Scottish Law Commission
(SCOT LAW COM No 128)

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ANNUAL REPORT
1989–90

Laid before Parliament by the Lord Advocate
under Section 3(3) of the Law Commissions Act 1965

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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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SCOTTISH LAW COMMISSION

Report for the year ended 15th June, 1990

To: The Right Honourable the Lord Fraser of Carmyllie, QC,
   Her Majesty's Advocate

In accordance with section 3(3) as read with section 6(2) of the Law Commissions Act 1965, as amended, we have the honour to submit this the Twenty-Fifth Annual Report of the Scottish Law Commission.

(Signed) C K DAVIDSON, Chairman
E M CLIVE
PHILIP N LOVE
IAIN MACPHAIL
W A NIMMO SMITH

KENNETH F BARCLAY, Secretary
3 September 1990

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Part I  General survey of the past year

1.1 The year covered by this report ended on 15 June 1990. That date marked the twenty-fifth anniversary of the two Law Commissions. On 25 June you and the Lord Chancellor were among those who celebrated the Silver Jubilee of the Commissions at a reception kindly given by the English Commission in the Old Hall at Lincoln’s Inn. In his speech the Lord Chancellor reviewed in generous terms the achievements of the Commissions over their first quarter century and expressed admiration for the notable contribution which they had made, both jointly and separately, to the progress of law reform. As the English Chairman, Sir Peter Gibson, reminded us, the Lord Chancellor’s tribute reflected his own close concern with law reform, having contributed as a Scottish Law Commissioner to the formulation of recommendations and thereafter as Lord Advocate and Lord Chancellor having been responsible for the implementation of reports submitted to him. Before proceeding to a review of our twenty-fifth year, we take this opportunity to express appreciation of the scholarship, industry and good sense that Commissioners and staff members have brought to their work over the past twenty-five years. In most areas of our work, however, we have to an increasing extent enjoyed the advantage of building on foundations carefully laid by our predecessors.

1.2 We are glad to report the virtual completion of a project relating to choice of law in tort and delict undertaken jointly with the English Commission. This project posed issues of unusual difficulty and gave rise to divergences of view between and within both Commissions. Recently our outstanding differences have been resolved, a report has been prepared, and a draft Bill is under consideration. We hope to submit our report in the near future.

1.3 Continuity in co-operation with the English Commission will be ensured by a reference made to each Commission in April 1990 by the Department of Trade and Industry. Our remit is to examine the principles which should govern the effect of statutory and non-statutory controls on the fiduciary duties of professional and business activities, particularly in relation to financial services. The two jurisdictions have different trust laws, but in answer to our preliminary enquiries Scottish financial institutions have indicated that a distinctively Scottish contribution to the reference will be based upon more than mere differences of law. Since we are not familiar with the workings of Scottish financial services, we intend, following the initiative taken by the English Commission, to find out from those who provide such services in Scotland what they consider to be the main difficulties. Once that enquiry has been completed, we intend to go on to the preparation of a consultation paper.

1.4 In August 1989 we published a Discussion Paper entitled *Bulk Goods—Section 16 of the Sale of Goods Act 1979 and Section 1 of the Bills of Lading Act 1855*.1 Two months earlier the English Commission had published a Working Paper entitled *Rights to Goods in Bulk*.2 Although the two papers revealed differences of approach to some of the issues raised, subsequent consultation between the two Commissions led to a harmonising of opinions. The Commissions agreed to concentrate attention in the first place upon reform of section 1 of the Bills of Lading Act 1855. The main defect of section 1 is that the rights which that provision confers upon the consignee of goods under a Bill of Lading depend on a passing of the property to him under the Bill. The option for reform of section 1 which we have found most attractive is a reformulation of the section so as to sever the link between passing of property

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and the rights of the consignee. A reform along these lines would, in broad generality, be consistent with the terms of current Conventions regulating the international carriage of goods by air, road and rail. We are confident that the terms of a joint report, together with a draft Bill, will be agreed in the near future. The Commissions have agreed that, once the report on the Bills of Lading Act 1855 has been submitted, we shall carry out a more detailed examination of section 16 of the Sale of Goods Act 1979 in order to determine whether or not it would be advantageous to reform that provision so as to enable a buyer of a quantity of goods out of an identified bulk to acquire an interest in the goods, as an owner in common, while the bulk remains undiminished.

1.5 In April 1990 the Lord Chancellor asked the English Commission to examine the law relating to payments made but not legally due, and in particular the common law rule that payments made under a mistake of law are irrecoverable. At present the common law of the two jurisdictions on recovery of money paid under error of law is substantially the same. One reason for this similarity is that English rules have influenced Scots law on the subject. If proposals made for the amendment of the English rules are implemented, and our law is left unchanged, unacceptable anomalies could arise, especially in respect of payments made to or by public authorities. We have therefore decided to carry out a limited exercise on the redress of unjustified enrichment arising from benefits conferred under error, with particular reference to the need to abolish or amend the error in law rule, and possible amendment of the law on benefits conferred under error of fact. The scope of this exercise is wider than that undertaken by the English Commission in so far as it includes error of fact as well as error of law, and that it is not restricted to money payments but extends to benefits of all kind however conferred. We are aware of an imbalance in Scottish legal literature in that, whereas obligations having their origin in contract and delict are elaborately discussed in modern textbooks, the treatment of unjustified enrichment has been sparse. As a first step therefore we consider it essential to frame a research paper on the existing law which may become the basis of a discussion paper. Mr D R Macdonald of Dundee University has undertaken to submit to us a research paper covering, among others, the question whether the common law error of law rule should be abolished or amended. His paper will also discuss the extent to which error of fact is a ground for the redress of unjustified enrichment and advise whether the law relating to that ground should be amended or its scope clarified by statute.

1.6 Our report on Succession, which was published in January 1990,1 contains important recommendations for reform. Our own researches, the contributions of consultees and the result of public opinion surveys have persuaded us that the existing rules for distributing intestate estate of a deceased person are unduly complicated and often do not achieve a fair result. Factors giving rise to complexity include the three sets of rights which vest in a surviving spouse, namely prior rights, legal rights and rights in residue as well as the distinction maintained in succession between heritable and moveable property. The element of unfairness can be illustrated in the case of the surviving spouse of a childless marriage who may be obliged to share a small estate with a brother, sister and parent of the deceased. Unfairness can also arise in the succession to a deceased who is survived by a spouse and children. The amount of the estate taken by the surviving spouse depends not only on the size of the estate, but on whether the deceased was the owner or tenant of the family house; if he was the owner, whether the house was subject to a building society loan; and on the respective values of the heritable and moveable parts of the estate. One major reform which we recommend is elimination for the purposes of succession of the distinction between the heritable and moveable parts of the estate. In another major reform we recommend a simplification in intestate succession so that, in the event of the deceased leaving no descendants, the surviving spouse would inherit the entire estate. In the event of the deceased leaving descendants, the surviving spouse would succeed to £100,000 and one half of any excess, the descendants succeeding to the remaining half. If these recommendations are implemented, one consequence will be an improvement in the position of the surviving spouse, who in most cases will

succeed to the entire intestate estate, a result which we believe would be approved over a wide range of informed opinion.

1.7 In our report on Succession we also recommend modifications to the legal protection against disinherintance afforded to the surviving spouse and children of a deceased person. Under existing law the surviving spouse and children can opt between taking whatever the will gives them and taking a fixed share of the moveable estate, the amount of that share being one half or one third, depending on circumstances. Our recommended reform would retain the system of fixed shares for the surviving spouse and children, but subject to important modifications. A legal share would be payable out of the entire estate, heritable and moveable, and it would have to be claimed within two years of the deceased’s death. In cases where all or most of the estate is bequeathed to the surviving spouse, the amount of the children’s legal share would be restricted. In all cases the surviving spouse would be entitled to 30% of the first £200,000 and 10% of any excess. The same level of legal share is recommended for the children in the event of the deceased’s spouse not surviving. If a spouse does survive, the amount of the children’s legal share would be halved, and they could not claim any legal share out of the first £100,000 of an estate which a surviving spouse inherits as far either by will or on intestacy.

1.8 We have made the following additional recommendations about succession:

(a) Unless the will provides otherwise, testamentary bequests in favour of a spouse should be cancelled automatically by a later divorce.

(b) Abolition of the rule that a child born after the execution of a will containing no provision in its favour can apply to the court for the entire will to be set aside. In our view it would be fairer to provide that the few children who fall into this category should, like other children for whom no testamentary provision is made, claim a legal share of the estate.

(c) Occasionally wills are not properly signed or witnessed, with the result that the writing has no testamentary effect. We recommend that the court should be entitled, on being satisfied about the deceased’s testamentary intention, to declare such a writing to be a valid will.

(d) The court should also be entitled to order rectification of a will where the person drawing it up has not given effect to the deceased’s instructions.

1.9 The recommendations for reform of the law of succession which are summarised above are the most important and wide-ranging to be put forward since the enactment of the Succession (Scotland) Act 1964. The 1964 Act gave effect to recommendations published by Lord Mackintosh’s Committee in 1950. While we recognise that some of our recommendations are controversial and that adequate time must be allowed for them to be publicised and debated, we trust that no delay such as that which befell the Mackintosh Committee’s reforms will separate the publication of our report and the introduction of a Bill in Parliament. These latest proposals for reform of the law of succession are the fruit of detailed investigation and the commitment of substantial resources over several years. If, as we believe, their enactment, in whole or in part, is likely to confer considerable public advantage, then it is plainly desirable that a draft Bill be presented to Parliament without undue delay so that, if it is enacted, the benefit of a new regime can be enjoyed by the Scottish public at an early date.

1.10 During the year under review we have made good progress on various aspects of the law of diligence. Before the end of 1990 we hope to publish a discussion paper on the Extra-Territorial Effect of Arrestments and Related Matters. Although the main issue is one of general importance, it is of prime concern to clearing banks and other financial institutions which have branch offices both in England and in Scotland. If an arrestment is laid in Scotland, there is doubt as to whether, and, if so, in what circumstances, that arrestment attaches debts which for ordinary purposes are located outside Scotland. Since the total credit and indebtedness of the defender have to be taken into account in determining whether he is truly a creditor of the arrestee, there is obvious force in the contention that such an arrestment has, and should have, extra-territorial effect. Doubts have, however, been expressed as to whether, on the
ground that it is exorbitant, such an arrestment would be refused recognition in other jurisdictions. We shall therefore invite views as to whether, and, if so, how the law on the extra-territorial effect of arrestments should be clarified by statute. In the discussion paper we shall also canvass a proposal that where a creditor and a debtor both bring enforcement proceedings against a third party in Scotland and in another country in respect of the same debt, the Scottish courts should have a statutory power to protect the third party from double jeopardy by recalling the Scottish enforcement proceedings. The absence of such a power in the Scottish courts at present is in contrast to the position in England, where the courts have recently intervened to protect third party garnishees from double jeopardy.

1.11 We are grateful to the Law Society of Scotland for drawing our attention to the current failure of Scots law to conform to the Brussels Arrest Convention of 1952 or to English law in respect that in an action in personam against a demise charterer of a ship arrestment on the dependence of that ship is not competent. Since this is a matter of restricted interest, in March 1990 we circulated a consultation paper on Arrestments of Ships Securing Claims Against Demise Charterers among a short list of consultees.

1.12 In December 1989 we published Discussion Paper No 84 on Diligence on the Dependence and Admiralty Arrestments. One of the main proposals submitted for consultation in that paper is that a warrant for diligence on the dependence should no longer be automatically available to a pursuer. Instead of that it is suggested that a discretionary power should be conferred on the court to grant or refuse a warrant in response to the pursuer's ex parte application. Alternatively, it is suggested that the pursuer should have to elect between obtaining a warrant automatically, but subject to the condition that in the event of the action failing the pursuer would incur strict liability for any loss suffered by the defender in consequence of the diligence, and making application to the court for a warrant on cause shown. If the pursuer opts for the latter course he would not be liable to the defender in damages in the event of the action failing unless he had caused the court to grant the warrant by making misleading statements.

1.13 In considering whether the courts should be required to exercise a discretion over the grant or refusal of a warrant for diligence on the dependence, one of the factors which has to be weighed is the likely effect of such a change upon court resources. It will also be necessary to assess the strength of the objection that automatic granting of warrant for diligence on the dependence is productive of hardship and injustice to some defenders. In May 1990 we published Discussion Paper No 87 on Statutory Fees for Arrestees. It is possible that implementation of the proposals contained in this paper could ease the difficulty involved in making the allowance of diligence on the dependence a matter of discretion for the court. Information supplied by the Committee of Scottish Clearing Bankers has revealed that during the decade between 1978 and 1988 the total number of arrestments used increased sixfold. On the other hand, the figures supplied for 1987 show that 94% of all the arrestments used attached no funds. In Discussion Paper No 87 we submit for consultation a statutory scheme for payment of arrestees whereby deposit-taking institutions would not be bound to comply with arrestments served upon them unless the arrester first tenders payment of a statutory fee determined in accordance with a sliding scale which broadly reflects the number of branch offices where search has to be made. In the event of the action succeeding the arrester would be entitled to recover the expenses of the arrestment from the defender; should the action fail, these expenses would not be recoverable by the arrester.

1.14 If a statutory scheme for payment for arrestees were to be brought into effect, it is reasonable to suppose that the total number of arrestments used would fall appreciably. On that assumption the case for allowing the court a discretion to grant or refuse warrant for diligence on the dependence might be strengthened. While we are aware of support in certain quarters for the granting of a discretionary power, the objections which we have outlined to such a regime indicate that it will be unusually difficult to work out a recommendation that secures a proper balance between the
competing interests. We are therefore anxious that all those who have practical experience in this important area of law should contribute positively to the debate.

1.15 We also made good progress with Adjudications for Debt and the Equalisation of Diligences. Although comments on our Discussion Papers No 78 and 79 have been few, they have been most valuable. In considering the modernisation of adjudications for debt we have also had regard to the position of creditors of the defender other than the adjudger. In this exercise we are grateful to the Joint Committee of the Law Society of Scotland and the Society of Messengers-at-Arms and Sheriff Officers for sharing their knowledge and experience with us.

1.16 We report significant progress in our work on property law. In the course of the year we have studied responses from consultees to Discussion Paper No 81 on Passing of Risk in Contracts for the Sale of Land. In considering the suggestion that the law be changed so that the risk of damage to or destruction of land should not pass from the seller to the buyer until the date of entry in the normal type of case, we have had to evaluate options for reform concerning such important details as identification of the date when risk should pass in various unusual circumstances and the legal consequences of the sale subjects being damaged or destroyed while the risk remains with the seller. We hope to submit our report on this matter in the near future.

1.17 We have made satisfactory progress with the preparation of a discussion paper on Land Tenure Reform. In directing our attention to abolition of the residue of the feudal system we have encountered difficulties, and consequently delays, in dealing with matters of detail, some of which are ancient and obscure. We have decided to give separate treatment to proposals for reform of the Law of the Tenement. A review of the existing law has revealed a surprising degree of uncertainty over detailed items which, although superficially of small consequence, are notoriously productive of tension and dispute between neighbours. We are therefore considering a new regime for the regulation of future tenements which would combine the merits of simplicity and broad equity. While we recognise that it would be disruptive to reform the law retrospectively for all existing tenements, we favour an extension of the jurisdiction of the Lands Tribunal whereby on payment of appropriate compensation by benefited to adversely affected proprietors the new rules should become applicable to an existing tenement by order of the Tribunal. We hope to publish our discussion papers on these subjects within the next few months.

1.18 In family law we have completed, and will soon publish, a discussion paper on Parental Responsibilities and Rights, Guardianship and the Administration of Children's Property. These areas of the law relating to children depend largely on the common law, much of which has become outmoded. In preparing our preliminary proposals we have studied the relevant experience of other jurisdictions, in particular the provisions of the Children Act 1989 which has introduced substantial changes into English family law.

1.19 In May 1990 we published Discussion Paper No 86 on the Effects of Cohabitation in Private Law. In recent years more and more couples have been living together in Great Britain as husband and wife without being married. Although this development has been more apparent in the south of England than in Scotland, the Scottish trend has in our view been sufficiently marked to make it necessary to canvass opinion as to whether, and, if so, how this phenomenon calls for a response in certain areas of private law. We have invited reaction from consultees on the following, among other, questions. If a cohabiting couple have bought household goods for joint domestic purposes while they have been living together, should each item belong to the buyer or should it belong to both of them equally? On the termination of cohabitation should the law allow one cohabitant to obtain financial compensation for economic advantages derived by the other party from contributions made by the claimant? Should the law allow a cohabitant any right to succeed to part of the other cohabitant's property if the latter dies intestate? If so, in what circumstances should such a claim be admitted? In the discussion paper we have attempted to set out the competing arguments on these matters fairly. We hope that they will stimulate an
informed public debate. In this area of law we are particularly concerned to have an accurate assessment of public perceptions. To that end we commissioned a public opinion survey which was carried out by System Three Scotland. Broadly, the results of this survey support our opinion that rights of cohabitants deserve to receive attention from law reformers. In addition, a large majority of those interviewed in the survey favoured an extension of the existing rights of cohabitants, especially in respect of intestate succession.

1.20 We hope that our programme on family law reform will culminate in consolidating legislation. In March 1990 we published Discussion Paper No 85 entitled *Family Law: Pre-Consolidation Reforms*. Among the reforms proposed for the modernisation and simplification of the law are the following:

(1) Marriage by cohabitation with habit and repute is the only form of irregular marriage which has survived. We propose its abolition, mainly on the ground that the relevant law is uncertain and potentially dangerous in its effect, because a later regular marriage may be challenged by an earlier unregistered marriage by cohabitation with habit and repute.

(2) Under existing law a person can marry the parent of a former spouse provided that both parties are over 21 years of age and that the former spouse and the other parent of that former spouse are both dead. We are not satisfied that these restrictions are justified, and we believe that our paper affords the first opportunity for a wide range of consultees in Scotland to express a view upon them.

(3) A marriage in Scotland is void if either party has gone through the ceremony with a secret mental reservation to the effect that no marriage is to result. While we accept that marriage is a contract of an unusual kind, we consider that, having regard to the nature and form of the ceremony, it should not be void merely because one of the parties had a tacit mental reservation.

(4) Our law provides that a marriage is voidable if at the time of the marriage either party was incurably impotent. Our preliminary view is that the appropriate way to dissolve such a marriage is not by an action of declarator of nullity but by an action of divorce.

(5) Because of the improved remedies available by way of aliment and occupancy rights we suggest that judicial separation has become outmoded and should be abolished.

(6) In conformity with the trend of recent legislation relating to family law we suggest that by express statutory provision no person whose status is governed by Scots law should be regarded as illegitimate.

1.21 As part of our work on Evidence we have made good progress on a topic which may have an important bearing on family law. Recent additions to the Rules of Court have empowered the court in actions concerned with the custody of, or access to, a child to refer the parties to a conciliation service. A question has arisen as to whether, and, if so, to what extent, communications passing between a conciliator and the parties to such a dispute should be confidential. There is a strong argument in favour of according a high degree of confidentiality to such communings, because otherwise the success of the conciliation procedure may be put at risk. On the other hand, the court has a duty to protect the interests of the child. Confidentiality would have to yield if a conciliator were to learn from one of the parties that the child had been, or was likely to be, the victim of a crime. Although this topic is being treated as an urgent one, before we publish a discussion paper we think it is desirable to obtain information about the working of conciliation in other jurisdictions. Once these enquiries have been completed, we intend to publish a paper without delay.

1.22 In September 1989 the Secretary of State for Scotland made a reference asking us to consider the case for amending the law of damages having regard to the possibility that there may be an incentive inherent in the present law for a defender to postpone settlement of a claim until after the pursuer’s death in order to minimise the amount of any compensation to be paid. This reference requires us to reappraise the arguments that persuaded this Commission in 1973 to submit proposals for reform of the
law which were implemented in the Damages (Scotland) Act 1976. Under that Act
the executor of a person who dies after sustaining personal injuries is entitled to
claim in respect of patrimonial loss—for example, loss of earnings—incurred by the
deceased between the date when he sustained the injuries and his death. On the other
hand, any claim that the deceased may have had for solatium in respect of pain and
suffering dies with him. It has been represented that this rule has produced hardship,
especially among the victims of dust diseases and their families. In some instances
the solatium awards made to such of these victims who survive long enough to obtain
a decree or a settlement are considerable, and very much higher than the awards for
loss of society made to dependants of those victims who die before obtaining decree
or settlement in their own claims. Having regard to the terms of the reference, we
obtained information by way of interview and written questionnaire from a number
of legal firms experienced in handling personal injury claims. Although fewer firms
responded to our request for information than we had hoped, we believe that we
gathered sufficient information from those who did respond to enable us to prepare
a discussion paper which we intend to publish very soon.

1.23 Our report on the Evidence of Children and Other Potentially Vulnerable
Witnesses was published in February 1990.¹ We propose changes in law procedure
in three areas.

(1) We recommend that the Lord Justice General be invited to issue a memo-
randum of guidance to judges on how best, in the exercise of their discretion,
to ease the strain experienced by children giving evidence by conventional
means. Expedients to be considered by the judge include the removal of wig
and gowns by those participating in the trial, enabling a child witness to give
evidence seated at a table along with the judge, counsel and solicitors, and
allowing a relative or other person to sit with the child while he or she gives
evidence.²

(2) It is recommended that primary legislation should empower a judge, subject
to certain conditions, to sanction any one of three procedures for taking a
child's evidence. These methods are the recording of the child's evidence on
video film at a commission held shortly before the date of the trial, the use
of screens in court to keep the accused out of sight of the witness, and the use
of closed-circuit television whereby the child's evidence is filmed in a room
apart from the court room.

(3) Relaxation of the law governing hearsay evidence. Instances have been
reported of a child who in an interview recorded on audio or video tape before
the trial gave a detailed and coherent account of a crime failing to repeat that
account at the trial. Under the existing law the account given at the interview
cannot be competent evidence of its contents at the trial. Our report recom-
mended that that restriction should be removed on condition that the court
is reasonably satisfied that the statement in question is complete and has been
accurately recorded and that it is adopted by the witness in court as being a
true account.

1.24 Implementation of parts (2) and (3) of our recommendations above would
create practical difficulties. The importance attached in Scotland to identification of
the accused in court means that in some trials the commission procedure may be of
little or no value, and the same factor may lessen the value of closed circuit television.
In relation to child witnesses therefore it may become necessary to place greater
reliance upon pre-trial identification of the accused. Further, if there is any merit
in our recommendations for modification of the hearsay rule, then, on principle, these
recommendations should not be restricted to the evidence of children and other
vulnerable witnesses. Because this latter reform, if implemented, may have an
important bearing on the outcome of many criminal trials, we have agreed to recon-
sider the recommendations about hearsay in preparing our report on Criminal Evid-
ence, Affidavit Evidence, Hearsay and Related Matters in Criminal Proceedings.

¹. Scot Law Com No 125.
². The Lord Justice General has now issued an appropriate memorandum in the light of our recommenda-
tions.
1.25 The need to give priority to some commitments in law reform has forced us to slow down the pace of other projects. Our examination of procedures for regulating multiple claims has been delayed both by reason of other more urgent work and by difficulties inherent in the remit. Further, we do not consider it worthwhile to resume work on rights in security over moveable property until the Department of Trade and Industry has indicated whether, and, if so, how it proposes to implement for Scotland the report on the Review of Security Interests in Property prepared by Professor A L Diamond. In criminal law we have nearly completed work on our remit on Forfeiture and Confiscation. We are, however, reluctant to embark upon any substantial criminal reference so long as no staff member of the Procurator Fiscal Service is seconded to us.

1.26 Following on submission of the Thirteenth Report on Statute Law Reform,¹ the Statute Law (Repeals) Act 1989 was enacted in November 1989. We report, with regret, that during part of the year under review owing to the urgent demands of law reform we have been unable to maintain our normal level of co-operation with the English Commission. This unsatisfactory state of affairs was temporary and has been remedied. We have continued to help our English colleagues on the preparation of the chronological table of local legislation. In addition, we have advanced the rationalisation of pre-1975 Scottish local authority private legislation. This latter exercise requires co-operation from Scottish local authorities. Our work has suffered because the resources available for this purpose to local authorities, as well as to ourselves, are exiguous.

1.27 The work of consolidating Scottish legislation proceeds steadily. The topics currently being dealt with are crofting, criminal procedure and town and country planning. In accordance with recent practice we have, where appropriate, broken down the legislation into constituent parts in order to make the resulting consolidation more convenient for the reader. We believe that the pace of consolidation would be considerably quickened once a computer database is created containing all United Kingdom public acts. We contributed to the feasibility study submitted by the Lord Chancellor’s Department to the Treasury in March 1990. We are firmly of the opinion that the recommendation made in the study that funds be made available for the project is soundly based, and we look forward to a favourable response from the Treasury.

1.28 We draw attention to the fact that recently the number of our recommendations awaiting implementation has increased substantially. Among them are those contained in our reports on the Legal Capacity and Responsibility of Minors and Pupils,² the Requirements of Writing,³ Civil Liability—Contribution,⁴ Recovery of Possession of Heritable Property⁵ and Prescription and Limitation of Actions—Latent Damage and other Related Issues.⁶ There is, however, cause for satisfaction in that the Consumer Guarantee Bill at present before Parliament seeks to implement recommendations made by both Commissions in a joint report on Sale and Supply of Goods published in 1987.⁷ In addition the Term and Quarter Days (Scotland) Bill, which implements our report on the Scottish Term and Quarter Days⁸ and was introduced by Mr Bill Walker MP, successfully completed its passage through Parliament and received Royal Assent on 13 July 1990.

1.29 In January 1990 Sheriff C G B Nicholson QC left the Commission to take up duty as Sheriff Principal of Lothian and Borders. His place was taken by Sheriff Iain Macphail QC. We welcome Sheriff Macphail whose wide knowledge of evidence and procedure has already proved most valuable to our work. It is a pleasure to record our gratitude to Sheriff Principal Nicholson who during his seven year period of

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service with the Commission initiated important recommendations for law reform, particularly in evidence and criminal law. It is satisfying to note that our report on *Computer Crime*,¹ for whose preparation he was largely responsible, has recently found widespread acceptance and, in part, has been implemented in the Computer Misuse Act 1990.

Part II  Progress of law reform projects

2.1 The present position in each of our current law reform projects is set out in more detail in this Part of our report. The main subject headings are presented in alphabetical order. Programme subjects,¹ are denoted by the use of an asterisk.

Administrative Law

2.2 We have now devoted more resources to this project and work is proceeding on the preparation of the first of a series of discussion papers. The first paper—which we hope to publish during the current year—will be mainly concerned with title and interest to sue under the common law supervisory jurisdiction of the Court of Session.

2.3 The research project being carried out by the University of Edinburgh on the impact of decisions of the sheriff on administrative authorities subject to his statutory powers of review² has been held up, but we anticipate that the results of this research should be made available to us within the next few months.

Criminal Law

2.4 Our work in the criminal field derives from proposals for law reform projects under section 3(1)(a) of the Law Commissions Act 1965 and references under section 3(1)(e) of that Act.

2.5 As reported in our last annual report³ we published a discussion paper⁴ seeking views on ways to widen the powers of the courts to order forfeiture of goods and articles used for the purpose of committing a crime and to order the confiscation of property representing the profits or proceeds of crime. A number of our consultees sought an extension of the period for comments and we agreed to their requests. The comments have been received and have been analysed and we would hope to submit a report during the current year to the Secretary of State for Scotland who gave us the reference on the matter.

Diligence*  
(Second Programme, Item 8)

2.6 We have made further progress in our work on the discussion papers referred to in our annual report for 1986-87.³ Two of these papers were published in 1988-89º namely Discussion Paper No 78 on Adjudications for Debt and Related Matters and Discussion Paper No 79 on Equalisation of Diligences. We continue to receive comments on these and await further comments from important organisations whom we have consulted. In the year under review, we have had two meetings with representatives of the Joint Committee of the Law Society of Scotland and the Society of Messengers-at-Arms and Sheriff Officers on the issues raised by these papers.

³ Scot Law Com No 123, para 2.5.
⁴ Discussion Paper No 82—Forfeiture and Confiscation.
⁵ (1987) Scot Law Com No 109, paras 2.9 to 2.12.
*Denotes programme subject.
2.7 In December 1989 we published Discussion Paper No 84 on Diligence on the Dependence and Admiralty Arrestments dealing in detail with the matters described in our last annual report.¹

2.8 In March 1990, in response to representations from the Law Society of Scotland, we issued to a limited number of consultees a Consultation Paper on Arrestments of ships securing claims against demise charterers in which we seek views on whether an arrestment of a ship should be competent on the dependence of an action in personam against a demise charterer of the ship, in a case where the ship is the particular ship with which the action is concerned, and on consequential reforms. Implementation of this proposal would, in our view, make Scots law conform more closely than at present to the probable intention of the Brussels Arrest Convention of 1952,² and would harmonise the Scots law with the English law so far as practicable,³ thereby giving to that extent effect to a uniform interpretation of the Convention within the United Kingdom.

2.9 In May 1990, we published Discussion Paper No 87 on Statutory Fees for Arrestees in response to representations received from the Committee of Scottish Clearing Bankers referred to in our last annual report.⁴ This seeks views on provisional proposals enabling persons receiving arrestments of moveable property and funds other than earnings⁵ to charge statutory fees as recompense for the expense incurred in complying with the arrestment.

2.10 The discussion paper proposes a statutory sliding scale of fees for arrestees who are deposit-taking institutions as defined by the Banking Act 1987, the scale being broadly proportionate to the number of offices in the arrestee's branch network. Arrestees holding arrested moveable goods in warehouses and the like, or discharging arrested cargo from ships, would be entitled to claim a flat rate fee plus an additional fee for any higher expense actually incurred.

2.11 At present there are no reliable and comprehensive statistics showing the number of arrestments of moveables and funds (other than earnings) which are executed. The Central Research Unit of the Scottish Office, at our request, have undertaken to conduct a survey to fill this gap and have obtained the agreement of the Society of Messengers-at-Arms and Sheriff Officers to provide the data on which the survey will be carried out in 1990-91.

2.12 We have also made progress in the preparation of a discussion paper on the extra-territorial effect of arrestments, and on the protection of arrestees from double jeopardy arising from concurrent enforcement processes in Scotland and another country. The paper is described at paragraph 2.28 below under the head of Private International Law.

Evidence*  
(First Programme, Item 1)

2.13 Our Report on The Evidence of Children and other Potentially Vulnerable Witnesses⁶ was submitted to you on 20 December 1989 and published on 14 February 1990. It recommends the adoption of various practices designed to reduce the anxiety or distress which a child is likely to suffer when he or she gives evidence in court. These practices would not require statutory authority. Legislation is recommended,

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1. Ibid, para 2.7.
3. See Supreme Court Act 1981, s 21(4); County Courts Act 1984, s 28(4).
5. The Debtors (Scotland) Act 1987, s 71, enables employers to charge fees for operating earnings arrestments.
*Denotes programme subject.
however, to enable the court in the exercise of its discretion to permit the use of pre-trial depositions, screens or closed-circuit television where evidence is to be given by a child or an adult witness who would be likely to suffer undue distress or anxiety if required to give evidence by conventional means. The report further recommends legislation, applicable to all witnesses, as to uncontentious evidence of identification and as to the admissibility of certain prior statements of witnesses as evidence of the facts stated in them. We have agreed to reconsider the later point. As yet, no legislation has been introduced to implement the report.

2.14 Our consideration of comments received from consultees in response to our Discussion Paper No 77—Criminal Evidence—Affidavit Evidence, Hearsay and Related Matters in Criminal Proceedings, has now been completed. We have begun to prepare our report to you on this topic and we shall be submitting it in due course.

Privilege and family conciliation

2.15 New rules of court have been enacted which empower the court, in a litigation as to the custody of, or access to, a child, to refer the parties to a specified conciliation service. We have started work on a discussion paper which will investigate the question whether confidentiality should attach to communications between a conciliator and the parties to such a dispute.

Family Law*
(Second Programme, Item 14)

Law of children
(including legal capacity of minors and pupils)

2.16 Our last annual report mentioned that our Report on Legal Capacity and Responsibility of Minors and Pupils was submitted to you on 1 October 1987 and published on 16 December 1987. A Private Member’s Bill to implement our report was introduced in 1989 but failed to make progress because of lack of time.

2.17 As we also indicated in our last annual report the next stage of our project on reform of the law of children concerns parental responsibilities and rights, guardianship, custody and access. The preparation of a discussion paper is well advanced with a view to publication during the next few months. One of our legal staff has continued to attend as an observer at meetings of the Child Care Law Review, the review body set up by the Secretary of State for Scotland to identify options for change in child care law, and it is anticipated that the review body will also publish their report during the next few months.

Obligations*
(First Programme, Item 14)

Corporeal moveables

2.18 No further work is being undertaken in this area for the time being.

The postal rule

2.19 In our Report on Requirements of Writing we indicated that we had not covered in the report the law on the communication of offer and acceptance in order to constitute a contract. We further indicated that it was our intention to consult separately on the questions whether the so-called “postal rule” (that posting of an acceptance may complete the contract) should be replaced by a rule requiring an acceptance to be communicated to the offeror before the contract is complete, and in that

1. Para 1.24 above.
2. Discussion Paper No 77 was published in October 1988.
5. Scot Law Com No 110.
*Denotes programme subject.
Rights in security over moveable property

2.20 As we indicated in our last annual report¹ work on the above topic was suspended pending the outcome of the review for Great Britain of the law of security over moveable property commissioned by the Department of Trade and Industry and undertaken by Professor A L Diamond (formerly Director of the Institute of Advanced Legal Studies, University of London) together with Mr A J Sim, a recently retired senior member of our staff. The Report on the Review of Security Interests in Property prepared by Professor A L Diamond was published on 27 January 1989, after which the Department of Trade and Industry invited comments by 1 September 1989 on certain of the proposals for reform put forward in that report.

2.21 The question of the extent of any future involvement by us in this area of the law will fall to be re-assessed after it is ascertained what action the Department proposes to take in response to the report and consultation.

Sale and supply of goods

2.22 A Private Member's Bill, the Consumer Guarantees Bill, introduced by Mr Martyn Jones MP, is currently before Parliament. The Bill would implement the recommendations contained in the joint report by the two Law Commissions on Sale and Supply of Goods which was published in May 1987.²

Supersession of missives

2.23 Work is again proceeding on this topic and we hope to publish a short discussion paper this year.

Other obligations topics

2.24 Following on the publication in August 1989 of our Discussion Paper No 83—Bulk Goods, we have received comments on our proposals and are discussing with the Law Commission for England and Wales the terms of joint reports which we shall submit to you in due course. The intention is to submit a report on the bills of lading aspects of the problem as soon as possible and a further report on the sale of goods aspects after further investigations have taken place.

Prescription and Limitation of Actions*

(First Programme, Item 3)

2.25 Our Report on Prescription and Limitation of Actions (Latent Damage and Other Related Issues)³ was submitted to you on 17 August and published on 12 October 1989. Although some of the recommendations involve wider issues, the primary objective of the report is to put forward proposals for the reform of the rules of the short and long negative prescriptions as they apply to a claim to make reparation for damage sustained (other than personal injury) particularly where that damage is not immediately apparent to the claimant when it occurs. The recommendations aim to achieve an equitable balance between the interests of the claimant, who requires sufficient time in which to discover the damage and proceed with his claim for compensation, and those of the defender, who requires protection against stale claims, and a degree of certainty as to the period during which a claim can be made against him.

2.26 A Consultation Paper on The Effect of the Execution of Diligence on the Operation of Prescription was circulated (but not published) in April with a request for comments by 30 June 1990. In this paper our main proposal for reform is that diligence executed for the purpose of enforcing a court decree, arbitration award or an order of a tribunal or some other statutory authority should not affect the running of the twenty year long negative prescription. Subsidiary proposals are also put

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¹. (1989) Scot Law Com No 123, para 2.3 and (1988) Scot Law Com No 114, para 2.3.
². (1987) Law Com No 160; Scot Law Com No 104.
³. Scot Law Com No 122.
*Denotes programme subject.
forward for consideration in relation to certain miscellaneous diligences which are infrequently used in practice—poinding of the ground, maills and duties, an arrestment in rem of a ship or her cargo in an Admiralty action in rem, and the landlord's sequestration for rent.

Private International Law*
(Third Programme, Item 15)

Choice of law rules in tort and delict
2.27 The outstanding difficulties arising from the joint consultative document on the choice of law rules in tort and delict mentioned in our last report, have now been resolved and work is in hand on the preparation of a joint report.

Extra-territorial effect of arrestments
2.28 We have made considerable progress in preparing a discussion paper on the Extra-territorial effect of arrestments and related matters, which we hope to publish in the next few months. The paper covers two main topics. First, there is some doubt concerning the circumstances in which an arrestment has the effect under Scots law of attaching debts which are for ordinary purposes located outside Scotland. Although the better view is that an arrestment does have that effect, there is some doubt about whether an arrestment having extra-territorial effect in this respect will win international recognition or be refused recognition as exorbitant. The paper will therefore seek views on whether or how the law on the extra-territorial effect of arrestments of debts and moveable goods should be clarified by statute. Second, the paper will provisionally propose that where a creditor and his debtor both bring separate enforcement proceedings by arrestment or other legal process in Scotland and in another country against an innocent third party in respect of the same debt, the Scottish courts should have a statutory power to protect the third party from the double jeopardy by recalling the Scottish arrestment or other form of diligence as the case may be. The paramount need to protect arrestees and innocent third parties receiving foreign attachments from double jeopardy was brought to our attention by the recent case of Deutsche Schachtbau v SIT Co which shows that the English Courts have powers (for which there is no Scottish equivalent) to protect innocent third party garnishee (equivalent to arrestees) from double jeopardy. The paper will also consider some related matters, eg as to jurisdiction in actions of forthcoming.

Property Law*
(Fourth Programme, Item 16)

Property law
2.29 In our last report we suggested that the publication of a discussion paper proposing the abolition of feudal tenure and its replacement by a system of absolute ownership with a section proposing a statutory reformulation of the existing common law rules comprising the law of the tenement would be published within a few months from the date of our report. Unfortunately the wide scope of this topic has led to some delays and we now hope to publish two papers during the course of the next few months, the first dealing with the law of the tenement and the second dealing with the abolition of feudal tenure.

Passing of risk in contracts for the sale of land
2.30 We expect to submit our report to you on the Passing of Risk in Contracts for the Sale of Heritable Property in the near future.

2. Scot Law Com No 123, para 2.25.
*Denotes programme subject.
Succession*
(Second Programme, Item 7)

2.31 Our Report on Succession\(^1\) was submitted to you on 13 November 1990 and published on 25 January 1990. The report follows on the three consultative memora
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- (a) Major changes in the law of intestate succession, in particular improving the position of the surviving spouse.
- (b) Replacement of legal rights by legal share as a means of protecting spouse and issue from disinheritance. Legal rights are calculated by reference to moveable property only and arise automatically. Legal share would be calculated by reference to the deceased's total net estate (heritable and moveable) and would have to be claimed within a certain period from the date of death of the deceased.
- (c) Validation of an improperly executed will, or an unexecuted will, if the court is satisfied that the testator intended the document to be his or her will.
- (d) Rectification of a will that fails to give effect to the testator's instructions.
- (e) Automatic revocation of bequests in favour of a spouse by the subsequent divorce of the testator.
- (f) Abolition of the common law rule (\textit{condito si testator}) which entitles a child born after the date of a parent's will that does not leave him or her anything to apply to the court for the will to be set aside.
- (g) Vesting of succession rights only if the successor survives the deceased for a period of at least 5 days. The deceased's will may provide for a different period in respect of testamentary provisions.

2.32 The Central Research Unit of the Scottish Office carried out research on a representative sample of testate and intestate estates to which confirmation was sought in late 1986 or early 1987. The results of this research\(^3\) were of great value to us in preparing our report.

Statute Law

2.33 As in previous reports we report under two heads: consolidation of legislation applying to Scotland only; and consolidation of legislation extending to other parts of the United Kingdom as well as to Scotland.

(a) Scotland-only consolidations

2.34 The Prisons (Scotland) Act 1989 (c 45) received Royal Assent on 16 November 1989. Work is presently proceeding on the consolidation of the Criminal Procedure legislation, the Crofting legislation and the Scottish Town and Country Planning legislation. We recently received a proposal that the Land Clauses legislation should be consolidated. This has been considered as a candidate for consolidation in the past but difficulties in connection with land tenure have prevented a consolidation proceeding. We are now looking at a possible consolidation in the light of the changes in the law to be suggested by our discussion paper on the abolition of the feudal system.

(b) United Kingdom and Great Britain consolidations

2.35 The Extradition Act 1989 (c 33) received the Royal Assent on 27 July 1989. The Opticians Act 1989 (c 44) received the Royal Assent on 16 November 1989.

2.36 The Capital Allowances Bill has been introduced and should receive Royal Assent in the current Parliamentary Session.

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2. No 69—\textit{Intestate Succession and Legal Rights}; No 70—\textit{The Making and Revocation of Wills}; No 71—\textit{Some Miscellaneous Topics in the Law of Succession}.

*Denotes programme subject.
2.37 Bills on the following subjects are in the course of preparation:

Tribunals and Inquiries Act 1971
Clean Air.


Local legislation 2.39 The Joint Working Party on Local Legislation2 has not met during the period covered by this report.

2.40 We are continuing to assist our English colleagues in their work on the Chronological Table of Local Legislation.3 We are also continuing to pursue the rationalisation of pre-1975 local authority private legislation in Scotland, which work on the Table showed was necessary. Our resources for this work, however, remain limited, so the main burden of preparing the Table rests on our English colleagues. Our project with the Scottish local authorities is also giving rise to problems, because they too have very limited resources for the work.

Database Group 2.41 We continue to be represented on the Statute Law Committee Secretariat Database Group which is part of a project to create a computer database containing all United Kingdom public Acts.4 The project team set up by the Lord Chancellor’s Department submitted a feasibility study to the Treasury at the end of March 1990, recommending that funds be made available for the project. The Treasury’s response is still awaited. We were involved in commenting on papers prepared for the feasibility study and, assuming that approval for the project is forthcoming, we expect to be involved in subsequent phases of the project. In particular, we anticipate that the editorial work, which is scheduled to start later this year, will produce material for the statute law revision process.

Other Matters

Class actions 2.42 Work has continued on the preparation of a discussion paper on this reference. In addition to the complex problems referred to in our last annual report,5 it has become apparent that a full treatment of the subject requires consideration not only of the civil court procedures, but also of the funding and expenses arrangements. There are legal aid implications that require exploration with the appropriate authorities. In view of the extensive work involved in this reference, we have found it necessary to reallocate our priorities in favour of more pressing commitments. We nonetheless hope to publish a discussion paper on class action procedures in 1991.

Fudiciary duties and regulatory bodies 2.43 In April 1990 we received from the Department of Trade and Industry a reference under section 3(1)(e) of the Law Commissions Act 1965 in the following terms:

“Certain professional and business activities are subject to public law regulation by statutory or self-regulatory control. The Scottish Law Commission is to consider the principles which should govern the effect of such controls on the fiduciary and analogous duties of those carrying on such activities, and to make recommendations. The inquiry will consider examples from differing areas of activity but will be with particular reference to financial services.”.

Work has started on this reference and we will be co-operating with the Law Commission for England and Wales who have received a similar reference.

2. See Appendix I.
Floating charges and receivers

2.44 As we indicated in our last annual report, Consultative Memorandum No 72—"Floating Charges and Receivers"—was published on 3 October 1986 with an invitation to submit comments by 31 March 1987. An analysis of the comments received has been carried out, but the nature and timing of any further work in this area may well be influenced by whatever action the Department of Trade and Industry proposes to take in response to the Report on the Review of Security Interests in Property prepared by Professor A L Diamond and published on 27 January 1989, and the results of the Department's subsequent consultation on certain of the report's proposals for reform.

Judicial factors, powers of attorney and guardianship of the incapable

2.45 This item in the Fourth Programme has replaced two separate law reform proposals made to us by the Law Society of Scotland on judicial factors and powers of attorney. The item has also enlarged our field of examination by adding guardianship so enabling us to examine personal guardianship along with management of property. As mentioned in our last annual report we are giving priority to the management and control of the personal welfare and financial affairs of adults who lack the capacity to look after themselves. We are currently engaged in preparing a wide-ranging discussion paper on these areas and the associated topics of enduring powers of attorney and directions for future health care—the so-called living wills. We anticipate that the discussion paper will be published in the course of the next year.

Personal injuries: damages

2.46 On 14 September 1989 we received a reference on behalf of the Secretary of State for Scotland, under section 3(1)(e) of the Law Commissions Act 1965:

"To consider the case for amending the law of damages in Scotland having regard to the possibility that there may be an incentive inherent in the present law for a defender to postpone making settlement or reaching proof until after the death of the pursuer in order to minimise the amount of any compensation to be paid."

2.47 In Scotland, the right of an injured person to claim compensation for pain and suffering terminates with his death, in contrast with the right to claim compensation for pecuniary loss. In certain circumstances, therefore, a defender may pay considerably less by way of damages when a claimant dies before his claim is resolved. It is this possibility which is thought to constitute at least an incentive to delay where a claimant seems likely to die. In recent months several asbestos-related deaths have been reported, where the victim died just before the conclusion of legal proceedings. The fact that compensation for the victim's suffering cannot be recovered by his family in these circumstances has caused public concern.

2.48 As a first step we decided to gather some basic facts from selected legal firms with substantial experience of handling claims for personal injuries. We prepared a short questionnaire and sent it to some 45 firms in Aberdeen, Edinburgh and Glasgow. We also carried out interviews with individual solicitors who have extensive reparation practices. Although the number responding to our questionnaire was lower than we had hoped, we nevertheless learned a great deal from those who did respond and those who gave time to be interviewed. We are now working on a discussion paper which we hope to publish within the next few months.

Miscellaneous: advice to Government Departments, etc

2.49 It has been our practice to mention under this heading items which do not readily fit into any of the other classifications adopted in this report, including matters of an international character on which our advice has been sought by Government departments. In some instances such matters have been the subject of formal references to us under section 3(1)(e) of the Law Commissions Act 1965 and have resulted


*Denotes programme subject.
in our undertaking law reform projects. Matters in this category are covered elsewhere in this report. In other cases, however, the requests have been dealt with informally. We do not think it would be appropriate for us to give an exhaustive list of matters in the second category in this report.
Part III Consultation

The Law Commission for England and Wales

3.1 We continue our close co-operation with the Law Commission for England and Wales. During the year under review we have continued to work together on various matters, including choice of law rules in tort and delict, and bulk goods. We shall also be working together on fiduciary duties and regulatory bodies.

3.2 We are grateful to the Law Commission for England and Wales for continuing to keep us informed of the progress of its work on topics of interest to us, and for affording us the opportunity to comment from time to time on the possible implications for Scotland of certain of its projects.

3.3 Our Working Party on Contract Law has remained in being although it has not met during the year under review.

Other law reform organisations

3.4 We have maintained our contact with law reform organisations in various parts of the world and are pleased to welcome members of these organisations who come to visit us.

The legal and other professionals, etc

3.5 We continue to consult with the leading organisations of the legal and other professions in Scotland and with other bodies. In this regard, we have continued to hold informal meetings with representatives of the Faculty of Advocates and the Law Society of Scotland and have found these meetings most useful. As in previous years, we wish to record our appreciation of the valuable assistance afforded by those whom we have invited to act as consultants or advisers and by others who have assisted us in various ways.

3.6 We are also most grateful for the help we continue to receive from the Librarian and staff of the Edinburgh University Library, Edinburgh University Law Library, the Centre of European Governmental Studies, the National Library of Scotland, the Advocates' Library, the Signet Library and the Institute of Advanced Legal Studies, London.

Conferences, seminars, etc

3.7 Commissioners and members of our legal staff attended a number of conferences, seminars and colloquia in the course of the year under review.

1. See para 2.27.
2. See para 2.24.
3. See para 2.43.
4. A list of the present members of the Working Party appears in Appendix I to this report.
Part IV  Miscellaneous

Commissioners

4.1 The Commission consists of a full-time Chairman, two full-time Commissioners, and two part-time Commissioners. The present Commissioners are:

The Honourable Lord Davidson, Chairman (Full-time)
Dr E M Clive (Full-time)
Professor P N Love, CBE (Part-time)
Sheriff I D Macphail, QC (Full-time)
Mr W A Nimmo Smith, QC (Part-time)

4.2 Sheriff I D Macphail QC was appointed as a full-time Commissioner from 1 January 1990 when Sheriff C G B Nicholson QC was appointed Sheriff Principal of the Lothian and Borders.

Staff

4.3 Our legal staff consists of one full-time and two part-time Parliamentary Draftsmen, our Secretary and eight other qualified lawyers. During the summer vacation of 1989 we employed three honours graduates in law to assist with our research work. We wish to thank them all for their assistance. Our complement of non-legal staff remains at eleven.

4.4 At the date of preparation of this report the principal members of staff were:

*Parliamentary draftsmen*
Mr J F Wallace, QC (Full-time)
Mr G S Douglas, QC (Part-time)
Mr W C Galbraith, QC (Part-time)

*Secretary*
Mr K F Barclay

*Grade 5 Solicitors*
Mrs L A Lilleker
Mr N R Whitty

*Other members of legal staff*
Mrs A F Bevan
Mr J M Dods
Ms G B Inch
Mr J G S Maclean
Dr D I Nichols
Mr C Robertson

*Librarian*
Mr N G T Brotchie

*Chief Clerk*
Mr J Dodson

Departmental committees and other bodies

4.5 Our Commissioners and legal staff are from time to time appointed to serve on Government and departmental committees and as members of other bodies concerned with the development and reform of the law.
4.6 Our Chairman serves on the Statute Law Committee and is a member of the Editorial Board for Statutes in Force. The Commission’s full-time Parliamentary Draftsman continues to act as an alternative member of the Editorial Board. In addition, our Secretary is a member of the ‘Secretariat’ set up under the chairmanship of the Permanent Secretary of the Lord Chancellor’s Department to assist the Statute Law Committee in its work.

Scottish Advisory committee

4.7 A member of our legal staff, Mrs A F Bevan, is a member of the Scottish Advisory Committee on Arbitration Law, but not in a representative capacity. The Committee published a discussion paper on the operation of arbitration in Scotland in the light of the UNCITRAL Model Law in May of this year.

Scrutiny of bills

4.8 As indicated in previous annual reports we now confine our detailed scrutiny of Bills to those which particularly touch upon areas of law under current examination by us.

Appendices

4.9 Membership of Working Parties appears in Appendix I. In Appendix II we list reports, consultative memoranda and other documents prepared by the Commission. These lists include certain consultative documents which were given restricted circulation. The extent to which our proposals have been incorporated in legislation is indicated in Appendix III.
Appendix I

Membership of Working Parties

Joint Working Party on Local Legislation
The Hon Mr Justice Peter Gibson (Chairman)  
The Hon Lord Davidson (Chairman)  
Mr H W Gamon, CBE MC  
Mr J G S Maclean (as alternate for Lord Davidson)  
Mr R J B Morris  
Mr D Rippengal, CB QC  
Mr R H Streeten  
Mr M J Ware, CB QC  

Secretary: Mr A M Rowland, Law Commission for England and Wales

Working Party on Contract Law
Professor P N Love, CBE (Chairman)  
Professor R Black, QC  
Mr M G Clarke, QC  
Professor W W McBryde  

Secretary: Mrs A F Bevan, Scottish Law Commission

Law Commission for England and Wales  
Scottish Law Commission  
Society of Parliamentary Agents  
Scottish Law Commission  
Chief Executive and Town Clerk, Northampton Borough Council  
Counsel to Chairman of Committees  
Law Commission for England and Wales  
Solicitor, Department of the Environment  

Scottish Law Commission  
University of Edinburgh  
Faculty of Advocates  
University of Dundee
## Appendix II

**1 Scottish Law Commission—Reports, Etc Published by Her Majesty’s Stationery Office**

<table>
<thead>
<tr>
<th>Commission No</th>
<th>Year</th>
<th>Title</th>
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<tbody>
<tr>
<td>1965</td>
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<td>First Programme of Law Reform</td>
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<td>1966</td>
<td>2</td>
<td>First Programme of Consolidation and Statute Law Revision</td>
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<td>3</td>
<td>First Annual Report 1965-66</td>
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<td>1967</td>
<td>4</td>
<td>Proposals for Reform of the Law of Evidence relating to Corroboration</td>
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<td>5</td>
<td>Reform of the Law Relating to Legitimation <em>per subsequens matrimonium</em> (Cmnd 3223)</td>
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<td>6</td>
<td>Divorce—The Grounds Considered (Cmnd 3256)</td>
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<td>*Report on the Consolidation of Certain Enactments relating to Shellfish Fisheries and Shellfish—Sea Fisheries (Shellfish) Bill (Cmnd 3267)</td>
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<td>Second Annual Report 1966-67</td>
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<td>1968</td>
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<td>Second Programme of Law Reform</td>
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*Produced jointly with the Law Commission for England and Wales.*

23
Commission
No
30  Report on Liability for Antenatal Injury (Cmd 5371)
31  Report on the Law relating to Damages for Injuries Causing Death
32  Statute Law Revision—Fifth Report: Draft Statute Law (Repeals) Bill (Cmd 5493)

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33  Eighth Annual Report 1972–73
34  Report on Presumption of Death
35  Friendly Societies Bill—Report on the Consolidation of the Friendly Societies Acts 1896 to 1971 and certain other enactments relating to the Societies to which those Acts apply (Cmd 5634)
36  Statute Law Revision—Sixth Report: Draft Statute Law (Repeals) Bill (Cmd 5792)

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38  Supply Powers Bill—Report on the Consolidation of Enactments relating to Supply Powers (Cmd 5850)
39  Exemption Clauses—Second Report
40  Statute Law Revision—Seventh Report: Draft Statute Law (Repeals) Bill (Cmd 6303)

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43  Eleventh Annual Report 1975–76
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45  Report on Liabilities for Defective Products (Cmd 6831)

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46  Third Programme of Consolidation and Statute Law Revision
47  Twelfth Annual Report 1976–77
48  Statute Law Revision—Ninth Report: Draft Statute Law (Repeals) Bill (Cmd 7189)
49  Electricity (Scotland) Bill—Report on the Consolidation of Certain Enactments relating to Electricity in Scotland (Cmd 7178)
50  Adoption (Scotland) Bill—Report on the Consolidation of Certain Enactments relating to Adoption in Scotland (Cmd 7187)
51  Damages for Personal Injuries: Report on
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52  Report on the Married Women’s Policies of Assurance (Scotland) Act 1880 (Cmd 7245)
54  Customs and Excise Management Bill—Report on the Consolidation of the Enactments relating to the Collection and Management of the Revenues of Customs and Excise (Cmd 7418)

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55  Thirteenth Annual Report 1977–78
56  Fourteenth Annual Report 1978–79

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58  Education (Scotland) Bill—Report on the Consolidation of Certain Enactments relating to Education in Scotland (Cmd 7688)
59  Report on Powers of Judicial Factors (Cmd 7904)
60  Report on Occupancy Rights in the Matrimonial Home and Domestic Violence
61  Fifteenth Annual Report 1979–80
62  Judicial Pensions Bill—Report on the Consolidation of Certain Enactments relating to Pensions and other Benefits payable in respect of Service in Judicial Office (Cmd 8097)
63  Statute Law Revision—Tenth Report: Draft Statute Law (Repeals) Bill (Cmd 8089)

1981
64  Report on Section 5 of the Damages (Scotland) Act 1976
66  Report on the Council of Europe Conventions on Foreign Money Liabilities (1967) and on the Place of Payment of Money Liabilities (1972) (Cmd 8318)
67  Family Law—Report on Aliment and Financial Provision

*Produced jointly with the Law Commission for England and Wales.
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1982
71 Fourth Programme of Consolidation and Statute Law Revision
72 Family Law—Report on Financial Provision after Foreign Divorce
73 Seventeenth Annual Report 1981-82

1983
74 Prescription and the Limitation of Actions—Report on Personal Injuries Actions and Private International Law Questions
75 Report on Irritancies in Leases (Cmd 8760)
77 *Medical Bill—Report on the consolidation of the Medical Acts 1956 to 1978 and certain related provisions (Cmd 8839)
78 Evidence—Report on Evidence in Cases of Rape and Other Sexual Offences
79 Obligations—Report on Rectification of Contractual and Other Documents
80 Report on the Mental Element in Crime (Cmd 9047)
81 Eighteenth Annual Report 1982-83

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82 Family Law—Report on Illegitimacy
85 *Road Traffic Regulation Bill—Report on the Consolidation of the Road Traffic Regulation Act 1967 and certain related enactments (Cmd 9162)
86 Family Law—Report on Matrimonial Property
88 *Private International Law—Report on Recognition of Foreign Nullity Decrees and Related Matters (Cmd 9341)
89 Nineteenth Annual Report 1983-84
90 Report on Breach of Confidence

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91 *Family Law—Report on Custody of Children: Jurisdiction and Enforcement within the United Kingdom (Cmd 9419)
92 Obligations—Report on Negligent Misrepresentation
93 Report on Art and Part Guilt of Statutory Offences (Cmd 9551)
94 *Report on the Consolidation of the Housing Acts—Housing Bill, Housing Associations Bill, Landlord and Tenant Bill (Cmd 9515)
95 Report on Diligence and Debtor Protection
96 *Private International Law—Polygamous Marriages: Report on Capacity to Contract a Polygamous Marriage and Related Issues (Cmd 9595)
97 Obligations—Report on Civil Liability in relation to Animals
98 Twentieth Annual Report 1984-85
99 Statute Law Revision—Twelfth Report: Draft Statute Law (Repeals) Bill (Cmd 9648)

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100 Evidence—Report on Corroboration, Hearsay and Related Matters in Civil Proceedings
101 Twenty-First Annual Report 1985-86

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103 Housing (Scotland) Bill—Report on the Consolidation of Certain Enactments relating to Scotland (Cmd 104)
104 *Report on Sale and Supply of Goods (Cm 137)
105 *Private International Law—Report on Choice of Law Rules in Marriage
106 Report on Computer Crime (Cm 174)
107 *Private International Law—Report on the Law of Domicile (Cm 200)

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108 Report on the Scottish Term and Quarter Days (Cm 208)
109 Twenty-Second Annual Report 1986-87

*Produced jointly with the Law Commission for England and Wales.
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2 Scottish Law Commission—Consultative memoranda/Discussion papers circulated for comment and criticism

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*Produced jointly with the Law Commission for England and Wales.
Memorandum No 26—Corporeal Moveables—Some Problems of Classification
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Memorandum No 30—Corporeal Moveables—Usuaption or Acquisitive Prescription
Memorandum No 31—Corporeal Moveables—Remedies
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Memorandum No 46—The Law of Evidence
Memorandum No 47—First Memorandum on Diligence—General Issues and Introduction
Memorandum No 48—Second Memorandum on Diligence: Poindings and Warrant Sales
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Memorandum No 53—Family Law: Illegitimacy
Memorandum No 54—Some Obsolete and Discriminatory Rules in the Law of Husband and Wife
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*Memorandum No 56—Polygamous Marriages (Capacity to Contract a Polygamous Marriage and the Concept of the Potentially Polygamous Marriage)
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*Memorandum No 63—Private International Law: The Law of Domicile
*Memorandum No 64—Private International Law: Choice of Law Rules in Marriage
Memorandum No 65—Legal Capacity and Responsibility of Minors and Pupils
Memorandum No 66—Constitution and Proof of Voluntary Obligations and the Authentication of Writings
Memorandum No 67—Child Abduction

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3 Scottish Law Commission—Other published documents

1979  Research Paper on the Law of Evidence of Scotland by Sheriff I D Macphail
1984  Research Paper on Actions of Ejection and Removing by Mr A G M Duncan

4 Scottish Law Commission—Consultative documents not published and with restricted circulation

1973  Consultation Paper on Divorce for Incurable Insanity
1974  Insolvency, Bankruptcy and Liquidation in Scotland—Consultative Paper
1979  Consultation Paper—Bankruptcy: *Gibson v Hunter Home Designs Ltd*
      Consultative Note on section 5 (6) of the Damages (Scotland) Act 1976
1980  Consultation Paper—Prescription and Limitation in Private International Law
1981  Consultation Paper—Financial Provision after Foreign Divorce
1982  Consultation Paper—Exchange of Standard Term Forms in Contract Formation
      Consultation Paper—Breach of Confidence
1983  Consultation Paper—Custody of Children: Jurisdiction and Enforcement within the United Kingdom: Jurisdiction of the Sheriff Court
      Supplementary Consultation Paper—Conflicts of Jurisdiction affecting the Custody of Children

*Produced jointly with the Law Commission for England and Wales.
Consultation Paper—Illegitimacy and the Guardianship Acts
*Consultation Paper—Recognition of Foreign Nullity Decrees and Related Matters

1984
Consultation Paper—Art and Part Guilt of Statutory Offences

1986
Consultation Paper—The Scottish Term and Quarter Days: A Statutory Definition (Resulting Report—Scot Law Com No 108)

1990
Arrestments of Ships Securing Claims against Demise Charterers
The Effect of the Execution of Diligence on the Operation of Prescription

5 Scottish Law Commission—Unpublished Confidential Documents

1975
*Interim Report on the EEC Preliminary Draft Convention on the Law applicable to Contractual and Non-Contractual Obligations

*Produced jointly with the Law Commission for England and Wales.
Appendix III

Statutory Provisions relating to the Scottish Law Commission’s Proposals

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