office</u>

14. (1) A new rule should be enacted prohibiting a sheriff officer from entering into employment for a wage or salary or from undertaking a profession, trade or business except with the written authorisation of the sheriff principal having disciplinary authority over him. (2) The sheriff principal should be empowered to refuse or to revoke an authorisation on the ground (a) that the extra-official activity in question is incompatible with the nature and functions of the office of sheriff officer, or (b) that it would or does interfere, with the officer's performance of his official functions. (3) Rule of Court 52 (prohibition of messengers-at-arms from acting as employees) should be revoked. If (as suggested in Proposition 11) all messengers-at-arms were also sheriff officers, it would be unnecessary to provide for authorisations being granted by the Court of Session, and an officer would seek authorisation in his capacity as sheriff officer. (4) Views are invited on the question whether any extra-official activity (other than debt collection which is dealt with below) — 5.9

Para.

should be specifically prohibited as incompatible with the office of messenger or sheriff officer. (5) It is for consideration whether penalties for the unauthorised performance of extra-official activities should be prescribed by the rules or should be within the discretion of the sheriff principal. (6) Records should be kept by sheriff clerks of authorised extra-official activities in respect of each officer. (7) Nothing in the rules should prevent a sheriff officer from being in the employment of another sheriff officer or a messenger from being in the employment of another messenger.

<u>Prohibition on officer of court enforcing debt in which he or relative etc has an interest</u>

15. (1) Rule of Court 50 (no sum other than fees to be exacted by messenger) should be replaced by a rule applying to sheriff officers as well as messengers which would prohibit officers from collecting or enforcing by diligence debts due to themselves as individuals. (2) Nothing in the foregoing rule, however, should prevent an officer from recovering on the creditor's account the fees and expenses of diligence recoverable from the debtor. 5.13

16. (1) An officer should also be disqualified from enforcing by diligence debts due to a company or firm (a) if the officer is a director of the company or a principal or partner in the firm; or (b) the business of the company or firm includes the purchase or acquisition of debts for enforcement by the company or firm as creditor and the officer has a pecuniary interest, however small, in that company or firm. (2) It is for consideration whether in addition a substantial pecuniary interest in other types of company should disqualify 5.15

Para.

the officer from enforcing debts due to the company as creditor and, if so, whether and how that substantial interest should be defined.

17. (1) An officer should be disqualified from executing diligence to enforce debts due to his business partners, employers or employees or to his spouse. (2) An officer should be disqualified from enforcing debts due to a near relative or other person only if it is established that he thereby derives pecuniary benefit, other than by way of diligence fees or possibly a commission for collecting the debt.	5.19
18. An officer's disqualification should also extend to debts due to a company (including a partnership or other corporate or unincorporate body) in which a business partner, employer or employee or spouse of the officer has an interest of a kind which (in terms of Proposition 16 above) would have disqualified the officer himself from acting if the interest had belonged to him.	5.20

<u>Debt collection by officers before decree</u>

19. The rules on the standards of conduct of messengers and sheriff officers should expressly prohibit them from purporting to act in that capacity when collecting debts before the debts have been constituted by decree.	5.27
20. Views are invited on the following questions and suggestions:-	5.35

(1) Should officers of court continue to be allowed to operate or have an interest in, debt collection agencies whose business consists of or includes the collection of debts before decree?

Para.

(2) Should officers of court be allowed to collect debts before decree by demanding payment in their own name as the creditor's agent without use of the designations "messenger-at-arms" and "sheriff officer"?

(3) If the answer to questions (1) or (2) is affirmative, it is suggested that (a) the authorisation of the sheriff principal should be required before such business is undertaken; and (b) a record or register of authorisations and of interests in debt collection agencies should be kept by the clerks of court.

(4) A sheriff officer or messenger acting as debt collector before decree should be prohibited by the rules regulating his conduct from demanding payment from the debtor of a collection charge to reimburse himself or the creditor for the expenses of the collection except in those (rare) cases where the charge is legally enforceable (i.e by virtue of a provision in the original contract constituting the debt).

(5) A sheriff officer or messenger should also be prohibited from having an interest in a debt collection agency collecting debts before decree if the agency requires payment from debtors of collection charges which are not legally enforceable.

(6) It is for consideration whether an interest of an officer's spouse, near relative or business associate in a debt collection agency should disqualify the officer from enforcing debts on the instructions of the agency; or whether the practice should be allowed subject to authorisation by the court and the keeping of records by the courts of those interests.

Para.

Debt collection by officers after decree

21. (1) It should be provided by legislation or statutory rules - 5.45

(a) that the collection of debts which have been constituted by decree (including a decree of registration) forms part of the official functions of messengers and sheriff officers;

(b) that in the absence of contrary instructions, a creditor's mandate to an officer of court to execute diligence or a step in diligence includes by implication a mandate to receive payment of the debt (principal, interest, judicial expenses and diligence expenses); and

(c) that an officer's bond of caution should be extended to cover debts collected in pursuance of decrees.

(2) Views are invited on whether the protection of creditors and debtors would be adequately achieved by the proposal at para. (1)(c) above or whether rules would be needed requiring the keeping of accounts as to creditors' money and the audit of these accounts.

Separation of functions as between officers of court and solicitors

22. (1) Views are invited on the question whether new provision applying to officers of court is needed to ensure that the functions of officer of court and solicitor are kept separate or whether it is sufficient to rely on the provisions of the Solicitors (Scotland) Act 1933 for this purpose. 5.49

(2) An officer of court should be prohibited from sharing the same business premises as a solicitor whether or not the officer and solicitor regularly instruct each other.

Para.

Collusive sales of poinded goods

23. Rule of Court 51 (no messenger to purchase goods sold under diligence) should be replaced by a rule applying to messengers and sheriff officers and providing a penalty of dismissal where the officer or any person acting on his behalf purchases at a warrant sale goods which the officer has poinded or where the officer shares in the proceeds of a resale by a creditor to whom the poinded goods have been adjudged and delivered. 5.52

Specific duties and rights of officers on receipt of instructions

24. (1) Consideration should be given to the enactment of uniform rules for messengers and sheriff officers (replacing Rule of Court 49) requiring an officer (a) on receipt of instructions to carry out these instructions without delay and (b) if unable to carry out the instructions to report the situation to the instructing creditor forthwith; and providing a more appropriate penalty than is provided by Rule of Court 49. (2) No change should be made in the present rule of practice whereby a solicitor instructing an officer of court becomes thereby personally liable for the officer's fees. 5.56

Advertising and soliciting for business by sheriff officers and messengers-at-arms

25. While it is envisaged that the proposed powers of the Court of Session to regulate standards of conduct should include power to control advertising and soliciting for business by officers of court, controls of those matters appear unnecessary at the present time. 5.57

Para.

Enforcement of child delivery orders etc

26. (1) The rules regulating the conduct of officers of court should provide that in the normal case an officer of court instructed to enforce a child delivery order should intimate his intention of doing so to the local social work department, and should request that a social worker of the department accompany the officer when he takes possession of the child. The foregoing rule should not, however, apply in cases of urgency (such as the imminent removal of the child from the jurisdiction) where the delay caused by making the intimation or securing the attendance of the social worker would be likely to result in failure to enforce the order. (2) It is for consideration whether a similar rule requiring a like intimation and request to the social work department should be applied to the enforcement of warrants for ejection of persons from their dwellinghouses. — 5.60

Liability of officer to creditor

27. (1) The measure of the damages for which an officer may be liable to a creditor for negligent delay in executing diligence against property should be the loss suffered by the creditor, viz the difference in amount between what would have been attached if the diligence had been executed at the proper time and what was actually attached. (2) No further change need be made in the rules on the personal liability of messengers-at-arms or sheriff officers for wrongous diligence or other fault in the execution of their functions. It should be recognised, however, that these rules are not an adequate substitute for supervision and control of officers by the courts. — 6.8

Para.

Official identity cards

28. (1) Sheriff officers should be provided with official identity cards which they should be bound to carry with them, and exhibit on request, when performing their official functions. It should be a defence in proceedings for deforcement that the officer in question failed to exhibit his identity card when reasonably required to do so. (2) It is for consideration whether an official identity card should be supplied to messengers-at-arms and whether messengers should be authorised, or possibly required, to use it (in the same way as sheriff officers would under the foregoing proposal) in place of the messenger's traditional wand and blazon. 6.11

Statistics on diligence

29. (1) The Judicial Statistics (Scotland) Act 1869 should be amended to enable the competent authorities to require messengers-at-arms and sheriff officers to make annual returns of the diligences executed by them. (2) The administrative machinery for making the returns should preserve confidentiality as to the volume of business undertaken by self-employed officers or firms of officers. (3) In principle, the cost of the work involved in making the returns should be borne by the Exchequer. 6.15

Membership of Society of Messengers-at-Arms and Sheriff Officers

30. The powers of the Court of Session to make rules regulating officers of court should include power to require that all officers holding commissions should be members of the Society of Messengers-at-Arms and Sheriff Officers, subject to such conditions as the rules may provide, including a condition that expulsion of such an officer from the Society would not be permitted except by leave of the court. 6.18