Scottish Law Commission

promoting law reform

(DISCUSSION PAPER No 146)

Discussion Paper on Judicial Factors

discussion paper

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Professor George L Gretton
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The Commission would be grateful if comments on this Discussion Paper were submitted by 15 April 2011.

Please ensure that, prior to submitting your comments, you read notes 1-3 on the facing page. Comments may be made on all or any of the matters raised in the paper. All non-electronic correspondence should be addressed to:

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[1] Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820).

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Abbreviations

The Accountant
: The Accountant of Court

Addison
: Derek Addison, *Judicial Factors* (1995).

JF Guidance Notes
: *Notes for the Guidance of Judicial Factors* (1984), issued by the Accountant of Court.

Johnston
: David Johnston, *Prescription and Limitation* (1999).

Judicial Factors Rules 1992
: Act of Sederunt (Judicial Factors Rules) 1992 (SI 1992 No. 272 (S.22)) (as amended).

RCS
: Act of Sederunt (Rules of the Court of Session 1994) 1994 (SI 1994 No. 1443) (as amended).

Stair Memorial Encyclopaedia
: *The Laws of Scotland (Stair Memorial Encyclopaedia).*

Thoms
: Hugh J E Fraser, *Thoms on Judicial Factors* (2nd edn, 1881).

Walker
: N M L Walker, *Trusts, Trustees, Executors and Judicial Factors: Judicial Factors* (1974).

Part 1 Introduction

Our remit

1.1 Our work in relation to the law of judicial factors has been carried forward into our Eighth Programme of Law Reform.[1] A great deal of work has been carried out on the project since it began, but progress was deferred until recently due to competing priorities. For the reasons set out below, we consider that a radical overhaul of this area of the law is necessary.

Current law

1.2 A judicial factor is an officer appointed by the court to collect, hold and administer property in accordance with the law applicable to that office. The office of judicial factor has a long history in Scots law.[2] The institutional writers discussed factors specifically in the context of managing the estates of minors where there was no one else to do this,[3] and the estates of persons abroad,[4] but judicial factors could also be appointed as an extraordinary remedy where it was seen by the court to be necessary, and the range of situations in which they could be appointed was broad. All judicial factors are supervised by the Accountant of Court (hereinafter referred to as "the Accountant").[5] The principal types of judicial factor which it is competent to appoint are set out in Appendix B.

1.3 There is a continuing and perhaps even a growing need for capable administrators to be appointed to manage the property of those who cannot, should not, or in some cases simply will not, manage it properly themselves. But in many cases where, in the past, a judicial factor might have been appointed, a new statutory office has instead been created.[6] Even in those situations in which it is appropriate to appoint a judicial factor, there is a general view that the legislation does not work well.

Criticisms of the current law

1.4 We have already met the Accountant, the Director of the Law Society of Scotland's Interventions Department, representatives of the Office of the Scottish Charity Regulator and other practitioners experienced in this field. It is apparent from those discussions that the existing legislation is regarded by those who use it and by those who come into contact with this office as no longer fit for purpose. Judicial factory is regarded as a cumbersome procedure involving expense which can be disproportionate to benefit. This is perhaps partly due to the fact that the office has not moved with the times. Since the Judicial Factors Acts of the 19th century there has been no new primary legislation pertaining specifically to judicial

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[1] Scot Law Com No 220 (2010).
[2] See Part 2.
[3] Erskine's *Institutes* (1773) ii 12.58.
[4] *Ibid*; Bankton, *Institute* (1751) iv.7.24.
[5] The Court of Session generally refers to the Accountant of Court simply as "the Accountant" – see Addison, para 1.2.
[6] Eg guardians appointed under the Adults with Incapacity (Scotland) Act 2000 (asp. 4).

factors[7] with the exception of the provisions in the Solicitors (Scotland) Act 1980 relating to the appointment of a factor on the estate of a defaulting solicitor. But, whatever the cause of these deficiencies in the law, the role and purpose of the office of judicial factor is neither clearly defined nor well understood.

Is abolition an option?

1.5 From information which we have gathered from the Accountant, it appears that there are approximately 115 live judicial factories with, on average, 12 new factories being granted each year. The length of factories varies greatly with some lasting for several years. The majority of petitions concern trusts, executries or partnerships or are brought in terms of the Solicitors (Scotland) Act 1980. In view of the relatively small number of cases, is there an argument in favour of abolition of the office of judicial factor? We have quickly concluded that there is not. It is apparent that there will always be a need for an official to step into one of the myriad situations which arise for which there is no other suitable remedy. There will always be cases where assets need to be safeguarded and administered by an independent and accountable person.

Our aim

1.6 The aim of this Discussion Paper is to examine the current law and make suggestions as to how it might be clarified, simplified and made of more relevance to those involved, in any capacity, in judicial factories in the 21st century. To that end, we have in the first place put forward proposals which will update the existing regime, alleviating as far as is possible without radical overhaul those concerns which are seen as most pressing. In addition to our proposals for amendment of the existing system, we have set out a further option based around a new public official, which we envisage would significantly improve many aspects of the office. It is in our view probable that such an official could provide the required service more economically and efficiently than is the case under the current arrangements, and it might be possible to confer upon such an official wider general functions than might be appropriate in the case of *ad hoc* appointments.

1.7 Accordingly, this Discussion Paper addresses a number of questions:

- Whether the present organisation of the office is appropriate;
- What changes would be needed to make the office of judicial factor more useful in modern conditions;
- Whether the problems with the existing system could be sufficiently ameliorated by minor alterations to that system;
- Whether an alternative model might in fact be more suitable; and
- Whether the office could usefully be combined with other statutory administrators to produce greater efficiency, as well as economies of effort and scale.

[7] There have, however, been amendments to the principal statutes. See the Judicial Factors Act 1849 and the Judicial Factors (Scotland) Acts of 1880 and 1889.

Outline of the Discussion Paper

1.8 In Part 2 of this Paper we discuss the background of the office of judicial factor – the origin of the office, its nature and how it, and the legislation governing it, have developed.

1.9 In Part 3, we discuss the current system by which judicial factors are appointed. We consider who may be appointed as a factor, the practicalities of petitioning the court for such an appointment and publication of an appointment.

1.10 In Part 4, we examine the mechanisms by which property vests in judicial factors and consider ways in which the law could be reformed.

1.11 In Part 5, we examine the duties of judicial factors. We consider whether the current accounting duties incumbent upon factors are appropriate, particularly when compared with modern accountancy practice.[8]

1.12 In Part 6, we set out the existing regime governing judicial factors' powers, and the various sources from which those powers flow. We examine the disparate nature of the sources of law in this area and explore possible options for reform.

1.13 In Part 7, we deal with miscellaneous matters. We consider whether caution[9] should have a continuing role in judicial factory. We also consider issues of factors' liabilities to third parties, the remuneration and expenses of factors and the prescription of claims against a factory estate or a judicial factor.

1.14 In Part 8, we examine the various methods by which a judicial factory can come to an end, including the various forms of discharge, and what happens when a judicial factor dies when in office.

1.15 Part 9 touches briefly on the option for reform of the current system before exploring the alternative option of the creation of a new official, namely, the Official Judicial Factor.[10]

1.16 Part 10 is an impact assessment of our proposals. It looks briefly at the effects of retaining the status quo before looking at the costs and benefits of the two options which this paper puts forward for consideration, namely maintaining, but improving, the current system or introducing an Official Judicial Factor.

1.17 Part 11 contains a summary of the proposals and questions set out in the earlier Parts of the Paper.

1.18 Appendix A explains the role of the Accountant of Court in judicial factories. Appendix B sets out a non-exhaustive list of the many types of judicial factory which can, or could, be created, summarising the situations in which they can, or could, be used. Finally, Appendix C sets out proposed powers which would apply to all judicial factors.

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[8] Paras 5.11 - 5.13.

[9] Pronounced "cay-shun". This is usually done by arranging a bond with an insurance company as security against any improper actings by the factor.

[10] This name is subject to change; see paras 1.20 - 1.21 below.

Common law or statute?

1.19 One of the features of the present arrangements, which will strike anyone who looks at them, is the ambivalence between common law and statute. The origins of the office lie in the power of the old Scots Privy Council, and the Court of Session, to make suitable provision for the administration of estates not otherwise provided for.[11] The passage of legislation, whether Acts of Sederunt or Acts of Parliament, to deal with many aspects of the office, might have been expected to lead to a recognition that the common law powers of the court had been superseded. But that is not the case, and some matters are still treated as falling within the *nobile officium* of the court. If, as a result of this consultation exercise, it appears appropriate to modernise the office and, for that purpose, to propose fresh legislation, we would also propose that any such legislation should cater for appointment in as wide a range of circumstances as possible. This would not prejudice, however, the residual ability of the court to appoint judicial factors under the *nobile officium* where circumstances arose which had not been foreseen by legislation.

What's in a name?

1.20 Whether or not a radical reform of the office is thought appropriate, one of the features which ought in our view to change is the name. "Judicial factor" conveys nothing to those who are not lawyers, and little to many of those who are. It would in our view do much to increase the public perception of the utility of the office if its official name described what it is for. We would provisionally suggest something like "official administrator", "public manager", or "property guardian", but we would be grateful for suggestions.

1.21 Accordingly, we ask the following question:

1. Should the term "judicial factor" be changed and, if so, to what?

1.22 In preparing this Paper, we have come across a further difficulty over nomenclature. The person for whom the factor is acting is frequently referred to in reported decisions as the "ward". But this label may be confused, in modern times, with the use of that word in other contexts. For the purposes of this Paper, therefore, we shall refer to the person or persons who are beneficially entitled to the estate as the "beneficiary".

Legislative competence

1.23 It appears to us that legislation in relation to judicial factors is in general within the legislative competence of the Scottish Parliament[12] as the law of judicial factors is not reserved to Westminster. One respect in which reserved matters may be touched upon is in relation to the Proceeds of Crime Act 2002 and the Terrorism Act 2000.[13] Any new provisions on the law of judicial factories which did impact on those areas would accordingly require to be put in place by an Order of the UK Government under the Scotland Act 1998.[14] In relation to other restrictions on competence, it is our view that legislation on judicial factors

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[11] Walker, p 3.
[12] Scotland Act 1998, s 29.
[13] Administrators under these Acts are currently supervised by the Accountant of Court. We propose later in this Paper that their functions could be incorporated into those of the Official Judicial Factor. For further discussion see paras 9.7, 9.18, 10.20, para 1 of Appendix A and paras 21 - 22 of Appendix B.
[14] Scotland Act 1998, s 104.

would not be incompatible with Community law or with the European Convention on Human Rights.[15]

The Review of Civil Courts

1.24 In October of 2009 the report of the Review of Civil Courts, headed by Lord Gill, was published and the Scottish Government has now announced its commitment to taking forward the majority of Lord Gill's recommendations. We do not foresee that any of our proposed reforms will conflict with those recommendations, but are conscious that their implementation will alter the framework of civil justice, including those parts relating to judicial factors, significantly. We welcome any general comments consultees may have on the proposed implementation of the Review recommendations as they relate to judicial factors.

Acknowledgements

1.25 We are most grateful to the many people who have placed their expertise at our disposal thereby leading us through how the current law operates in practice. All have answered our questions patiently and provided us with much useful information. We are particularly indebted to the Accountant and to the Director of the Interventions Department of the Law Society of Scotland.

[15] *Ibid* ss 29 (2)(d) and 126(1).

Part 2 The office of judicial factor

Introduction

2.1 The office of judicial factor is uniquely Scottish and has not been noticeably influenced by models from other jurisdictions.[1] This may be because it has a long history in our law. This Part looks at this history, the legislative developments that have influenced the office generally and how the office has been perceived. (Not surprisingly, other jurisdictions have developed similar offices. In England, for example, a receiver – whose powers appear to be regulated largely by the common law – can be appointed in cases where a judicial factor would be appointed in Scotland.)

Origin of the office

2.2 The office of judicial factor has developed from what could be seen as a merging of different roles. Originally the Crown was vested with the guardianship of all unprotected persons,[2] that is to say, minors or incapable adults. Before the Union in 1707 the Scots Privy Council could provide such extraordinary remedies as the appointment of someone to manage the affairs of another.[3] The Court of Session too had power to appoint a factor or steward over sequestrated[4] estates and it is from this that the name "judicial factor" originated.[5] In fact, the term "factor"[6] can be seen in Acts of the Parliaments of Scotland from as early as 1581 and it is apparent that Parliament could also exercise the power to appoint a factor.[7] After 1707, following the abolition of the pre-Union Privy Council, the Court of Session assumed full responsibility over judicial factors, exercising the *nobile officium* to appoint them.[8] The Court of Session, and later the sheriff court, also had the power to appoint factors under statute.

2.3 The term "factor" is also used to mean an ordinary private law agent or mandatory, such as a factor appointed to manage a landed estate or to look after property when the principal is in a different country and hence unable to manage it. The term is often used in relation to managers of tenements. Another example is the Factors (Scotland) Act 1890 which is about "mercantile agents".

2.4 Whereas the major focus in early comment on judicial factors was on those appointed in sequestration, particularly in the context of bankruptcy, the focus has shifted as bankruptcy is now a largely distinct area of law. Sequestration involved the removal of

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[1] D M Walker, *A Legal History of Scotland Vol III: The Sixteenth Century* (1995), p 115.
[2] *Bryce v Graham* (1828) 6 S 425 at 433.
[3] *Ibid* at 430. See also Walker, p 3.
[4] For more on the term 'sequestration' in this context, see para 3.20 *et seq* below.
[5] Thoms, pp 1-2; Campbell Irons, *Law and Practice in Scotland Relative to Judicial Factors* (1908), p 1.
[6] Although not necessarily in the sense of a judicial factor.
[7] According to the General Index of The Acts of the Parliaments of Scotland: 1581 c 40 (III 229) provided for the discharge of factories of the livings of certain persons accused of treason; 1661 (VII 258b) provided that aliens were not to be employed by merchants as their factors abroad; 1685 c 61 (VIII 495) appointed factors on the estate of Sir William Primrose of Caringtoun whose "memory and judgment" were affected by palsy; and 1700 (X 218b) provided that papists were incapable of acting as factors.
[8] Walker, p 4.

property from the control of the possessor by the court and, according to some definitions, also included the placing of it in the hands of another.[9] According to Bankton, sequestration was:

> "the depositation of a thing in controversy, between two or more, in the hands of a third person, during the suit, to be restored to him, who is found in the event to have the best right".[10]

2.5 This would have included the sequestration of bankrupt estates, where a factor was appointed for the interim preservation of the estate, but it would also have covered other situations, such as where there was a dispute in court over property. Although there seems to have been some disagreement on the issue, it appears that sequestration was not a necessary prerequisite to the appointment of a judicial factor.[11] Stair concentrated on factors in the context of arrestments and described judicial factors as "factors constitute by the Lords". He described the appointment as follows:

> "Under Arrestment is comprehended *Sequestration*, whereby not only the Subject is Arrested, to remain *in statu quo*, without the Access of either Party contending till ther Titles be discust, but likewise the custody of the thing contraverted is intrusted, by an Act and Commission of the *Lords*, to persons nominat by them, either for the Custody, or for the Management thereof and Profits of the samen, to be made furthcoming to the Parties that shall be found to have best Right. These are ordinarily called *Factors* constitute by the *Lords*."[12]

2.6 He goes on to give five examples of when such a factor might be appointed which cover situations where there is a dispute over property in court or where heirs are in doubt or out of the country.[13]

2.7 The institutional writers also discussed factors in the context of managing the estates of minors where there was no one else to do this[14] and of managing the estates of persons abroad.[15] It must be noted that this did not detract from the fact that judicial factors could be appointed where it was seen to be necessary by the court and that the range of situations in which they were appointed was broad.

Legislative developments

2.8 Early legislation from the Scottish Parliament used the term "factor" but it was not until later that legislation was used to regulate the office of judicial factor generally. The legislation listed below is confined to that which has affected the general nature of the office. More recent legislation which has affected particular types of judicial factor or has provided an alternative scheme in a specific area has been omitted.

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[9] Walker, p 4.
[10] Bankton, *Institute* (1751), i.15.15.
[11] Campbell Irons, *Law and Practice in Scotland Relative to Judicial Factors* (1908), pp 1 and 516 – 518.
[12] Stair (1693) IV, 50, 27.
[13] *Ibid* IV, 50, 28.
[14] Erskine's *Institutes* (1773), ii 12.58.
[15] *Ibid*; Bankton, *Institute* (1751), iv.7.24.

Acts of Sederunt

2.9 Early Acts of Sederunt applied to factors appointed to ingather sequestrated rents. Those dated 31 July 1690 and 25 December 1708 imposed liability for interest on rents recovered or which ought to have been recovered; the Act of 22 November 1711 required the lodging of an inventory; and that of 31 July 1717 prohibited a factor from buying in debts or receiving gratuities from a creditor.

2.10 These were rendered irrelevant by the more comprehensive Act of Sederunt of 13 February 1730 which was seen to be necessary in light of the large number of applications to regulate the duties of factors. This Act of Sederunt named only three categories of officer to which it applied, namely factors *loco tutoris*, factors *loco absentis* and curators *bonis*, but it regulated the powers and duties of almost all judicial factors.[16] Although not expressly repealed, certain sections of the 1730 Act of Sederunt have been impliedly repealed by subsequent legislation which addresses the same issues.[17]

Judicial Factors Act 1849

2.11 The Judicial Factors Act 1849, sometimes referred to as the Pupils Protection Act 1849, created the office of the Accountant of the Court of Session. The Accountant was charged with the duty to:

> "superintend generally the conduct of all judicial factors…and see that they duly observe all rules and regulations affecting them for the time."[18]

It also expressly provided for a factor's duty to find caution[19] and to lodge an inventory and accounts with the Accountant. Like the 1730 Act of Sederunt, this enactment applied to three classes of factor, although unlike the 1730 Act of Sederunt it was explicitly restricted to those classes.[20] This resulted in some types of judicial factor being regulated by the Act of Sederunt and others by the 1849 Act.[21] This would change with the Judicial Factors (Scotland) Act 1889, discussed below.

Bankruptcy (Scotland) Act 1856

2.12 The 1856 Act introduced a further officer known as the Accountant in Bankruptcy[22] whose duties included keeping a Register of Sequestrations and overseeing the conduct of trustees. Under section 16 of this Act the court could appoint a judicial factor for the interim preservation of the estate but other than this a trustee in sequestration would be appointed.

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[16] Campbell Irons, *Law and Practice in Scotland Relative to Judicial Factors* (1908), p xxxix.
[17] Walker, p 7.
[18] Judicial Factors Act 1849, s 10.
[19] See paras 7.2 to 7.10 below.
[20] *Accountant of Court v Morrison* (1857) 19 D 504.
[21] Walker, p 7.
[22] Bankruptcy (Scotland) Act 1856, s 156.

Court of Session (Scotland) Act 1857

2.13 The 1857 Act was also known as the Distribution of Business Act 1857. It provided that applications for judicial factor appointments were to be brought before a junior Lord Ordinary.

Titles to Land Consolidation (Scotland) Act 1868

2.14 The 1868 Act detailed the method and form by which title to heritable estate was to be completed by the judicial factor.

Judicial Factors (Scotland) Act 1880

2.15 The 1880 Act empowered the sheriff courts to appoint judicial factors over small estates.

Trusts (Scotland) Amendment Act 1884

2.16 The 1884 Act provided that in it and previous Trusts Acts the term "trustee" was to include a judicial factor. It also set out the investment powers of trustees.

Judicial Factors (Scotland) Act 1889

2.17 The 1889 Act brought all classes of judicial factor under the 1849 Act.[23] It also united the offices of the Accountant of the Court of Session and the Accountant in Bankruptcy into one office known as the Accountant of Court.[24]

Trusts (Scotland) Act 1921

2.18 The 1921 Act provided a list of extended powers in section 4 for trustees, and that term was so defined as to include judicial factors. Section 25 provided a method for judicial factors to complete title over heritable and moveable trust estate.

Conveyancing Amendment (Scotland) Act 1938

2.19 The 1938 Act provided for judicial factors, on a trust estate, to complete title to heritable property.

Trustee Investments Act 1961

2.20 The Trustee Investments Act 1961 made provision for investment by trustees, including judicial factors. The provisions relevant to judicial factors have since been repealed by the Charities and Trustee Investments (Scotland) Act 2005 and replaced with a new regime.[25]

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[23] Judicial Factors (Scotland) Act 1889, s 6.
[24] *Ibid*, s 1.
[25] For discussion of the 1961 Act, from which reform in the shape of the 2005 Act followed, see Part II of the Law Commission and Scottish Law Commission *Report on Trustees' Powers and Duties* (Law Com No 260, Scot Law Com No 172, 1999).

Trusts (Scotland) Act 1961

2.21 The Trusts (Scotland) Act 1961 provided further powers and duties for trustees, including judicial factors.

Law Reform (Miscellaneous Provisions) (Scotland) Act 1980

2.22 The 1980 Act amended previous legislation to attempt to simplify the procedure surrounding judicial factors. It allowed for the Accountant to grant authority to judicial factors to act where they were not given the express authority to do so by the court and also further extended the powers of the sheriff courts to appoint judicial factors.

Bankruptcy (Scotland) Act 1993

2.23 The 1993 Act again separated the offices of the Accountant of Court and the Accountant in Bankruptcy.

Charities and Trustee Investments (Scotland) Act 2005

2.24 The 2005 Act repealed most of the Trustee Investments Act 1961, amending the law in relation to charity fundraising and investment powers of trustees (including judicial factors).[26]

Nature of the office

2.25 The office has been perceived as that of a preserver of the estate and the duty of conservation is apparent in certain definitions of the office of judicial factor.[27] In Bell's Commentaries it was stated that the object of sequestration and purpose of the appointment of a factor was to preserve the estate rather than to improve it for the benefit of the creditors[28] and the duties and powers of a factor were described as those of a "mere manager".[29] Bankton, again in the context of sequestration, stated:

> "The office of a sequestree is safely to keep the thing, and to manage it to the best advantage in the mean time, and, at the end of the suit, to deliver it, with the profits, to the person that is preferred…"[30]

2.26 The appointment is seen as one of necessity rather than convenience (and as such its temporary nature has been stressed).[31] This is consistent with the power of the Court of Session to appoint which arises from the *nobile officium* and the open list of situations in which a factor can be appointed. It has been stated that:

> "Now, there is no limit to the circumstances under which the Court, in the exercise of its *nobile officium*, may appoint a judicial factor, provided the appointment is

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[26] Schedule 3, paragraph 4 of the 2005 Act. For discussion of the reforms which were enacted in the 2005 Act, see Part II of the Law Commission and Scottish Law Commission *Report on Trustees' Powers and Duties* (Law Com No 260, Scot Law Com No 172, 1999).
[27] 24 *Stair Memorial Encyclopaedia*, para 247.
[28] Bell, *Commentaries* (6th edn), III. 15, 4; IV. 5,12.
[29] *Ibid,* III. 5,12.
[30] Bankton, *Institute* (1751), i.15.16.
[31] *Bryce v Graham* (1828) 6 S 425.

necessary to protect against loss or injustice which cannot in the circumstances be prevented by allowing the ordinary legal remedies to take their course."[32]

2.27 This is also linked with the limit on the powers of a judicial factor to those which are necessary for achieving the purpose of the appointment.[33]

2.28 As part of the general fiduciary duty, a judicial factor must avoid any conflict of interest with the beneficiaries of the estate. Furthermore, in addition to the duty of conservation referred to above, when considering the nature of the office, it must be remembered that judicial factors are subject to the supervision of the Accountant.[34]

2.29 The factor's fiduciary position means that there is no entitlement to remuneration except for the commission set by the Accountant. It also means that any profit earned during the course of the factory belongs to the estate and that if the factor, *qua* factor, enters into any loss-making transactions with himself or herself in another capacity, that shortfall must be made up.[35] In the case of *Lord Gray and Others, Petitioner*[36] it was held by the majority of judges that a judicial factor could not make profit by appointing his own firm as law agents to the factory. This was based on the theory that a factory can be seen as a trust[37] and that the "…office of judicial factor is eminently of a fiduciary character."[38] Judicial factors are deemed to be trustees for certain purposes and are in a broader sense in a position of trust and therefore subject to the associated fiduciary duties.[39]

2.30 Another aspect of the nature of judicial factory, and trust law in general, is that it was seen as important that the court did not generally interfere with the administration of estates where a judicial factor had been appointed.[40] This was emphasised in the case of *John Mathieson, Petitioner*[41] where the court was careful to use the word "authorised" rather than talk of a "direction" in its interlocutor so as not to interfere with the discretion of the *curator bonis*.

Conclusion

2.31 There is a continuing requirement for judicial factors in modern times, although the number of situations in which such an officer may be appointed has decreased. The applicable law for those that remain, however, has not changed significantly since the 19th century and any changes which have occurred have not challenged the traditional view of the judicial factor as a preserver of the estate.

2.32 Although this view of judicial factors as preservers is still held today and the conservation duty is still apparent in perceptions of the role of a judicial factor, it can be contended that types of judicial factor come under two broad categories: those who preserve the estate and those whose role is, in fact, one of realising and distributing the estate (such

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[32] *Leslie's Judicial Factor* 1925 SC 464 at 469.
[33] 24 *Stair Memorial Encyclopaedia*, para 253.
[34] *Ibid* at para 243.
[35] Walker, p 2. See also *Robertson v Morison* (1849) 6 Bell App 422; *Mitchell v Burness* (1878) 5 R 1124; *AB's Curator Bonis* 1927 SC 902.
[36] (1856) 19 D 1.
[37] *Ibid* at 15.
[38] *Ibid* at 21.
[39] 24 *Stair Memorial Encyclopaedia*, para 246.
[40] Bell, *Commentaries* (6th edn), III. 15, 4.
[41] (1857) 19 D 917.

as those appointed on intestate estates or under bankruptcy legislation). It could be said that even under the former category it would be more appropriate to redefine the "outmoded" conservation duty as a duty on the factor to administer in the interests of the beneficiary and those to whom the beneficiary owes duties of support. This is because a duty of conservation, strictly interpreted, may possibly work against the beneficiary's interests (as the estate is not being used to the benefit of the beneficiary) and in favour of those who will eventually succeed to the estate. Further, as the conservation duty was largely based on a now old-fashioned view of heritage as the paradigm form of investment,[42] it may need to be reconsidered for the 21st century.

[42] See para 6.29 below.

Part 3 Appointment of judicial factors

Introduction

3.1 The procedure for the appointment of a judicial factor is by petition to the appropriate court. With the exception of a petition for the appointment of a factor in terms of section 41 of the Solicitors (Scotland) Act 1980 (where the petition is made to the Inner House of the Court of Session) either the Outer House of the Court of Session or the appropriate sheriff court may be petitioned.[1] The appropriate sheriff court varies according to the type of judicial factory.[2]

Who may petition?

3.2 Anyone with an interest in the property which it is sought to have preserved may petition the court for the appointment of a judicial factor. For example, in the case of a trust estate, it would be competent for a beneficiary to petition; in a bankruptcy factory it would be competent for a creditor to petition. The Accountant may petition for the appointment of a factor in the event that a factor has died undischarged or has ceased to perform his or her duties.[3]

Who may be appointed?

3.3 Any natural person of full legal capacity may be appointed provided that the court considers that person to be suitable for the office. The petition will name a person to be appointed as factor and usually the court will appoint that person although it has the ultimate discretion in that regard.[4] We understand from the Accountant that, generally speaking, those appointed as judicial factors are either practising solicitors or chartered accountants.

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[1] RCS, rules 14.2 and rule 61.16 *et seq* govern petitions under s 11A of the Judicial Factors (Scotland) Act 1889 on the estate of a deceased person; s 4(1) of the Judicial Factors (Scotland) Act 1880, as amended by s 14 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, empowers sheriffs to appoint judicial factors in small estates.

[2] In any petition for the appointment of a judicial factor on a trust estate, (other than a marriage contract) the appropriate sheriff court is that of the sheriffdom in which the truster was domiciled at the date on which the trust came into operation or, in any other case, the sheriff court at Edinburgh. With regard to a marriage contract, the appropriate sheriff court is that of the sheriffdom in which either spouse was domiciled at the date of death or, in any other case the sheriff court at Edinburgh. In a petition for the appointment of the judicial factor to an individual, the appropriate sheriff court is that of the sheriffdom in which the individual is resident; in any petition for the appointment of a factor *loco absentis* for an individual, the appropriate sheriff court is that of the sheriffdom in which the individual was last known to the petitioner to be resident; in any other case the appropriate sheriff court is that at Edinburgh: Judicial Factors (Scotland) Act 1880, s 4(1A) (inserted by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, s 14).

[3] Judicial Factors (Scotland) Act 1889, s 10.

[4] *Anderson, Petitioner* (1854) 17 D 97; *Broad v Edinburgh Northern Tramways Co* (1888) 15 R 615. Someone who has been sequestrated cannot be appointed as a judicial factor; see *Miller and Others* (1849) 12 D 911. Similarly, someone with an adverse interest will not usually be appointed; see *Leslie* (1904) 12 SLT 359; *Hagart* (1893) 1 SLT 62 (OH).

Domicile

3.4 The general – and said by Walker to be "almost universal"[5] – rule is that, in order to be appointed, a prospective judicial factor must be resident in Scotland and therefore subject to Scottish jurisdiction.[6] There have, however, been some cases where the factor was not domiciled in Scotland,[7] but these are very few in number and have been treated as anomalous in both the textbooks[8] and by the courts themselves.[9] It therefore appears both in theory and in practice that only those domiciled in Scotland will be appointed as a judicial factor, and thus that the Scottish courts will enjoy jurisdiction in any actions raised against them. Walker notes that in those cases where a factor is appointed who is furth of Scotland, he or she is required to prorogate the jurisdiction of the Scottish courts,[10] as happened in *Sim v Robertson*.[11]

3.5 The existing law governing who may be appointed as a judicial factor appears to us to be satisfactory.[12]

Cost of petition for appointment

3.6 The expenses of a successful petition will generally be borne by the estate over which the judicial factor is appointed,[13] although the court will occasionally award expenses against the petitioner depending on the circumstances.[14]

Jurisdiction

3.7 At present, most, if not all, petitions for appointment of a judicial factor are made to the Court of Session. While it is competent, by virtue of section 4 of the 1880 Act, to petition the sheriff, this facility is not much used. Some of those with whom we have discussed these questions are of the view that this tendency to initiate petitions in the Court of Session may contribute to the length of time taken to secure appointments. On the other hand, at a time when communications have never been easier, and the use of judicial factors so named is declining,[15] it may be more appropriate to continue with what has become a centre of

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[5] Walker, p 63.
[6] Thoms, ch iii para 42; Walker, *ibid*. See also *Adie v Mitchell* (1835) 14 S 185, *Robertson* (1846) 9 D 210, *Napier* (1902) 9 SLT 439, *Forsyth* 1932 SLT 462 and *Mitchell v Mitchell* 1961 SLT (Sh Ct) 58.
[7] See for example *Scott* (1851) 13 D 951, *Lord MacDonald* (1864) 2 M 1194 and *Duff* (1910) 2 SLT 202.
[8] Thoms refers to *Scott*, *ibid*, as "most likely *per incuriam*" – *supra* fn 7.
[9] As noted by Walker at p 63, *Duff* (fn 7) is impliedly disapproved in *Forsyth* (fn 6, at p 463). Walker also notes that in *Lord MacDonald* (fn 7) the court affirmed a minor's choice of an English *curator*, rather than selecting a suitable appointee itself. In the earlier case of *Napier* (*supra* fn 6), Lord Pearson noted that (his own) appointment of an Englishman was an example of a practice which "ought not to be extended" and which "on principle… ought not to be done" (at p 439). A petition under the Guardianship of Infants Act 1886 for appointment of an Englishman in *Sim v Robertson* (1901) 3 F 1027 was regarded by the Lord President (Kinross) as "unusual", and was granted only because of the requirement in the 1886 Act that the court have regard to the best interests of the pupil. Notably, however, the appointee specifically prorogated the jurisdiction of the Scottish courts, and furthermore, he was joined in the petition for appointment by the pupil's mother, who *was* resident in Scotland.
[10] Walker, p 63, note 21.
[11] (1901) 3 F 1027.
[12] It appears that current EU legislation does not have a bearing on this issue.
[13] *Hill v Piercy* (1854) 16 D 425.
[14] Walker, p 129.
[15] Due, in part, to the creation of statutory offices which have taken over work traditionally carried out by judicial factors.

expertise in the Court of Session than to encourage applications to be made in any of the sheriffdoms across Scotland.[16]

3.8 Although there are arguments both for and against change in the concurrent jurisdiction presently exercisable by both the Court of Session and the sheriff court, we suggest that in order to ensure a modern, flexible system for the appointment and use of judicial factors, practitioners should continue to have the option to use the sheriff court as well as the Court of Session.

3.9 Regarding applications to the Court of Session, it is for consideration whether all such applications should be made to the Outer House, or whether it should still be possible for particular kinds of application, such as those under the Solicitors (Scotland) Act 1980, to be made to the Inner House.[17] Our inclination would be to confine applications to the Outer House.

3.10 A further point about jurisdiction is that the concurrent jurisdiction relates only to the appointment of judicial factors by way of petition. Insofar as the Court of Session has power, under the *nobile officium*, to appoint judicial factors in the course of other proceedings,[18] or otherwise, we would not suggest that that power should be conferred on the sheriff court.

3.11 Accordingly, we ask the following question:

2. Should the present concurrent jurisdiction of the Court of Session and the sheriff court in relation to petitions for the appointment of judicial factors continue, or should that jurisdiction be limited to one or other court?

3.12 We also propose the following:

3. Where appointments of judicial factors are sought in the Court of Session, such petitions should be brought in the Outer House only.

Form of petition

3.13 The petition for the appointment of the judicial factor must set out all relevant facts as fully as possible. For example, in an application under section 11A of the Judicial Factors (Scotland) Act 1889, a petition must include:

(a) The name, last known address and date of death of the deceased;

(b) The reasons for the appointment being necessary;

(c) The interest of the petitioner, including –

(i) if a creditor, the nature and amount of the debt, how constituted, vouched or established, or

[16] We note the 2009 Review of Civil Courts recommends alteration of the respective jurisdictions of the Court of Session and sheriff court. See above, para 1.24.
[17] Again, see para 1.24.
[18] *Simpson's Executor v Simpson's Trustees* 1912 SC 418, discussed below at para 3.14.

(ii) if a person having an interest in the succession to the estate, the nature of that interest;

(d) Details of the estate of the deceased person so far as known to the petitioner including heritable and moveable property, any stock in trade, interests in any business or partnership, debts owed to or by the deceased and any other relevant facts;

(e) The names and addresses of all persons known to the petitioner as having an interest in the estate either as creditors or in the succession to the estate, and the nature of the interest in each case; and

(f) The name, designation and address of the person nominated to be the judicial factor.[19]

3.14 If it is important that an appointment of a factor is made urgently then the petition will also seek the appointment of an interim judicial factor. Such interim appointments are the solution to the competing necessities of taking over an estate as quickly as possible and intimating to interested parties. Once the petition has been lodged the court pronounces an interlocutor for service.[20] In the case of a petition lodged under section 11A of the Judicial Factors (Scotland) Act 1889, there is also a requirement for intimation in the Edinburgh Gazette.[21] In addition to appointment by way of petition, a factor can be appointed *de plano* in place of a factor who has been removed from office,[22] to administer a child's property,[23] to administer damages or sums of money payable to children[24] and by the Inner House in the course of a litigation pending before it. In the case of *Simpson's Executor v Simpson's Trustees*[25] the Inner House heard an appeal against the sheriff's decision to reverse the decision of the sheriff substitute confirming the executor as executor nominate. The trustees were seeking the reduction of the will. The court had no difficulty in deciding to appoint a judicial factor on the estate pending resolution of the action of reduction.

3.15 In relation to formal appointments, a number of practitioners have already suggested to us that the current method of appointment by way of petition – normally to the Court of Session – is too slow. We are not persuaded that the petition process *itself* causes delay. The implications of appointing a judicial factor are significant and it is important that the process is not rushed. On the other hand, we do consider that there is room for improvement in relation to the application for caution which accompanies the petition process. We discuss caution at paragraphs 7.2 to 7.10 below.

Interest

3.16 It is a requirement that those who petition for the appointment of a judicial factor have a direct interest in the estate over which the appointment is sought.[26] In some cases,

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[19] RCS, rule 61.17.
[20] RCS, rule 14.5.
[21] RCS, rule 61.18.
[22] *Accountant of Court v Jaffray* (1851) 14 D 292.
[23] Children (Scotland) Act 1995, s 11(2)(g).
[24] *Ibid*, s 13(2)(a).
[25] 1912 SC 418.
[26] Addison, para 22.1. In the case of factories over the estates of deceased persons, s11A of the Judicial Factors (Scotland) Act 1889 expressly requires that the petitioner's interest is set out in the petition.

however, it may be that there is nobody who can demonstrate such an interest. Take, for example, the scenario of an individual who goes missing but is not presumed dead. There do not appear to be any relatives. The roof of the missing person's semi-detached house is badly damaged. Does the owner of the adjoining property have an interest which would permit an application for a judicial factor to administer the missing person's property? We think that the court would be sympathetic in such circumstances but we would be interested to learn of any instances where the lack of a direct interest has caused difficulty. Ultimately, of course, in the case of a property in which nobody had an interest, the Queen's and Lord Treasurer's Remembrancer would have an interest as *ultimus haeres*.

3.17 Accordingly we ask the following questions:

4. Are any practical problems encountered by the absence of the necessary interest to petition for the appointment of a judicial factor?

5. Should the definition of "interest" be widened for the purposes of a petition for the appointment of a judicial factor?

Material to be included in the petition

3.18 We have received some representations that the material included in a petition for the appointment of a judicial factor does not "tell the whole story" in the sense that a person reading the petition would not know precisely why the appointment was being sought. It may be that the styles used in drafting petitions have become outdated, contributing to the problems encountered by practitioners, mentioned above. As set out in paragraph 3.13, section 11A of the Judicial Factors (Scotland) Act 1889, which governs judicial factories created over the estate of a deceased person, requires the petition appointing the factor to include certain specific pieces of information, and may be a useful framework on which to base a set of requirements for all judicial factory petitions to follow.

3.19 Accordingly, we ask the following question:

6. Do consultees consider that the usefulness of petitions for the appointment of a judicial factor and the resulting interlocutors would be improved by either:

(a) updating drafting styles, or

(b) requiring that certain items of information be included?

Sequestration

3.20 Sequestration has been defined by Bell as "a judicial assumption by the Court of the possession of property which is in competition before it, that it may be placed in the custody of a neutral person… in order to be preserved and properly managed…".[27] The concept is of course familiar in relation to personal insolvency under the Bankruptcy (Scotland) Act 1985 and related legislation. It is also used, however, in certain cases where a judicial factor is appointed on an estate. In such a case, it is unconnected with insolvency, and

[27] Bell, *Commentaries* (ed. John M'Laren, 1870), VI.II.I.II at para 263; see also *Smith v Smith* (1892) 20 R 27.

indeed use of the term "sequestration" to describe what occurs in these two entirely different situations was lamented as early as 1870.[28]

3.21 Be that as it may, it is difficult to identify any clear principle from the practice of the Court in relation to sequestration as an incident to the appointment of a judicial factor. In *Smith v Smith*[29] Lord Young observed:

> "The meaning of sequestration is the placing of the estate under the management of an officer appointed by the Court, and the manager is the sequester. If, then, the Court appointed a judicial factor without sequestrating the estate, you would have a manager with nothing to manage."

That was a case where a judicial factor was sought to be appointed on a partnership estate and, in relation to partnerships, the practice has been approved more recently. In *Council of the Law Society of Scotland v McKinnie (No. 2),*[30] Lord Penrose said:

> "In the case of partnership, as in the case of trusts, sequestration remains an essential preliminary to the appointment of a judicial factor wherever there is a risk of conflict of power."[31]

The conflict referred to is presumably the potential conflict between the powers of the partners or trustees, on the one hand, and the powers of the judicial factor, on the other.

3.22 It is therefore perhaps surprising that there is thought to be no such risk where the property is owned by an individual or a sole practitioner,[32] or forms part of an intestate estate or lapsed trust.[33] Indeed, in relation to such an appointment, Lord Penrose observed, in the same case:

> "In my opinion the proper view of the effect of the appointment of a judicial factor on a solicitor's estate in terms of sec. 41 of the 1980 Act, derived from a consideration of the purposes of the appointment, is that possession of the solicitor's estate, including client funds, is transferred to the judicial factor with title to intromit therewith and to realise the estates and to apply the proceeds in accordance with the requirements of the situation after full investigation…[I]t makes little sense to refer to continuing rights of property in the solicitor in assets which are totally at the disposal of the judicial factor during his period of administration."[34]

3.23 It is possible for a factory estate which has already been sequestrated into the hands of the judicial factor to be sequestrated again under the Bankruptcy (Scotland) Act 1985 (as amended).[35] Before this can happen, however, the court must recall the original sequestration, otherwise the right of administration will remain vested in the (vacant) factor's

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[28] *Ibid*, VI.II.V.I at fn 2.
[29] (1892) 20 R 27.
[30] 1995 SC 94.
[31] *Ibid,* p 110.
[32] *Ibid* at p 110 per Lord Penrose.
[33] Walker, pp 4 - 5.
[34] *Council of the Law Society of Scotland v McKinnie (No. 2)* 1995 SC 94 at 110 - 111.
[35] *Ross v Gordon's Judicial Factor* 1973 SLT (Notes) 91 in relation to the 1985 Act's predecessor.

post following termination of his or her appointment.[36] The judicial factory comes to an end when this second sequestration takes place and the trustee in sequestration is appointed.[37]

3.24 As the powers of a judicial factor, as described by Lord Penrose in the quotation above, appear to apply whether or not there is formal sequestration of the factory estate into the hands of the factor, we wonder if sequestration remains a live issue or if it has outlived its purpose.[38] Alternatively, if a formal sequestration is of assistance in defining the extent of the factor's powers, then perhaps it should be an incident of all appointments of judicial factors. If the latter course were to be followed, then it is for consideration whether the same term should be used in relation to judicial factories as in relation to insolvency, in view of the undesirable connotations in the latter case.

3.25 Accordingly, we ask the following questions:

7. Should factory estates be sequestrated into the hands of the judicial factor as a matter of course?

8. For the avoidance of confusion, should another term be substituted for "sequestration" where it is used in the context of suspending the owner's right to administer the estate and vesting such a right in the judicial factor and, if so, what should that term be?

Publication of appointment

3.26 Some of those to whom we have spoken were concerned that the fact of an appointment was not sufficiently widely advertised. For example, a bank might not be aware that a judicial factor had been appointed to deal with a person's affairs and might make a loan to such a person in ignorance of the appointment. We note that, where a factor is appointed on the estate of a deceased person his appointment must be advertised in the Edinburgh Gazette (and any other appropriate newspaper) within 14 days of receiving the official copy interlocutor and a copy of each newspaper containing this notice with certificates of publication must be lodged in process.[39] It is for consideration whether all appointments, not just those of factors over the estates of deceased persons, should be publicised, and if so, where that should be done. It may be that appointments could be

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[36] Walker, pp 116 - 117. See also *Shedden and Others, Petitioners* (1867) 5 M 955; *Hunter v Home* (1834) 12 S 406.
[37] Walker, p 116. See also *Mitchell v Scott* (1881) 8 R 875 at 878, *per* the Lord President (Inglis).
[38] Furthermore, in terms of title to property, the effect of sequestration is unclear. See Part 4 for discussion.
[39] See also paragraph 5.22 *et seq* below. We also note that, whereas the Home Owner and Debtor Protection (Scotland) Act 2010, s 12 repealed ss 15(6) and 25(6) of the Bankruptcy (Scotland) Act 1985 which required the publication of certain notices in the Edinburgh Gazette on award of sequestration and appointment of a replacement trustee, other requirements in the 1985 Act to so advertise have not been affected.

registered in an existing database, for example the Register of Inhibitions, which is routinely searched in transactions involving heritable property.[40]

3.27 Accordingly, we ask the following question:

9. Should appointments of judicial factors be publicised, and if so, in what manner?

[40] It should be noted that a factor is required to intimate his or her appointment over a company to the Registrar of Companies – ss 1154 - 1155 of the Companies Act 2006.

Part 4 Vesting in the Judicial Factor

Introduction

4.1 A factor is an agent and accordingly it might be expected that title to the beneficiary's property would remain with the beneficiary. That is indeed the common law rule. "The position of a curator bonis[1] is not that he has transferred to him the estate of the ward, nor is the ward divested of that estate."[2] Nevertheless statutory provisions exist that enable the judicial factor to take title. In this Part we outline the current law and, after concluding that it is not in a satisfactory state, suggest how it might be reformed.

Comparison with trustee in sequestration

4.2 By way of background, it is worth noting the position in a sequestration by way of bankruptcy. The debtor's estate is vested in the trustee in sequestration.[3] Where the property is not subject to registration, the trustee takes a completed title immediately. The main examples are corporeal moveable property,[4] and monetary claims against third parties.[5] Where registration is required, the sequestration enables the trustee to complete title, but unless and until that happens, title remains with the debtor. Heritable property is the main example, but some moveable property (ships, patents, company shares) is also subject to registration.

Sequestration in favour of a judicial factor

4.3 Sequestration, in the context of judicial factories, is discussed in Part 3. Whether it has any effect in terms of title to the property in question is unclear. In *Yule v Alexander*[6] Lord Adam said: "This point turns on the question whether or not the ward is divested of his estate by the appointment of a curator bonis. In this case the ward's estate has not been sequestrated. If that had been done I do not know … what effect it would have had."[7]

The conveyancing legislation: the statutes of 1868, 1921 and 1938

4.4 Section 24 of the Titles to Land Consolidation (Scotland) Act 1868 provides a mechanism for a judicial factor to complete title, *qua* judicial factor, but only in relation to heritable property. The authority of the court is required. This was supplemented by section 25 of the Trusts (Scotland) Act 1921, in relation to both heritable property and "moveable or personal property", but only in respect of judicial factories of trust estates, and only where the application to the court is made within the petition.

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[1] A type of judicial factor. See Appendix B.
[2] *Yule v Alexander* (1891) 19 R 167 at 168 *per* Lord Kinnear.
[3] See generally William W McBryde *Bankruptcy* (2nd edn 1995) chapter 9.
[4] Except ships.
[5] Except for bonds subject to the Stock Transfer Act 1963.
[6] (1891) 19 R 167.
[7] *Ibid* at 168.

4.5 Section 1 of the Conveyancing Amendment (Scotland) Act 1938 allows a judicial factor on a trust estate to complete title to heritable property without the authority of the court.[8] The provision applies only to heritable property, so that a judicial factor seeking to complete title in relation to a trust estate can found on the 1938 Act for heritable property but must found on other legislation in relation to moveables.[9] That other legislation is either section 25 of the 1921 Act, as just mentioned, or section 13 of the Judicial Factors (Scotland) Act 1889, considered below.

Section 13 of the Judicial Factors (Scotland) Act 1889

4.6 Section 13 of the Judicial Factors (Scotland) Act 1889 provides:

> "An official certified copy interlocutor of the appointment of any judicial factor… shall have throughout the British Dominions, as well out of Scotland as in Scotland, the full force and effect of an assignment or transfer, executed in legal and appropriate form, of all funds, property, and effects situated or invested in any part of the British dominions, and belonging to or forming part of the estate under his charge; and all debtors and others holding any such funds, property, or effects, shall be bound, on production of such official certified copy interlocutor to pay over, assign or transfer the same to such judicial factor, trustee, or other person."

4.7 The expression "assignment or transfer" is odd, because an assignment (assignation) is one type of transfer, namely the transfer of incorporeal property. Possibly the section was intended to apply only to incorporeal property. On the other hand the expression "all funds, *property*, and effects" is unqualified. As far as we are aware, no reported case discusses the application of section 13 to land. In *Inland Revenue v McMillan's Curator Bonis*[10] there was some brief but inconclusive discussion of the question. Lord Sorn asked Counsel:[11] "Is section 13 not intended to deal only with moveable property?", to which the answer was: "Its language certainly suggested moveable rather than heritable property, but it was submitted that it was general in its application."[12] The point was not determined because the judicial factory seems in fact not to have involved any heritable property. An additional puzzle is that the section's headnote reads: "Funds, &c, furth of Scotland to be paid to factor, &c on the production of official extract of appointment." That represents the section as dealing solely with non-Scottish assets. Yet the section itself is not so limited.

4.8 An argument for the view that section 13 does not apply to heritable property is that if it does, then the special provisions mentioned above[13] would be otiose. Indeed, a parallel argument could be applied to moveables, for section 25 of the 1921 Act contemplates completion of title to moveables with the authority of the court, something that would seem pointless if section 13 of the 1889 Act applies to moveables.

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[8] See Walker, p 84 and *Lowe's Judicial Factor* 1925 SC 11, *Leslie's Judicial Factor* 1925 SC 464 and *McMurtrie* (OH) 1939 SN 48.

[9] Cf *Boazman, Petitioner* 1938 SLT 582. This was a trust case, but parallel issues arose. The estate was mixed heritable and moveable, and it was held that no warrant to complete title to the heritable property was needed but that warrant was needed to complete title to the moveable property.

[10] 1956 SC 142.

[11] Shearer QC (later Lord Avonside).

[12] *Inland Revenue v McMillan's Curator Bonis* 1956 SC 142 at 145. This exchange is not recorded in the SLT report of the case (1956 SLT 67).

[13] 1868 Act, s 24, 1921 Act, s 25 and 1938 Act, s 1.

4.9 The question as to what property section 13 covers is not the only source of uncertainty. There is also authority that, despite the words of the section, no assignation or transfer takes place. In the case just mentioned, Lord Clyde said:[14]

> "It was also maintained that under section 13 of the Judicial Factors (Scotland) Act, 1889, the decree appointing the curator bonis operated as an assignation of the assets of the incapax to the curator. But I do not so read the section…. [T]he section is merely designed to reinforce the title of the curator bonis to uplift and ingather the estate of the incapax. The section, so far from providing that the appointment of the curator is to operate as an assignation to him of the funds of the incapax, merely provides that the extract of the appointment is to have the effect of a duly executed transfer of the funds in question in order to give the curator authority to recover these funds from debtors and others holding these funds. But the section recognises that these funds still remain part of the ward's estate under the charge of the curator."

4.10 This interpretation takes some liberties with the wording of the section, which speaks expressly of assignation.[15] It appears that in practice judicial factors do sometimes complete title, *qua* factor, to stock market investments.[16]

Summary of the current law

4.11 The current law may be summarised as follows:

(i) It is uncertain whether sequestration[17] has any effect on title.

(ii) A judicial factor can complete title to heritable property with the authority of the court in non-trust cases.[18]

(iii) A judicial factor can complete title to heritable property without the authority of the court where the judicial factory is in respect of a trust estate.[19]

(iv) A judicial factor can complete title to moveable property with the authority of the court in trust cases, but only if authority is sought in the initial petition, not later.[20]

(v) Section 13 of the 1889 Act may (a) operate as a transfer of all kinds of assets or (b) operate as a transfer of moveable assets or (c) not operate as a transfer at all.

(vi) If section 13 does not operate as a transfer of moveables, then it seems that, with one narrow exception, there is no statutory mechanism whereby a judicial factor can complete title to moveables. That narrow exception is where the judicial factory is in respect of a trust estate, and only where the court's authority is sought within the petition itself.[21]

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[14] *Inland Revenue v McMillan's Curator Bonis* 1956 SC 142 at 148. See also the comments of Lord Justice Clerk Ross in *Bank of Scotland v Laverock* 1991 SC 117. Moreover, *Yule v Alexander* (1891) 19 R 167 was decided soon after the 1889 Act, and yet s 13 was not mentioned.

[15] It may be added that s 13 applies to trusts as it does to judicial factories. (Though we have omitted this in the text of s 13 quoted above.) Lord Clyde's approach could hardly apply to trusts.

[16] Walker, p 87.

[17] We are not here speaking of sequestration in the sense of bankruptcy.

[18] 1868 Act, s 24.

[19] 1938 Act, s 1.

[20] 1921 Act, s 25.

[21] *Ibid*.

Evaluation

4.12 The law is, we think, needlessly complex and in some important respects unclear. It is particularly unsatisfactory that there should be uncertainty as to whether a judicial factor can complete title to moveable property.

Policy options

4.13 We see no objection to the possibility that a factor should be able to complete title, to property of any type, *qua* factor. In substance that is the current law. There are nevertheless certain points of detail that need to be determined.

4.14 The first is whether any distinction should be made between judicial factories in respect of trust estates and other judicial factories, a distinction drawn in the current law. We do not see why such distinction should be drawn, but would welcome the views of consultees.

4.15 The second is whether completion of title should require the authority of the court. (For the current law on this, see above.) We find it difficult to see much value in a rule requiring the factor to obtain authority. Since such a rule has a tendency to increase expense, we incline to think that judicial authority should not be required, ie that authority to complete title should be implied in the factor's appointment.

4.16 If this approach is accepted, then there is a third, technical question, involving two alternatives. The first is that the appointment would operate, from the technical standpoint, in the same way as the appointment of a trustee in sequestration,[22] which is to say automatic completion of title for some types of property, and an option to complete title for other types of property. The second is that there would be no automatic completion of title, but the factor would simply have the option to complete title, for property of any type. We incline to think that the latter would be the preferable approach. Completion of title is less likely to be useful in a judicial factory than in a bankruptcy, and we think it should be a matter for the factor's judgment whether to take title, *qua* factor, or whether, on the other hand, to leave title where it stands, and to act merely as agent.

4.17 If this approach were to be adopted, completion of title, if opted for by the factor, would be effected by whatever was the method appropriate to the type of property in question. For land, it would be registration. The same would be true of other registered property such as ships, patents and company shares. For corporeal moveables, the method would be the taking of possession, and for monetary claims it would be intimation to the account debtor.

4.18 Since the interlocutor appointing the factor would not specify any particular heritable property, it might be wondered whether that would cause a problem from a conveyancing standpoint. The answer is negative. The interlocutor appointing the factor would of itself operate as a "general conveyance", on the basis of which the factor could complete title. For example, if X is the registered owner of Blackmains, and there is a judicial factory, then the factor could simply submit the interlocutor to the Keeper and would thereupon be registered

[22] See para 4.2 above.

in the Land Register as the heritable proprietor (*qua* judicial factor) of Blackmains.[23] In substance this is the position for trustees in sequestration.

4.19 Accordingly, we propose the following and ask the following question:

10. No distinction should be made, as to completion of title, between judicial factories in respect of trust estates and other judicial factories.

11. A judicial factor should be able to complete title to property of any type without the express authority of the court.

12. Should the position be the same as for trustees in sequestration, or should the factor simply have the power to complete title?

13. Section 24 of the Titles to Land Consolidation (Scotland) Act 1868 and section 25 of the Trusts (Scotland) Act 1921 should be repealed. Section 13 of the Judicial Factors (Scotland) Act 1889 and section 1 of the Conveyancing Amendment (Scotland) Act 1938 should be repealed in so far as they apply to judicial factories.[24]

[23] If title is still in the Register of Sasines, a notice of title would be needed, deducing title through the interlocutor. If the title is in the Land Register, such a notice of title would not be required. But if the recommendations in our report on land registration (Scottish Law Commission Report on Land Registration (Scot Law Com No 222, 2010)) are implemented, notices of title would be used in Land Register cases as they are in relation to the Register of Sasines.

[24] The latter two provisions also extend to trustees. Whether they should be repealed in relation to trustees is not a matter for the present project.

Part 5 Duties of a judicial factor

Introduction

5.1 Judicial factors have certain general duties and others which are dependent on the nature of the appointment. This will turn upon the nature of the problem which the appointment is intended to solve. The duties of a judicial factor will differ according to whether the appointment is interim or not.

General duties

5.2 Whatever the particular purpose of the appointment, judicial factors are under certain general duties. These are either laid down in statute or derived from the fact that a judicial factor is in a fiduciary position in relation to the estate. In addition to this it has been stated that a judicial factor is under a general duty of care, skill and diligence.[1] In the case of *Hutton v Annan*,[2] where an investment made by a judicial factor was being examined, Lord Shand discussed the "…caution and care that should be exercised by a judicial factor…" and the "…duty of exercising care and prudence…".[3]

5.3 Further, for some of their powers and duties, judicial factors must refer to legislation pertaining to trustees. This is not ideal as a judicial factor is not a trustee in all senses of that word. The Commission recognised this tension as long ago as 1974 when we stated in Memorandum 19 on *Powers of Judicial Factors*:

> "It has been stated 'that the process whereby tutors of certain types are spatchcocked into a Trusts Act is highly artificial', and the observation applies with equal force to judicial factors. These considerations suggest that there can be no permanent solution which does not recognise and make provision for the different functions respectively of judicial factors and trustees properly so called. Such a solution might require that judicial factors be extricated from the Trusts Acts and provided with a new statutory code which would so set out their powers and duties that much of the existing doubt about the need or otherwise for a judicial authorisation would be dispelled. But the task is formidable: no limit can be put upon the purposes for which judicial factors may be appointed, and the range of activities for which judicial factors have sought special powers is astonishingly wide."[4]

5.4 Factors to whom we spoke would find it useful to have a general statement of a factor's duties, which could be expanded to meet the particular needs of particular cases.

Preservation of estate assets

5.5 There is a distinction to be drawn between factories which are intended to preserve an estate and to manage it in the long term, and those which are intended to wind up an estate and distribute its assets in the short term. In the former type of factory, the duty to

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[1] 24 *Stair Memorial Encyclopaedia*, para 248.
[2] (1898) 25 R (HL) 23.
[3] *Ibid* at 28.
[4] At p 18. Footnotes omitted.

preserve assets should not be interpreted as a requirement on the factor to effectively freeze the estate; the factor maintains the estate as an economic entity, which can involve, for example, continuing the running of a business. Despite this inherent flexibility, it might be prudent to require a factor to be more pro-active in administering the estate for the benefit of the ultimate beneficiary.[5] If so, we wonder if there is a case for restricting such a duty to certain types of case, for example, those factories created to manage an estate in the long term.

5.6 There will of course continue to be cases where the primary responsibility of a judicial factor is to preserve the estate. But there will be others where the factor is appointed because those responsible for the estate – perhaps a partnership – have reached an *impasse* in their personal relations and are unwilling to agree on anything. In such a case the factor could play a valuable role in resolving the practical matters which were in dispute between the parties by encouraging them to reach a sensible conclusion to their dispute.

5.7 Accordingly, we ask the following questions:

14. Should factors be under a general duty to manage the estate pro-actively for the benefit of the ultimate beneficiary?

15. If factors should have a general duty to manage the estate pro-actively, should that duty be restricted to certain types of case and, if so, to what types?

16. Should factors be under a duty, where parties responsible for the estate are in dispute, to encourage and assist those parties in settling that dispute?

Ingather estate

5.8 A judicial factor must gain control over the entirety of the estate over which the appointment has been made.[6] This may involve taking possession or completing title. In general, the title to heritable property will not be completed in the name of the judicial factor, although if circumstances require it the court can give a judicial factor power to do this.[7] The judicial factor must also recover all important documents and writs relating to the estate and collect all money due to the estate which is not securely invested.[8]

Lodge inventory

5.9 As soon as possible after obtaining the certified copy interlocutor of appointment, and at least within six months from the receipt of the bond of caution by the Accountant, a judicial factor must lodge a detailed inventory of the estate with the Accountant.[9] The Accountant has no power to extend this time limit.[10] The inventory must show the estate as at the date of appointment (therefore before the factor has intromitted with the property)[11] and must be

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[5] See also para 5.14 *et seq* below.
[6] Walker, p 83.
[7] 24 *Stair Memorial Encyclopaedia*, para 244. See Part 4 above.
[8] Judicial Factors Act 1849, s 3.
[9] See paras 7.2 - 7.10 below.
[10] Addison, para 5.1.
[11] Walker, p 96.

lodged with all relevant documents and vouchers. The inventory may be altered by the Accountant if further property is found at a later date and this is intimated to the Accountant by the judicial factor in the annual account and by letter[12] but the 1849 Act states that a judicial factor must "…use all reasonable diligence in ascertaining the exact nature and amount of the estate placed under his charge…". The form for the inventory is provided by the Accountant[13] and the inventory must be signed by both the Accountant and the factor.[14]

5.10 If there is more than one estate subject to the factory, the factor should lodge a separate inventory for each estate. For example, the factor may have an inventory for a partnership estate and also a separate inventory for the estates of each of the partners.[15]

Lodge accounts

5.11 A judicial factor is under a duty to lodge accounts of charge and discharge with the Accountant annually. This duty is found in section 4 of the 1849 Act. The Accountant sets the day when the accounts are to be closed and a factor then has one month to lodge them with the Accountant along with all the documents necessary to vouch for the entries. These vouchers are to be numbered and referred to in the account by their numbers. The Accountant is given the power in the statute to extend the deadline for lodging the accounts to a maximum of three months from the date set for the closing of the accounts.

5.12 In our meetings with factors we were told that the requirement to lodge accounts in accordance with section 4 was rarely complied with on time. Further, the current form of accounting, known as accounts of charge and discharge, is regarded by many as archaic,[16] and the requirement to produce original vouchers for all transactions is not in line with general accounting practice. One firm observed that in their dealings with Her Majesty's Revenue and Customs they are trusted to do accounts properly, subject always to random audits and the questioning of any irregularities. They did not see why the system in relation to judicial factories should be so much more onerous. We agree that the existing form of accounting is unsatisfactory and does not reflect modern practice. For example, in relation to guardianship, the Public Guardian has considerable discretion as to the form of accounts and the process of audit.[17] It is clear that there is scope for much more flexibility; a statement of affairs recording receipts and payments such as that frequently submitted to the Accountant in Bankruptcy in sequestration cases might be one possible alternative.

5.13 Accordingly, we ask the following questions:

17. Is the current system of accounting for the operation of judicial factories unsatisfactory and, if so, what accounting system should be substituted in its place?

18. Are the current requirements regarding the timing of the lodging of accounts satisfactory?

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[12] 1849 Act, s 3.
[13] Addison, para 23.1.
[14] 1849 Act, s 3.
[15] Addison, para 23.2.
[16] Cf Addison, para 10.3.
[17] Adults with Incapacity (Scotland) Act 2000, Sch 2, para 7.

Banking and investment duties

5.14 Under section 5 of the 1849 Act a judicial factor must not retain more than £500 of estate funds for longer than 10 days or a financial penalty, in the form of a prohibitive interest rate, will be imposed. The Act imposes a duty on the factor to lodge funds (in the judicial factor's name as factor on the estate) in one of the following institutions listed in section 5(1):

(a) an institution authorised under the Banking Act 1987;

(b) the National Savings Bank; or

(c) a building society incorporated (or deemed to be incorporated) under the Building Societies Act 1986.

It is indicative of how unsatisfactory this area of the law is that the Banking Act 1987 has been repealed without section 5(1) of the 1849 Act having been updated, thereby creating further uncertainty for judicial factors.

5.15 Some of the factors with whom we discussed this matter were of the view that factors should be under a positive duty to invest where possible: they felt that otherwise there was a tendency for factors simply to put funds on deposit in a bank, which would not benefit the estate to any extent. There is authority for the proposition that trustees are subject to a general duty to invest the funds in their care, rather than simply to place them on deposit,[18] but it is not clear that that duty extends to judicial factors. Given the emphasis placed by the court on the general responsibility of a judicial factor to conserve the estate, it may be that it would not be appropriate to impose any general duty to invest on a judicial factor. It seems to us, however, that if there is any support for a more pro-active role such as that discussed earlier,[19] such a duty could be imposed, if appropriate, in the interlocutor appointing the judicial factor. On the other hand, if a new general duty to invest were to be subject to section 4A of the Trusts (Scotland) Act 1921[20] it may be that such a duty would benefit factory estates without exposing the beneficiary's interests to any unreasonable risk.

5.16 Accordingly, we ask the following question:

19. Should judicial factors be subject to a general duty to invest funds rather than simply conserve them?

Duty not to delegate

5.17 A judicial factor is under a duty not to delegate responsibilities to another,[21] except under certain circumstances in relation to investing the factory estate.[22] This does not take

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[18] *Park & Others (Noble's Trustees) v Melville* (1896) 4 SLT 198.
[19] See paras 5.5 - 5.7 above.
[20] Inserted by the Charities and Trustee Investments (Scotland) Act 2005, s 94. S 4A requires that a trustee (including a judicial factor) must consider the suitability of investing and if necessary seek appropriate financial advice before doing so.
[21] 24 *Stair Memorial Encyclopaedia*, para 249.
[22] Under s 4B of the Trusts (Scotland) Act 1921, inserted by s 94 of the Charities and Trustee Investment (Scotland) Act 2005**,** which provides for a power to appoint nominees for the purpose of exercising the power of investment under s 4(1)(ea) of the 1921 Act.

away from the fact that as part of the exercise of a judicial factor's duties a factor may be required, in certain circumstances, to seek legal or other professional advice.

Seek professional advice

5.18 Where it is appropriate to do so a judicial factor must seek professional advice. This was confirmed in the case of *Crabbe v Whyte*[23] where a *curator bonis* invested money with an insufficient security. Although a valuation had been obtained by the borrower, it was held that the *curator bonis* had not made sufficient enquiry as to whether this would be a safe investment.

Enforce claim on behalf of estate

5.19 A factor has a duty to enforce and defend claims for the benefit of the estate.[24] In the case of *Henderson v Watson*[25] where a judicial factor had raised an action against a former trustee who had made payments to his own firm of solicitors for work done in relation to the estate, Lord Justice Clerk (Aitchison) said:

> "As soon as the judicial factor realised that unlawful payments of trust moneys had been made to the defender, I think he had a clear duty to recover the moneys for the behoof of whoever may be found entitled to them at the end of the day. I think, therefore, he had a clear title and interest, and indeed duty, to raise this action…".[26]

Special powers[27]

5.20 A judicial factor is entitled to apply to the court for special powers under section 7 of the 1849 Act or section 5 of the Trusts (Scotland) Act 1921. If it is in the best interests of the estate in question, it appears that a judicial factor is also under a duty to apply for these powers.

Duty to distribute

5.21 If distribution is part of the purpose of the appointment, the judicial factor will have both a duty to do so and the powers necessary for such distribution. Thus, in the case of *Francis Cooper & Sons' Judicial Factor*,[28] it was said to be unnecessary for a factor appointed to wind up a partnership estate to apply to the court for the power to sell certain heritable estate as "…he [was] only proposing to do what he was bound to do from the very moment he was appointed."[29]

Duties of a factor on the estate of a deceased person

5.22 As noted above, at paragraph 3.13 *et seq*, certain specific duties are laid down in the rules of court and in section 11A of the Judicial Factors (Scotland) Act 1889 relating to judicial factors appointed over the estate of a deceased person.[30] The first such duty is that

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[23] (1891) 18 R 1065.
[24] Walker, p 90.
[25] 1939 SC 711.
[26] *Ibid* at 720.
[27] See also paras 6.15 – 6.16 below.
[28] 1931 SLT 26 (OH).
[29] *Ibid* at 27.
[30] RCS, rules 61.20 - 61.30; Judicial Factors Rules 1992, rules 25 - 35.

the appointment must be advertised in the Edinburgh Gazette (and any other appropriate newspaper) within 14 days of receipt of the official copy interlocutor and a copy of each newspaper containing this notice with certificates of publication must be lodged in process. Creditors are required to submit claims to the factor within four months of this publication and the factor must examine and evaluate these claims. Before proceeding the judicial factor must pay preferred debts and reserve sufficient funds for administration costs and the legal expenses of the factory.

5.23 If there are creditors then the judicial factor must prepare a state of funds and, if there are sufficient funds to pay creditors, a scheme of division. These must then be lodged with the Accountant. Once the Accountant has reported on these documents they must be sent to all creditors along with that report. If there are no objections then the court will approve the scheme of division.

5.24 Where no creditors have made a claim within the specified period then the judicial factor must prepare a report on how the funds should be distributed. The Accountant will then write an opinion on this report which the factor will lodge in process. Finally, the judicial factor must give notice to interested parties.

5.25 Accordingly, we ask the following question:

20. Is it appropriate for there to be duties specific only to appointments under section 11A of the Judicial Factors (Scotland) Act 1889?

Management plans

5.26 A number of those to whom we have spoken were of the view that it would be to the advantage of the factor and of the estates managed if the factor were under a clear duty to prepare a management plan in relation to the estate. We have no doubt that that is what many factors will do in any event. We think that if the factor were under a clear statutory duty to prepare such a plan, and to agree it with the Accountant, this would give the beneficiaries an effective means of monitoring the progress of the factory. The factor and the Accountant could be required to review the plan from time to time, and any interim changes would have to be agreed with the Accountant. If the factor acted outwith the agreed plan, this would amount to a breach of his or her duty of care.

5.27 Accordingly, we ask the following question:

21. Should a judicial factor be under a duty to prepare a management plan, agreed with the Accountant, on appointment?

Statutory statement of duties

5.28 As mentioned at paragraph 5.4 above, we have already had some support for a general statutory statement of the duties of a judicial factor which the court could amend, at its discretion, according to the circumstances of a particular case.

5.29 Accordingly, we propose the following:

22. There should be a statutory statement of the duties of a judicial factor which could be adjusted by the court to meet the needs of particular cases.

5.30 We also ask the further question:

23. Would the duties set out in Part 5 of this Paper form a suitable basis for a statutory statement of the duties of a judicial factor and, if not, what deletions and/or additions do you consider to be appropriate?

Breach of duty

5.31 Section 6 of the 1849 Act provides for certain penalties on a factor for misconduct or failure in the discharge of duty. The section states that:

> "If the factor shall misconduct himself, or fail in the discharge of his duty, he shall be liable to such fine, and to the forfeiture of the whole or any part of his commission, and to suspension or removal from his office as factor, and to the payment of expenses, or to any one or more of such penalties, as the court in its discretion shall decide; and that over and above such further liability as he may be subject to as accords of law in reparation of any loss or damage sustained by the estate in consequence of such misconduct or failure."

It is clearly necessary to have adequate remedies available in the case where a judicial factor fails, culpably or negligently, to carry out the duties of the office but it is not so clear that the formulation set out in the 1849 Act is appropriate in modern times. The office is fiduciary in character and high standards are to be expected of those carrying it out. Unless there are allegations of actual dishonesty, in which case the criminal law may well be involved, it may be sufficient if the beneficiaries of the estate are able to seek an accounting from the factor, who may be made personally liable for the consequences of omitting to execute properly the functions of the office.

5.32 Accordingly, we ask the following questions:

24. Where there is misconduct or failure to discharge the duties of the office of judicial factor in some material way, are the remedies available under the current civil and criminal law sufficient?

25. If not, what additional remedy or remedies should be introduced?

Interim judicial factors

5.33 The situations where it is deemed necessary to appoint a judicial factor will often require urgent action. It is possible in such cases to have a judicial factor appointed on an interim basis before the service of the petition for appointment of a factor. This is much like the role of an interim trustee in sequestration, where the purpose is to preserve the debtor's assets prior to the appointment of a permanent trustee.[31] In some respects the duties of an

[31] See s 18 of the Bankruptcy (Scotland) Act 1985 and McBryde, *Bankruptcy* (2nd edn, 1995), para 7-01 *et seq*. See also the similar role of a provisional company liquidator - the Insolvency Act 1986, s 135.

interim factor are distinct from those pertaining to a standard appointment, although in many respects the duties are the same.

5.34 As with a permanent factor, the interim factor must take control of the estate without delay and must act independently. The interim factor is subject to the same duties to find caution[32] and to obtain a certified copy interlocutor under section 2 of the 1849 Act.

5.35 The preservation duty is particularly onerous for an interim factor. This is because when a petition is made to appoint a permanent factor, that appointment may be contested and the interim factor may be required to return the property. In that situation the person to whom the property is being returned can expect that the property will be in the same state as it was when the interim factor was appointed.

5.36 The duties of an interim factor will depend upon the particular problem which the appointment is intended to solve. In some cases it may be sufficient for the factor to secure the estate and preserve it. In others, where the estate comprises a going concern such as a shop or a farm, it may be necessary for the interim factor to be more pro-active and manage the continuing business. In these circumstances, it may therefore be more flexible for legislation to provide one schedule of duties which would pertain to both interim and permanent judicial factors and leave any necessary adjustment of those duties to the judge making the appointment.

5.37 Some of the factors with whom we discussed these issues mentioned cases in which an interim appointment had subsisted for a significant period. It is clearly desirable for there to be flexibility in these matters, but it would be unfortunate if an interim appointment, made on the basis of *ex parte* statements, and before the petition has been served on the interested parties, should subsist for any very long time. It may be that consideration should be given to a statutory time limit on the duration of an interim appointment.

5.38 Accordingly, we ask the following questions:

26. Should interim judicial factors' duties be the same as those of permanent judicial factors?

27. Should appointments of interim judicial factors be subject to a statutory time limit and, if so, should there be a facility for an interim judicial factor to apply for an extension to that limit?

Review of appointment

5.39 A major difference with an interim appointment is that the interim factor is under a duty to report to the Accountant monthly rather than annually. This requirement came about after the case of *McCulloch v McCulloch*[33] where the interim judicial factor over a partnership estate delayed in taking control of the estate after apparently being misled by the law agents who petitioned for his appointment. The partners made an agreement while the factor was in office conferring powers over the property on two other accountants. After consultation with the Second Division of the Court of Session, the Lord President (Cooper) said:

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[32] See paras 7.2 - 7.10 below.
[33] 1953 SC 189.

> "[I]n future cases of this kind it would be well to incorporate in the interlocutor making the appointment an express direction to the factor to report at intervals of not more than one month to the Accountant of Court so long as his appointment stands as an interim appointment. This may ensure that parties are not again permitted to impetrate from the Court an extreme remedy which they never allow to come into effective operation."[34]

5.40 It may certainly be appropriate to specify that the intervals between reports to the Accountant should be shorter than one year where the appointment is interim. We wonder if one possible approach would be to allow the judge making the appointment more flexibility in setting the precise interval.

5.41 Accordingly, we ask the following question:

28. Should the Accountant be required to review the appointment of an interim judicial factor periodically and, if so, should the court have greater discretion in fixing the period between reviews?

[34] *Ibid*, p 192.

Part 6 Powers of a judicial factor

Introduction

6.1 A judicial factor's powers were originally based in the common law, but these are now largely superseded by the powers given in statute.[1] The powers given to a judicial factor will depend on the purpose of the appointment. Whether at common law or under statute, a judicial factor will be given the powers required to carry out this purpose and the relative duties.[2] This Part examines the usual and special powers of judicial factors, after first considering the distinction between the two. Certain specific powers are discussed but only where these are of particular note. Also considered are the powers of an interim judicial factor and the consequences of a factor acting *ultra vires*.

The distinction between usual and special powers

6.2 The usual powers of a judicial factor are those which can be seen as ordinary acts of management. Special powers will be required for anything over and above these ordinary acts.[3] The distinction between usual and special powers was discussed in the case of *Pattison's Curator Bonis* as follows:

> "The Lord Ordinary, in his opinion, held that it was impossible to draw any hard and fast line between expenditure falling within the ordinary course of management of a judicial factor, which he is entitled to incur without the special authority of the Court, and extraordinary expenditure, for which he must obtain special powers. Each case must be judged of according to its special circumstances…
>
> …Where, however, there is any real difficulty in determining whether the expenditure falls within the scope of ordinary beneficial management, or is extraordinary expenditure, the safe course would be for the factor to apply for special power, otherwise the burden will fall on him to show that the expenditure was necessary or beneficial."[4]

Thus, for example, the alienation of property will be part of the usual powers of a factor who is appointed to realise and distribute an estate, but not of a factor appointed to conserve property pending the outcome of litigation.[5] Special powers have been granted for a wide variety of acts, including compromising a litigation[6] and donating heritable property for tax planning purposes.[7]

6.3 Usual powers will be granted to a judicial factor on appointment. Special powers will not usually be granted, however, until the situation which requires them arises and the

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[1] 24 *Stair Memorial Encyclopaedia*, para 251.
[2] *Ibid* at para 253.
[3] *Ibid.*
[4] (1895) 3 SLT 110 (OH) at 110.
[5] When the power to alienate property was first given to judicial factors in statute it was questioned whether this was unconditional but it was held that this was not the case and it was still necessary to look to the purpose of the appointment - *Marquess of Lothian's Curator Bonis, Petitioner* 1927 SC 579.
[6] *Tennent's Judicial Factor v Tennent* 1954 SC 215.
[7] *D's Curator Bonis, Noter* 1998 SLT 2.

judicial factor applies to the court.[8] Under Court of Session rule 61.15 it appears to be possible for an application for special powers to be made in the petition for appointment but the drafting of the rule is not internally consistent.[9] Whether or not any general legislation follows upon this Discussion Paper, perhaps an opportunity may be taken to adjust the terms of Court of Session rule 61.15 to clarify its meaning.[10]

6.4 Special powers are generally granted to carry out one specific act and not as a more general power to carry out a class of act.[11] Therefore, for example, general and unspecific investment powers, in addition to those provided for in legislation, will not be conferred on judicial factors.[12] When a judicial factor petitions the court for special powers the court can dismiss the petition as unnecessary, grant the petition or refuse the petition.[13]

6.5 While it would be preferable for a factor to be appointed with the usual powers, and apply for special powers later, there may be circumstances where it is the requirement for something out of the ordinary to be done which prompts an urgent application to the court. In such circumstances it would be unfortunate if the procedural requirements for petitions were to prevent consideration by the court of an application for special powers prior to the appointment of a factor. Naturally, if such an application were to be made, it would be necessary to ensure that appropriate notice was given to interested parties.

6.6 Accordingly, we propose the following:

29. It should be clarified that it is possible to combine an application for special powers with a petition for the appointment of a judicial factor.

Usual powers

6.7 As has already been stated, the starting point for considering what is within the usual powers of judicial factors is to consider what powers are necessary for the factors to discharge their duties, having regard to the purpose of the appointments. It is useful to look at the powers provided under the Trusts (Scotland) Acts and certain other common powers. We discuss potential reform of judicial factors' powers at paragraphs 6.27 - 6.38 below.

Powers under the Trusts (Scotland) Acts

6.8 The Trusts (Scotland) Act 1921 section 4, as amended, gives certain powers to trustees[14] and, for the purposes of the Act, a trustee is defined to include a judicial factor.[15] Despite this, the development of the Trusts Acts has generally been by reference only to trust law and practice, not judicial factory. Powers under section 4 of the 1921 Act are conferred with the qualification that they must not be at variance with the terms or purposes

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[8] Walker, p 78.
[9] "An application may be made (a) in the petition for the appointment of the judicial factor; or (b) by note in the process of that petition." - Court of Session rule 61.15(2); "An application by a judicial factor for special powers under this rule shall not be made before he has received an official certified copy of the interlocutor appointing him." – RCS, rule 61.15(7).
[10] See also Judicial Factors Rules 1992, rules 5 and 17.
[11] Walker, p 79.
[12] *Carmichael's Judicial Factor v Accountant of Court* 1971 SC 295.
[13] 24 *Stair Memorial Encyclopaedia*, para 253.
[14] See this Commission's proposals for the re-enactment of the powers of trustees set out in the Trusts (Scotland) Act 1921 in our *Discussion Paper on Trustees and Trust Administration* (Scot Law Com No 126, 2004).
[15] 1921 Act, s 2.

of the trust. Judicial factors must therefore consider the purpose of their appointment in determining what their powers are. Unlike trustees, they do not have a trust deed to set out the terms or purpose of their appointment and they must look to the interlocutor appointing them. If this is unclear then it is necessary to refer to the averments in the petition.

6.9 While the conferring on judicial factors of the powers in the trusts legislation was no doubt intended to clarify and extend the powers of judicial factors, the difference between the underlying purposes of the relevant legislation has caused some confusion. Where a factor is appointed on a trust estate, in place of the original trustees, the purpose of the appointment will be derived from the trust deed,[16] and the powers of the factor will be those set out in the 1921 Act, section 4. Where the original trust deed confers powers which are different from or in addition to those set out in section 4, such powers will not normally transfer to the judicial factor. In *Carmichael's Judicial Factor*,[17] the judicial factor, with the consent of the trustees being replaced by the factor, sought the conferral of particularly wide powers of investment which the original trust deed had conferred upon the original trustees. The court refused to confer such powers, and in the leading judgment, Lord Wheatley observed:

> "For the protection and conservation of the estate his [the judicial factor's] powers of investment are circumscribed by Acts of Parliament, unless the Court grants him additional powers…This places a judicial factor in a different position from trustees appointed under a trust disposition and settlement by a testator, who has the freedom to extend to them wider powers at his own option. If that is how the testator wishes his estate to be administered, so be it. But if the estate is sequestrated and comes within the administration of the Court, it is the Court which has to be satisfied about the manner in which it is to be administered, not the testator. If powers are to be given to trustees in excess of those which the law would normally confer, these powers can be given only by the person or body appointing the trustees. In the case of a trust disposition and settlement, that person is the testator. In the case of a judicial factor, that body is the Court."[18]

6.10 So it is not the case that a judicial factor appointed on a trust estate will inevitably enjoy all the powers of the previous trustees, and it will be necessary for the interlocutor of appointment to make clear what additional or different powers the factor may have from the "usual powers" mentioned above.

6.11 In cases where a judicial factor is appointed otherwise than on a trust estate, the analogy between that position and the position of a trustee is not helpful in identifying precisely the relative powers.

Power to take and defend a legal action

6.12 Judicial factors are under a duty, and therefore have the power at common law, to enforce and defend claims by action and diligence for the benefit of the estate.[19] A factor is also advised, however, to obtain the approval of the Accountant as regards the necessary

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[16] Walker, p 76; *Leslie's Judicial Factor* 1925 SC 464 at 470 - 471.
[17] 1971 SC 295.
[18] *Ibid* at 303.
[19] Walker, p 90.

expenditure of going to court if the intention is to charge this against the factory estate, otherwise the expenditure may be disallowed.[20]

Sale of heritage

6.13 It will depend on the circumstances whether or not judicial factors can sell heritable property within their usual powers. Relevant considerations are whether this is part of the usual running of the particular estate or whether it is a matter of necessity.[21] In any case, it is necessary for the Accountant to see the valuation of the property and approve the terms and conditions of the sale.[22] The power to sell heritage will be implied where there is a general duty to distribute.[23]

Judicial factories under the Solicitors (Scotland) Act 1980

6.14 While every factor will have, *ex officio,* the powers set out in the 1921 and 1961 Acts, we understand that it is customary, in cases under the Solicitors (Scotland) Act 1980, for petitions seeking the appointment of a judicial factor to seek the conferral of the powers of a receiver as set out in paragraphs 1 to 16 of Schedule 2 to the Insolvency Act 1986.

Special powers

6.15 If a judicial factor considers it to be necessary to obtain special powers, the factor can apply under section 5 of the Trusts (Scotland) Act 1921, section 7 of the Judicial Factors Act 1849 or under the *nobile officium*. In certain cases this can be done retrospectively. The procedure is found in Court of Session rule 61.15 and rule 17 of the Judicial Factors Rules 1992.[24] The factor makes a report to the Accountant who may investigate the matter and must write an opinion. The report and opinion are then submitted by the factor to a Lord Ordinary, who will in turn report to the court.

6.16 If the court considers it "expedient and consistent with due regard to the amount of the estate at the time"[25] or "in all the circumstances expedient for the execution of the trust",[26] it can give its authority for the act in question.

Applications to the Accountant

6.17 There is now a procedure under the Trusts (Scotland) Act 1961 whereby a judicial factor can apply to the Accountant for her consent to the acts mentioned in certain of the paragraphs of section 4(1) of the 1921 Act.[27] It is less formal than an application to the court, but does require intimation to interested parties.

6.18 This procedure came about as a result of the Scottish Law Commission's *Report on Powers of Judicial Factors*,[28] which resulted in amendments to the 1961 Act. It was seen as

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[20] JF Guidance Notes, note 28 (b).
[21] 24 *Stair Memorial Encyclopaedia*, para 260.
[22] *Ibid*.
[23] *Francis Cooper & Sons' Judicial Factor* 1931 SLT 26 (OH).
[24] Please note comment at para 6.3 above.
[25] The Judicial Factors Act 1849, s 7.
[26] The Trusts (Scotland) Act 1921, s 5.
[27] 1961 Act, s 2(3). The procedure is set out in RCS, rule 61.14(3) and the Judicial Factors Rules 1992, rule 16(3).
[28] Scot Law Com No 59 (1980).

a temporary solution to problems faced by judicial factors in determining whether an act was at variance with the purpose of their appointment under section 4 of the 1921 Act and the need, in cases of doubt, to take the matter to court with an application for special powers.

Nobile officium

6.19 Before the powers of judicial factors were provided for in statute, special powers could be given to judicial factors by the Court of Session under the *nobile officium*. It is now not generally necessary for the Court of Session to use its powers under the *nobile officium* in this way and they would be exercised only in very unusual circumstances.[29]

6.20 If consultees agree that fresh legislation is desirable, we would propose that such legislation should confer upon the courts the ability to confer a wide range of powers upon judicial factors generally. It would also be possible for the court to grant more limited powers where that seemed appropriate in a particular case; nor would it prejudice the residual ability of the court to grant additional powers where the need for those particular powers had not been foreseen by the legislation.[30]

Retrospective granting of powers

6.21 One area where it is currently competent for the court to exercise its authority under the *nobile officium* is in retrospectively granting powers for the extraordinary acts of a judicial factor.[31] This power of the court will only be exercised in exceptional circumstances. Examples include where the result of making an application to the court would have been to raise the price of the property to the detriment of the estate and those whom it supported[32] or where there was an urgency in making payments for the maintenance of the destitute cousin of the beneficiary, who was also her heir-at-law, where the estate was ample to cover these payments.[33]

Maintenance and payments to third parties

6.22 Depending on the nature of the appointment, it may be within the usual powers of a judicial factor to make maintenance payments out of the estate. In many situations, however, the factor will be required to apply for special powers to expend the estate in this way.[34] There seems to be a lack of clear guidelines as to what amount is reasonable for a judicial factor to distribute for this purpose. It is clearly inconsistent with the conservation principle to disburse the estate via maintenance payments, but in some circumstances this principle operates against the interests of those who currently own the estate and in favour of those who might eventually succeed to it.

6.23 If there is a third party who has a right to support from the estate then it is for the judicial factor to provide that person with support and it would not seem that special powers are required to do this, although this will depend on the circumstances of the case.[35] On the

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[29] 24 *Stair Memorial Encyclopaedia*, para 254. See also the discussion regarding trustees' powers at paras 5.32 - 5.34 of *Discussion Paper on Trustees and Trust Administration* (Scot Law Com No 126, 2004).
[30] See also para 1.19 above.
[31] 24 *Stair Memorial Encyclopaedia*, para 263; Walker p 81.
[32] *Gilray* (1876) 3 R 619.
[33] *Hamilton's Tutors* 1924 SC 364.
[34] Walker, p 108.
[35] *Ibid*, p 109.

other hand, the making of voluntary payments to a third party would require special powers and consideration will be given (where relevant) to what the person whose estate is being administered would have done, the amount of the estate and the position of the person to whom a payment is being made.[36]

Carrying on a business

6.24 Carrying on a business is outwith the normal powers of a judicial factor.[37] This means that a judicial factor must apply for special powers in order to do so. It is also evident that a judicial factor will not usually have the requisite expertise to carry on a business in all possible fields and may therefore need to employ a manager for that purpose.

Encroachment on capital

6.25 A judicial factor will usually require special powers to encroach on capital.[38] This is not something for which the Accountant can generally grant authority under her normal powers[39] but there is a formal procedure provided for in the rules of court.[40] A judicial factor can apply under this procedure if the income from the estate is not sufficient to maintain the beneficiary. The application is by letter to the Accountant who can consent to the encroachment (if it is 5% or less of the capital value of the estate) or require the factor to intimate or to apply to the court for special powers. If required to intimate, the factor must send the letter of application and a notice setting out the procedure to all interested parties. If a party objects, the factor must apply to the court for special powers. If there are no objections, the Accountant can either consent to the encroachment or require the factor to apply to the court for special powers.

Ultra vires acts

6.26 If a judicial factor acts outwith his or her powers and is not given authority to use special powers retrospectively then he or she will be liable to those with an interest in the estate.[41]

Options for reform

6.27 From our meetings with judicial factors it was clear that there were a number of cases of dissatisfaction with the present situation. Factors felt that in some cases the "usual powers" were too restrictive. This resulted in applications to the Accountant, and sometimes to the court, for relatively minor matters. Where applications were refused as "unnecessary" this too caused dissatisfaction.[42]

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[36] *Hamilton's Tutors* 1924 SC 364.
[37] Walker, p 107; *Macleod* (1856) 19 D 133; *Rutherford's Judicial Factor, Petitioner* 1931 SLT 587 (OH); *Drew, Petitioner* 1938 SLT 435 (OH). (It is of course the case that a factor may be appointed for the purpose of carrying on a business.)
[38] Addison, para 7.19; 24 *Stair Memorial Encyclopaedia*, para 261.
[39] Addison, para 7.19.
[40] See RCS, rule 61.13; Judicial Factors Rules 1992, rule 15.
[41] 24 *Stair Memorial Encyclopaedia*, para 264.
[42] The refusal of an application as unnecessary does, however, simply resolve the doubt which occasioned the application in the first place but the form of the decision may be seen as unfortunate on a superficial level.

6.28 The whole question of what should be the "usual powers" of a judicial factor turns essentially on the nature of the office, and the purpose for which the appointment has been sought.

6.29 It seems reasonably clear that, historically, the principal function of a judicial factor was to preserve the estate. This preservation function was overlaid with the prevalent 18th and 19th century respect for heritable property.[43] It remains the case that the appointment of a judicial factor is in almost all cases a temporary expedient, for instance to carry on the business of a company or charity while alleged misconduct of directors or management is investigated. Where, for example, the appointment is to replace trustees on a trust estate, it is normally envisaged that new trustees will be appointed, and it would not be appropriate to expect, or to allow, a judicial factor to exercise any unusual powers conferred on the original trustees.[44] In other cases it is even plainer that the appointment is in response to some transient contingency.

6.30 Accordingly, and making due allowance for what is perhaps a more balanced modern attitude to the perceived status of different kinds of property, it will normally remain the duty of a judicial factor to preserve the estate for whomsoever will in due course be found to be entitled to it.

6.31 The duty of simple preservation would clearly not be consistent with active management as, for example, where the factory involved the carrying on of a business.[45] In such a case to do nothing might well diminish the value of the estate. Equally, there may be cases where prudent investment of funds might be better for the long term interests of the estate than an unimaginative safeguarding, as in the parable of the talents. Further, there may be cases, as noted above, where the factor must consider the alimentary obligations of the beneficiary or the estate.

6.32 It is to be hoped that the purpose for which the judicial factory is being established will be clearly set out in the interlocutor appointing the factor. Thereafter, it would seem reasonable for the factor to be able to carry out any lawful activity which is reasonably necessary for that purpose. To avoid doubt as to the extent of the factor's capacity, that should be made clear in legislation.

6.33 This raises the question of whether it is better to set out what a factor is able to do by reference to a general statement or by reference to a detailed list of powers. We have previously considered the alternative merits of these two approaches with regard to trustees' powers.[46] While some of those who responded to us on that point thought that a list would be desirable, because it would resolve subsequent doubts as to what could or could not be done, most were of the view that a general power would be preferable. Some of those

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[43] Cf *Marquess of Lothian's Curator Bonis* 1927 SC 579, per Lord Sands at 586 – "The effect of this provision [s 4 of Trusts (Scotland) Act 1921] … is to give to a judicial factor a general power of sale of heritage. There is one consideration which might suggest a narrow view, viz, the tradition of the eighteenth century spectacles through which heritage appears to be sacrosanct, a man's importance to be measured as to ninety-five percent by the land he possesses, and the sale of a family interest in an important industrial undertaking to be regarded as a matter of trifling concern compared with the sale of some tenement property."

[44] Cf *Carmichael's Judicial Factor v Accountant of Court* 1971 SC 295; see para 6.9 above.

[45] Cf *McGuinness v Black (No. 2)* 1990 SC 21, in which a factor was appointed to carry on the business of a limited company.

[46] Scottish Law Commission, *Discussion Paper on Trustees and Trustee Administration* (Scot Law Com No 126, 2004), paras 3.41 - 3.51.

thought that a list might be inflexible – that is to say, a list of powers in the legislation could not possibly include every power the office holder is ever likely to need. Others thought that a general power would be adequate because any well-drafted trust deed would specify the powers of the trustees in some detail.

6.34 There is obviously room for a range of options. Our provisional view is that a wide and comprehensive list might be appropriate, if only to reassure third parties dealing with the judicial factor. It would not be sensible to expect interlocutors appointing judicial factors to go into the same detail as trust deeds as to specific powers. What should be apparent from an interlocutor is the purpose of the appointment. That purpose should in turn inform the factor's decisions as to which powers it will be appropriate to use. For example, a factor appointed to hold a family house during the minority of an heir would not normally consider disposing of it. Equally, if the estate comprised a viable and functioning farm, or bakery business, the factor would not be in any doubt that running the business was not simply appropriate but essential to the purpose of the appointment.

6.35 If proper consideration is given to the range of powers required for the purposes of judicial factories in general, and those powers are set out in legislation, this should reduce the need for a factor to seek further or special powers. As we identified with regard to trustees' powers,[47] such an approach has the advantage of certainty – factors could readily ascertain, and demonstrate to third parties, the extent of their powers by reference to the general factor powers contained in statute and any extra, role-specific powers specified in the interlocutor appointing them.

6.36 However the powers of a judicial factor are set out, we suggest that it should be done separately from any similar exercise in relation to the powers of trustees. The application to judicial factors of powers relating to trustees was no doubt intended to provide a degree of clarity but it has in some cases produced confusion.

6.37 There will continue to be areas of uncertainty, and in such cases it will be appropriate for the judicial factor to seek the approval of either the Accountant or the court itself. But if the legislation confers upon judicial factors a wider range of clearly set out basic powers, then those occasions will be reduced and the administration will be more efficiently and economically carried on. Appendix C to this Paper contains a list of powers which could form the basis of a schedule of powers to a new Judicial Factors Act. Allocation of powers would be at the discretion of the court in each individual case. We would envisage that the court's discretion, on appointment, would normally be to limit the powers conferred; nor do we think that it would be desirable to attempt to formulate any statutory division between usual powers and special powers.

6.38 Accordingly, we ask the following questions:

30. Should the powers exercisable by the factor be set out in legislation as a comprehensive list so as to reduce the number of circumstances in which special powers have to be sought?

31. Does the list of powers in Appendix C provide appropriate default powers for judicial factors?

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[47] *Ibid* at para 3.43.

32. In particular, would powers specific to the situation where a factor has been appointed to a sequestrated estate within 12 months of a person's death be useful? See Appendix C, paragraphs 24 – 26.

Interim factors

6.39 For interim factors the conservation duty is paramount in the present law and, accordingly, their powers are those of preservation.[48] Where, however, the estate comprises a business or a farm, in order to ensure that, in the event of objections to the appointment of a judicial factor being upheld, there is still such an asset to be handed over, it seems clear that "there would appear to be no option but to carry on the business as a going concern".[49] In some instances, this would involve the interim factor employing a manager. On the other hand, if a business was running into difficulty, the interim factor might require power to close down the business in order to preserve other assets. A court appointing an interim factor to a limited company might grant him or her the powers of a receiver[50] or an administrator.[51] As an interim appointment can remain for a substantial period of time, it is important that the powers of an interim factor are clarified. Rather than legislate for a set of powers which pertains solely to interim factors, we think that, as in relation to duties,[52] there is a strong case that it should be left to the discretion of the court to limit, as it sees fit, the application of a general list of powers pertaining to all judicial factors.

6.40 Accordingly, we ask the following question:

33. Should interim judicial factors be given the same powers as permanent judicial factors?

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[48] Addison, para 30.2.
[49] *Ibid*, para 30.2.
[50] *Ibid*, para 30.3. Insolvency Act 1986, Sch 2, paras 1 - 16.
[51] Insolvency Act 1986, Sch B1, para 59 *et seq*.
[52] Paras 5.33 - 5.38 above.

Part 7 Miscellaneous matters

Introduction

7.1 This Part looks at a number of miscellaneous aspects of the office of judicial factor.

Caution

Caution generally

7.2 Before judicial factors can proceed to carry out their duties and exercise their powers, they must find caution.[1] This rule does not, however, prevent the factor from doing something which is necessary in an emergency situation in order to protect the interests of the estate.[2] In a normal case a judicial factor has one month from the interlocutor of appointment to find caution, although a different time may be specified by the court or the one month time limit extended if a timely motion to prorogate is lodged before the court.[3]

7.3 The Accountant sets the amount of caution, which is usually 100% of the estate's value.[4] Practitioners have told us, however, that it is difficult to obtain caution for an estate with a value in excess of £50,000. Although it is competent for the court to limit the amount of caution,[5] the Accountant can increase the amount independently unless the factor requires her to report to the court first.[6] The premium is paid from factory estate funds, reducing the value of the estate for the ultimate beneficiaries. Once the premium has been paid and caution found, the judicial factor must deliver the bond of caution to the Accountant.[7] If the appointment is to be made by the Court of Session, the Accountant must then sign and endorse a certificate stating that caution has been found as well as the amount of caution and the date.[8] If the appointment is to be made in the sheriff court, the Accountant must notify the sheriff clerk that caution has been found to her satisfaction.[9] The judicial factor then requests a certified copy interlocutor from the court. This final step should be carried out without delay, as the factor cannot act without the certified copy interlocutor except in the emergency situations mentioned above.[10]

Procedural delay

7.4 The requirement to find caution has been criticised for causing undue delay in the appointment procedure, especially as it is often the case that a factor requires to act speedily

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[1] Pronounced "cay-shun". This is usually done by arranging a bond with an insurance company as security against any improper actings by the factor. Judicial Factors Act 1849, s 2 as amended.
[2] *Calver v Howard Baker & Co* (1894) 22 R 1.
[3] Addison, para 3.2; RCS, rule 61.9 (2); Judicial Factors Rules 1992, rule 10.
[4] RCS, rule 61.9 (3); Judicial Factors Rules 1992, rule 9.
[5] Judicial Factors Act 1849, s 27.
[6] RCS, rule 61.9 (4). This does not appear in the Judicial Factors Rules 1992.
[7] RCS, rule 61.9 (5); Judicial Factors Rules 1992, rule 11(1).
[8] RCS, rule 61.9 (6).
[9] Judicial Factors Rules 1992, rule 11 (2).
[10] Judicial Factors Act 1849, s 2 as amended. See also RCS, rule 61.11 and Judicial Factors Rules 1992, rule 13.

in order to conserve assets.[11] Although an interim appointment order may be obtained more speedily, the factor cannot proceed without the court's interlocutor which in turn requires caution to have been found.[12] A detailed form must be filled in and submitted to a "person authorised to carry on a regulated activity" under section 31 of the Financial Services and Markets Act 2000.[13] In practice, we understand that there is a limited number of companies which will now consider granting caution.[14]

The cost of caution

7.5 A second criticism relates to the cost of the bond. The annual premium is paid by the estate over which the factor is appointed, which in some cases may reduce the value of the estate significantly. In contrast to the era in which the statutory requirement for caution was enacted, judicial factors are in modern times almost invariably either chartered accountants or solicitors and are therefore required to carry professional indemnity insurance.[15] It has been suggested that where the grantee of the bond of caution benefits from such insurance and (in the case of a solicitor) the Law Society of Scotland Guarantee Fund, there should be no need for caution as these other insurances provide sufficient protection to the estate. That view was put forward in the case of *Cooper, Appellant*[16] which concerned an application for renewal of guardianship under the Adults with Incapacity (Scotland) Act 2000. The appellant (the guardian) was a solicitor. Sheriff Principal Sir Stephen Young stated, however, that the cost of the bond of caution was "a small price to pay for the assurance… required against the possibility of dishonesty on the part of the [guardian]", and that he was not satisfied that such assurance "would be afforded in all circumstances by the appellant's professional indemnity insurance and the backing of the Guarantee Fund."[17] Nevertheless, the Sheriff Principal went on to say that he could "envisage circumstances in which the court might take the view, for example, that the cost of securing an unqualified assurance of protection… would be prohibitively high in relation to the extent of [the] risk and the value of the adult's estate", and that in such cases it might not be appropriate for the court to require that caution be found.[18]

7.6 No doubt regard must be had to the particular circumstances of particular cases. But it does not appear from the report that the Sheriff Principal was addressed upon the risk, as opposed to the possibility, of the solicitor defaulting. We have no figures as to the percentage of solicitors acting as judicial factors who have had to make calls upon either their professional indemnity funds or upon a cautioner within the recent past. We suspect that the number is low. We would therefore regard it as an open question whether, taking the requirement to find caution as in some sense a policy of insurance, the risk justifies the cost of that insurance.

7.7 We note that private law firms routinely supplement their master indemnity policy by purchasing add-on insurance policies, which are designed to afford extra cover to practitioners when engaging in work with added risk. It may be that such an arrangement

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[11] With regard to delay in the issuing of bonds of caution over the estates of deceased persons, see Scottish Law Commission, *Report on Succession* (Scot Law Com No 215, 2009) at para 7.9.
[12] *Donaldson v Kennedy* (1833) 11 S 740.
[13] RCS, rule 33.5.
[14] Zurich SGS, Royal & Sun Alliance and through Marsh Ltd.
[15] See para 3.3 above, and also our *Report on Succession* (Scot Law Com No 215, 2009) at para 7.8.
[16] 2009 SLT (Sh Ct) 101.
[17] *Ibid* at para 14. In *Cooper* the cost of the bond of caution represented 0.2% of the value of the estate.
[18] *Ibid* at para 13.

would provide suitable protection for judicial factory estates. Furthermore, if firms routinely make use of such policies, then their existing procurement procedures could be used in finding insurance cover for judicial factories. This would avoid the need to follow the peculiar procedures involved in finding caution.

7.8 One judicial factor suggested to us that if a sufficiently robust system of appointment was put in place, abolition of the requirement to find caution would be workable and desirable in light of the prevalence of professional indemnity insurance. We think that the same point is pertinent in relation to the very small number of judicial factors who are not professionally qualified and hence would not have such additional insurance. There is an argument that an updated scheme of appointment by the court and supervision by the Accountant would reduce the risk of any wrongdoing to such an extent that the expense and trouble of finding caution would be unduly onerous.

7.9 Moreover, in our *Report on Succession*,[19] we noted in relation to executors-dative overwhelming support among consultees for the general abolition of the requirement to find caution.[20] The problems caused by the requirement to find caution in executry practice appear to mirror those in judicial factories, notably the creation of undue delay and expense to the estate. The possibility of introducing a discretionary power to order caution was also discussed in our *Report on Succession.*[21] We were, however, dissuaded from recommending such a power by consultees who made the point that to make caution discretionary as opposed to mandatory would be likely to have the effect of collapsing the current market in bonds of caution, thereby rendering occasional bonds very expensive to obtain. For the same reasons, we do not propose such a power in relation to the finding of caution by judicial factors.

7.10 Accordingly, we ask the following question:

34. Should the requirement for judicial factors to find caution be abolished?

Remuneration

7.11 Like other parties in a fiduciary role, the only remuneration to which a judicial factor is entitled is commission.[22] The amount of the commission is set by the Accountant at the annual audit of accounts according to what is seen to be reasonable in each individual case.[23] Generally the commission will be fixed according to the number of hours worked on the factory, although, if the purpose of the factory is to generate profit from investments in order to make payments under a trust deed, the commission will be a percentage of this revenue.[24] If the commission is to be based on hours worked, a judicial factor will generally be required to submit a report to the Accountant detailing time worked. The Accountant is not bound to pay a factor for all hours submitted if it appears to her that the amount is too high, nor is she required to take account of market rates or the amounts paid by the factor's

[19] Scot Law Com No 215, 2009.
[20] *Ibid* at paras 7.8 - 7.11.
[21] *Ibid* at para 7.12.
[22] See *Lord Gray and Others* (1856) 19 D 1.
[23] Judicial Factors Act 1849, s 13.
[24] Addison, paras 28.1 - 28.2.

own firm in setting the hourly rate upon which the commission is set.[25] The judicial factor's commission is credited at the next annual account.[26]

7.12 In practice, as the hourly rate of commission is often less than a judicial factor's hourly charge out rate, the total amount of commission earned by the factor is often less than the amount he or she claimed. A number of the factors to whom we have spoken expressed concern at the level of remuneration. Some even indicated that they would no longer take on the work because of the low rates of payment. Given that most factors are professional people appointed because of their professional qualifications, it is difficult to see why they should not be paid at rates which reflect their expertise. Equally, the cost of an appointment is borne by the estate, and not all the estates to which it is appropriate to appoint a judicial factor are wealthy. Indeed, some appointments are made precisely because the estate is in financial difficulty.

7.13 It may be that the current method, based around an hourly rate, and with a duty on the Accountant to satisfy herself that the number of hours claimed is reasonable, is basically satisfactory. It might be sensible to investigate whether standardised hourly rates should be set out, perhaps in a schedule to the legislation. Whatever method of payment is selected, we can see no reason why, in principle, payments should not be made to the factor more frequently than annually.

7.14 Accordingly, we ask the following question:

35. On what basis should judicial factors be paid?

7.15 It would appear that there is no statutory basis for a review of the Accountant's decision in relation to commission as the procedure for the lodging of objections in section 15 of the 1849 Act is restricted to the audit of accounts. It would still be competent, however, for a challenge to be made under the court's common law powers if the amount of the commission was seen to be either too high or too low.[27]

7.16 Accordingly, we ask the following question:

36. Should any facility to challenge the Accountant's decision as to the remuneration of a judicial factor be put on a statutory basis?

Expenses

7.17 Expenses, such as legal expenses, can be charged against the estate. The Accountant will have to be satisfied that these expenses are necessary and her prior approval may be required before they are incurred.[28] A factor cannot claim as expenses monies paid to a solicitor for work which he or she could have carried out competently.[29]

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[25] Addison, para 28.2.
[26] Walker, p 99; JF Guidance Notes, note 19. Note that the latter date from 1984 and that no updated version has been published.
[27] Walker, p 99; 24 *Stair Memorial Encyclopaedia*, para 252.
[28] Addison, para 14.1.
[29] Walker, p 100; *AB's Curator Bonis* 1927 SC 902.

Liability to third parties

7.18 This section examines the liability of judicial factors to third parties in relation to delict, contract, litigation expenses and unjustified enrichment. It also examines contractual capacity.

Delictual liability

7.19 It is foreseeable that a delictual claim could be made against a judicial factor, although it would not appear that there is any direct authority for this. Although it is more likely that delictual liability would be incurred through the factor (or a person for whom the factor is responsible) *omitting* to act, we think that the likelihood of delictual liability arising from either acts or omissions is very small. Nonetheless, we consider that this is a matter which should be clarified.

7.20 There appears to be no reason why a factor should incur direct liability for acts or omissions which turn out in retrospect to have been ill-advised, where the factor was acting (or omitting to act) in good faith while exercising reasonable judgement.

7.21 The same might be said in terms of finding a judicial factor vicariously liable, that is to say liable for the acts or omissions of someone other than the factor him- or her-self. An example might be where the factor is running a business as part of the factory estate and an employee of that business causes harm to a third party in the course of the employment Trustees in such a position have been held to be vicariously liable.[30] It is difficult to see, however, why the judicial factor should be made personally liable to third parties for delicts committed by employees of the estate.

7.22 If a judicial factor is found to be either vicariously or directly liable, the question is then whether the factor should be personally liable to pay any damages claim or whether it should be met out of the estate. This would probably, as is the position with trustees and with judicial factors for litigation expenses,[31] depend on the form of the decree. If decree is awarded against the factor as judicial factor then liability extends only to the extent of the factory estate. If the award of expenses is unqualified in this way, the factor may still make the payment from estate funds except where they are insufficient to cover the amount, in which case the factor must make up the shortfall out of his or her own estate.[32] It would appear that there is no general consensus of opinion as to whether a decree should generally be against the judicial factor as factor or unqualified. The view has been expressed, however, that to make the factor pay out of his or her own funds, if the factory estate is not sufficient, is to give the other party to the action an additional security.[33]

7.23 We consider this to be a matter that should be clarified. In principle, and in practice, the judicial factor is carrying out a public duty for the benefit of the estate. Provided that duty is carried out within the limits of the decree which appoints the factor, and in good faith and with reasonable judgement, it seems unreasonable for the factor to incur any personal liability at all.

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[30] *Mulholland v MacFarlane's Trustees* 1928 SLT 251.
[31] See below at paras 7.30 - 7.33.
[32] Walker, p 92.
[33] *Ibid* at p 93; *Craig v Hogg* (1896) 24 R 6; Thoms, chapter xvi, para 104.

7.24 Accordingly, we ask the following question:

37. Should it be made clear that, where a person suffers loss as a result of some act or omission of the judicial factor (or anyone for whom the factor is responsible) in the course of carrying out his or her duties as factor, damages should generally be payable from the estate with the estate having a right of relief against the judicial factor to the extent that the factor was personally at fault?

Contracts and contractual liability

7.25 Any contracts in force at the time when a judicial factor takes over responsibility for an estate will remain in force. The judicial factor will be able to take the benefit of those which are profitable, and will be liable, *qua* factor, for any estate debts which had been incurred prior to appointment and for existing employees. The existing contracts are as much a part of the circumstances in which the estate finds itself as are its fixed assets and cash in hand.

7.26 Although the Trusts (Scotland) Act 1921 gives factors the power to enter into contracts,[34] this is achieved in an oblique fashion by including judicial factors within the provisions which are designed primarily to apply to trusts and trustees.[35] As the ability to enter into contracts would appear to be a necessary incident of any general power of administration, we consider that the law should be explicit about the extent to which judicial factors are able to enter into contracts with third parties.

7.27 A further question which has been raised is whether, when a factor enters into contracts, the third party's rights under that contract are enforceable against the factor or the estate. It is unsatisfactory for there to be any doubt as to the liability of a judicial factor in relation to contracts entered into by him in that capacity. The factor will be acting as agent of the beneficiary so that any liability will fall upon the estate.[36] It is clear that the judicial factor should not be personally liable and in our view there is no doubt that the liability, if any, should fall on the factory estate, provided it is made clear to the other party to the contract that the factor is contracting as factor and not in a personal capacity.

7.28 Practical issues, such as whether to sue the beneficiary or the factor, arise. It would seem appropriate, where a factor has been appointed, for any litigation to be directed against him or her, in that capacity. That would be the case whether the litigation related to contracts in place before the factor was appointed, or to contracts entered into by him or her. No doubt the matter could be dealt with in Rules of Court.

7.29 Accordingly, we propose the following:

38. The ability of a judicial factor to enter into contracts, and the extent to which he or she can do so, should be set out explicitly in legislation.

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[34] S 4.
[35] Trusts (Scotland) Act 1921, s 2(b).
[36] See *SME Reissue Agency and Mandate,* para 127; *Stone and Rolfe Ltd v Kimber Coal Co Ltd* 1926 SC (HL) 45; *Scottish Brewers Ltd v J Douglas Pearson* 1996 SLT (Sh Ct) 50.

39. Where a judicial factor enters into a contract as factor and this is known at that time to the other party, it should be made clear that the third party's rights under the contract should be enforceable only against the estate and not against the factor personally.

40. Where a contract relating to the factory estate gives rise to litigation, the action should be raised by, or directed against, the factor, in that capacity.

Liability for litigation expenses

7.30 A judicial factor may be liable to the opposing litigant for expenses.[37] The following conclusions on liability for litigation expenses can be drawn from early case law:

- As a general rule a judicial factor is personally liable for expenses to a successful opposing party;
- This rule may be relaxed at the discretion of the court;
- A judicial factor will be personally liable if the decree is simply against the factor as "the defender" or "the pursuer";
- If it is intended that only the estate over which the judicial factor is appointed should be liable then the decree should be against the judicial factor *qua* judicial factor;
- As a general rule a judicial factor has a right of relief against the estate; and
- If it is intended that the judicial factor should not be able to exercise this right of relief then this should be expressly stated in the decree.[38]

7.31 Walker states that there is no general consensus of opinion as to whether the decree should generally be against the judicial factor as factor or unqualified.[39] He notes also that if the judicial factor has conducted litigation properly and has acted reasonably and in good faith then the factor should normally be able to recover these expenses of litigation from the estate.[40] The general rule that a judicial factor should obtain the Accountant's approval before entering into legal proceedings (whether pursuing or defending) should be borne in mind as this would presumably affect any decision as to whether the factor has acted reasonably. It is the Accountant who decides whether to allow the expenditure and she will only do so if she considers it to be necessary or expedient and is satisfied that there are sufficient funds to meet the expenses.[41]

7.32 While it seems that the existing law will generally provide a judicial factor with protection against being found personally liable in the expenses of litigation, it may be that the presumption operates the wrong way. If a factor is appointed to administer an estate, and reasonably enters into litigation, either as pursuer or defender, in that interest, it is

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[37] Thoms, chapter xvi, para 104.
[38] Maclaren, *Expenses in the Supreme and Sheriff Courts* (1912), pp 228 - 9.
[39] Walker, p 92.
[40] *Ibid* at p 94. See also J W Hastings, *Expenses in the Supreme and Sheriff Courts* (1989), p 80.
[41] JF Guidance Notes, note 28.

difficult to see why liability for the expenses of that litigation should not fall upon the estate in the first instance. Our provisional view is that it should only be where the litigation has been commenced, continued or defended in circumstances where no reasonable judicial factor would have commenced, continued or defended it, that the factor should be personally liable. Even in that event, the initial liability should fall upon the estate, leaving it with a right of relief against the factor.

7.33 Accordingly, we ask the following question:

41. Should it be made clear that liability for the expenses of any litigation undertaken by a judicial factor falls upon the estate with, in appropriate circumstances such as where the factor had engaged in unnecessary litigation either as pursuer or defender, the estate having a right of relief against the factor?

Unjustified enrichment

7.34 The question of liability for unjustified enrichment incurred during the course of a judicial factory is not one which appears to have been addressed by the courts. As with contract, however, we would anticipate that the principles of agency would apply in such a situation. This would mean that if, through the dealings of the factor administering it, the factory estate was unjustifiedly enriched, the resulting liability would fall upon the estate and not the factor personally, because it would be the factory estate and not the factor who was the true recipient.[42] There might be a right of relief against the factor where he or she had acted in bad faith.

7.35 Accordingly, we ask the following question:

42. Should it be made clear that liability for unjustified enrichment falls upon the estate with, in appropriate circumstances such as where the factor had acted in bad faith, the estate having a right of relief against the factor?

Prescription of claims against the estate

7.36 The matter of whether a claim against an estate over which a judicial factor is appointed is subject to the five year negative prescription[43] is presently unresolved.

7.37 It was previously accepted that such claims did not prescribe[44] but doubt was cast on that assumption in *Bank of Scotland v Laverock*.[45] An Opinion obtained by the Accountant also supported the view that such claims could prescribe.

7.38 Due to the potential impact of such a change of view, the Accountant sought judicial deliberation of the matter.[46] A petition was brought before the Inner House[47] in which the

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[42] *SME Reissue Agency and Mandate,* para 193; *Royal Bank of Scotland Plc v Watt* 1991 SC 48 at 66, per Lord McCluskey.
[43] Prescription and Limitation (Scotland) Act 1973, s 6.
[44] Addison, para 43.1.
[45] 1992 SLT 73.
[46] Addison, para 43.1.

question could have been decided but, unfortunately, the court dismissed the petition as lacking in specification.

7.39 Obligations of judicial factors in relation to claims against the estate are not in the list of imprescriptible rights and obligations listed in Schedule 3 to the Prescription and Limitation (Scotland) Act 1973. The argument that they should nevertheless be considered imprescriptible is based on the fact that obligations of trustees to make furthcoming to any person entitled to trust property do appear on that list[48] and the 1973 Act adopts the definition given in the Trusts (Scotland) Act 1921[49] in which judicial factors are considered to be trustees. Other points in favour of the argument that claims for payment from judicial factors are imprescriptible are that a judicial factor has, as one of his usual powers, the power to pay lawful debts[50] and that the very purpose for which a judicial factor is appointed may be to distribute the estate.[51]

7.40 This argument has been criticised[52] on the basis that there is no reason why the appointment of a judicial factor should have the effect that claims against the estate suddenly become imprescriptible. Further, there are similar categories of office where it has not been argued that appointment should have this effect[53] and there is no reason why a claim against an estate over which a judicial factor is appointed should be given special treatment in this way. David Johnston suggests that claims against trustees and those assimilated to trustees have to be read narrowly to include only those claims actually having a fiduciary quality and not to include ordinary claims between debtors and creditors, which should prescribe in the normal way.[54] This would appear to proceed on the basis that he regards the provisions as applicable to judicial factors. We agree.

7.41 Approaching the matter from first principles, there would appear to be no reason why the ordinary law on prescription of debts owed by and to the estate should cease to operate simply because a judicial factor has been appointed. The factor should take over the estate as it is when the appointment is made. The debts owed to and by the estate are part of the inherited situation. Our clear view is that the ordinary debts of the estate should continue to be subject to the ordinary rules in relation to prescription.

7.42 Accordingly, we propose the following:

43. It should be made clear that ordinary debts due to or owed by the estate prescribe in the ordinary way.

Prescription of claims against a judicial factor

7.43 Under paragraph (e)(i) and (ii) of Schedule 3 to the Prescription and Limitation (Scotland) Act 1973, the obligations of a trustee to produce accounts and to make reparation

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[47] Petition of judicial factor on the estate of *Beltmoss Quarry Co*, 28 April 1994, Extra Division of the Inner House, unreported.
[48] Prescription and Limitation (Scotland) Act 1973, Schedule 3 (e) (iii).
[49] *Ibid*, s 15(1).
[50] Trusts (Scotland) Act 1921, s 4(1)(l). See Addison, para 43.1.
[51] Addison, para 43.1; Petition of judicial factor on the estate of *Beltmoss Quarry Co*, 28 April 1994, Extra Division of the Inner House, unreported, para 11.
[52] Johnston, para 3.42.
[53] Those mentioned are executors (who are also said to be trustees under the Trusts (Scotland) Act 1921, s 2), liquidators and trustees in bankruptcy.
[54] Johnston, para 3.43.

or restitution in respect of any fraudulent breach of trust to which the trustee is party or privy are imprescriptible. In relation to paragraph (e)(ii), it should be noted that under normal circumstances this will be dealing with restitution, that is where a trustee has caused loss to the estate because of his or her breach and there is a claim against him or her to restore the estate to the position in which it was before the loss. If the breach of trust has caused no loss to the estate but only gain to the trustee then there may be an argument as to whether the action for the trustee to surrender the gains comes under paragraph (e)(ii) or (iii) (where the beneficiary is claiming trust property). If the breach is not fraudulent (even if negligent) then it cannot come under subparagraph (ii) and if the trustee is not in possession of the proceeds it cannot come under subparagraph (iii).[55]

7.44 The aspect of the factor's position which is most like that of a trustee is that the factor acts in a fiduciary capacity for those in whose interest the estate is being preserved and to whom it will be handed over when the judicial factory comes to an end. If that process takes a number of years, there would appear to be no sound reason in principle why a factor should be able to avoid any liability to those for whom, ultimately, he or she is acting, simply because of the operation of a rule of prescription. Furthermore, it is difficult to see for whose benefit the factor could resist a claim from a beneficiary on the basis that it had prescribed. The judicial factor holds the property in the factory in his capacity as factor. Apart from proper remuneration, the factor must account to the beneficiaries for the whole estate, less expenses. Our view is that any debt owed by the factor to the beneficiaries of the estate should not be liable to prescribe while the factor remains in office.

7.45 It is clearly unacceptable that there should be any continuing uncertainty over whether or not debts owed by a judicial factor prescribe. This may be a further instance of the uncertainties caused by the overlapping provisions in relation to trustees and judicial factors.

7.46 Accordingly, we propose the following:

44. It should be made clear that, so long as a factor remains in office, his or her duty to account to those for whom he or she is managing the estate is imprescriptible.

[55] *Ibid* at paras 3.23 - 3.46.

Part 8 Termination

Introduction

8.1 In this Part we look at the ways of bringing a judicial factory to an end. In most cases a judicial factory will come to an end when the purpose of the factory has been fulfilled.[1] A judicial factory may be terminated by the formal procedure of judicial discharge, in a restricted number of cases by the less formal procedure of an administrative discharge, or it may simply be written off by the Accountant. It is also possible that a judicial factory will continue to subsist but that the appointment of a particular judicial factor comes to an end. This may occur where there is recall of the appointment, or the judicial factor dies or is removed from office.

Judicial discharge

8.2 Under section 34 of the 1849 Act a judicial factor can present a petition for discharge to the court.[2] The procedure requires the judicial factor to call all interested parties as parties to the petition, including the cautioners.[3] The court can also order intimation as it sees fit. If the factor was appointed under section 11A of the 1889 Act it is also a requirement that a notice of the petition be put into the Edinburgh Gazette.[4] The purpose of other parties being allowed to raise objections is not to prevent the discharge of the factor, but rather to permit interested parties to suggest alterations to the terms of the discharge.[5] Objections will normally be dealt with by the court before the process is remitted to the Accountant to provide a report.[6]

8.3 The petition for discharge may be made by interested parties other than the factor.[7] Although not stated expressly it is likely that the procedure where the petitioner is someone other than the factor would also require all other interested parties to be called as parties to the petition.[8]

8.4 In every application for discharge the Accountant must produce a report[9] before discharge may be granted.[10] The process for this report is detailed in the Notes for the Guidance of Judicial Factors issued by the Accountant[11] as are the documents that the factor must submit to the Accountant according to the ground of the petition for discharge.[12]

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[1] Walker, p 116.
[2] See the Judicial Factors (Scotland) Act 1880, s 4(6) for the power given to the sheriff court. See also RCS, rule 61.33; Judicial Factors Rules 1992, rule 21.
[3] Walker, p 118.
[4] RCS, rule 61.33(2)(a); Judicial Factors Rules 1992, rule 36.
[5] Walker, p 119.
[6] Addison, para 29.3.
[7] Walker, p 115.
[8] *Ibid*, p 118.
[9] Judicial Factors Act 1849, s 34.
[10] *Aitken, Petitioner* (1893) 21 R 62.
[11] JF Guidance Notes, note 34.
[12] *Ibid*, note 37.

8.5 Once signed, the Accountant's report is lodged in process along with the inventory of the factory estate, the audited accounts, the Accountant's audit reports and any other relevant documents.[13] The process is then returned to the court and if all is in order the court will issue an interlocutor discharging the factor. The Accountant will send the bond of caution back to the factor on receipt of a certified copy of the interlocutor discharging him and the factor can then return this to his cautioners.[14]

Accounts

8.6 Before the Accountant produces her report the accounts must be in order. The Accountant will require the judicial factor to produce a penultimate account after which a sum will be set for the judicial factor to reserve before paying out the remainder of the estate. This sum must cover the remaining commission due to the factor, the costs of distributing the estate and the cost of the discharge.[15] This requires the factor to verify with his or her law agents that the amount reserved will cover their costs. The Accountant will then require the factor to lodge a final account, supported as usual by all necessary vouchers.[16]

Discharge based on a division of the estate

8.7 Where a judicial factor must divide and distribute the estate and has not obtained agreement of the parties the factor may apply for a judicial discharge on the basis of a proposed division of the estate. This allows beneficiaries to lodge objections. The court may amend the proposed division prior to approval.[17] Factors may also competently raise an action of multiplepoinding to distribute the factory estate, prior to seeking a discharge.[18]

Judicial discharge generally

8.8 A clearer and more streamlined procedure for discharge has been called for by practitioners to whom we have spoken, who felt that the existing procedure was time-consuming and expensive. Problems were also encountered where there were estate funds left over, especially in charity cases where these were funds dedicated to public purposes. If a factor must go to court for a decision as to what is to happen to the money then this is extra time and cost which may be important if the funds in question are small. Another concern raised was that there was not a sufficient check on whether the factor had maintained the property effectively before discharge was given. Interested parties are not always in a position to judge this.

8.9 It is important to ensure that factors are entitled to a discharge, that is, that they have adequately carried out their duties as imposed by the interlocutor of appointment. There is a question as to whether that can be ascertained properly prior to the handing over of the estate. In the absence of compelling evidence to the contrary, however, our provisional view is that the calling of all interested parties under section 34 of the 1849 Act should meet

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[13] Addison, para 29.3.
[14] *Ibid.* See paras 7.2 - 7.10 above.
[15] *Ibid* at para 29.1.
[16] *Ibid.*
[17] Addison, para 29.4. Walker, p 119. See also *Divers' Judicial Factor, Petitioner* 1966 SLT 181.
[18] *Ross's Judicial Factor v Martin* 1955 SC (HL) 56 at p 59, per Lord Chancellor (Kilmuir); *Tait's Factor v Meikle* (1890) 17 R 1182 at 1184, per Lord Lee. An application for discharge must be made separately following the action of multiplepoinding: *Campbell v Grant* (1869) 8 M 227.

that requirement. There appears to be no alternative method which would ensure that interested parties can make themselves heard.

8.10 Nevertheless, we ask the following question:

45. Are the interests of those to whom the estate is to pass sufficiently protected by the requirement, in section 34 of the 1849 Act, that they be called as parties to the petition for discharge?

Administrative discharge

8.11 Section 34A of the 1849 Act[19] provides that the court can make provision for discharge other than by the procedure set out in section 34. Such a provision is made in the rules of court[20] but only in relation to a factor appointed as *curator bonis*, guardian, factor *loco absentis* or commissary factor.[21] It applies only where the judicial factory is terminated because of the recovery, death or attainment of the age of legal capacity of the beneficiary, or due to the exhaustion of the estate. The factor must intimate the application for administrative discharge to the cautioner and any other interested parties and there is then a 21 day period during which objections may be made. After this period the Accountant decides whether or not to issue a certificate of discharge and sends a copy of her decision to the factor, the Deputy Principal Clerk or sheriff clerk and any party who has made representations. The issue of a certificate of discharge is authority for the factor to uplift his or her bond of caution. Provision is made for an appeal against the Accountant's decision. This appears to be a practical way to deal with problems of this sort.

Writing off

8.12 At present, it is possible in some circumstances for the Accountant to "write off" the case as an alternative either to the factor petitioning the court for a judicial discharge or to administrative discharge. This will be done if the judicial factor has concluded the administration of the estate but his or her actions might remain open to question or if the factor does not have sufficient funds to apply for a judicial discharge. We consider it undesirable for the factory to be ended without the certainty provided by a formal discharge. For that reason, it may be that the administrative discharge procedure might usefully be extended to cover those situations where at present the writing off procedure would be used.

8.13 Accordingly, we ask the following questions:

46. Should the procedure for administrative discharge be extended to cover all types of judicial factory?

47. Should the "writing off" procedure be abolished in favour of a revised administrative discharge?

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[19] Inserted by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, s 67.
[20] RCS, rule 61.31; Judicial Factors Rules 1992, rule 19.
[21] On commissary factors, see Currie on *The Confirmation of Executors in Scotland* (8th edn by Eilidh M Scobbie, 1995), paras 8.72 - 8.76.

Recall and removal

8.14 A factor requires the authority of the court in order to resign and therefore must petition the court for recall of his or her appointment.[22] The court is given the power to accept the resignation under section 31 of the Judicial Factors Act 1849.[23] The petition must include a crave for discharge and for the appointment of a new named factor.[24] The court will then order service of the petition on those parties with an interest in the estate to allow any objections to be made and issue the interlocutor appointing the new factor. The Accountant will be asked to report in relation to the previous factor. Before the previous factor may be discharged the new factor must be fully appointed, which includes having found caution and having taken over the estate.[25]

8.15 It is not only a judicial factor who may petition the court for recall of the appointment. Any person dissatisfied with the factor's management of the estate who has a relevant interest may apply for the removal of the factor from office.[26] Removal from office is one of the possible penalties for misconduct or failure to carry out duties under the Judicial Factors Act 1849, section 6.

Partial discharge

8.16 In certain circumstances, a judicial factor's appointment may cease over only part of the factory estate where the purpose of the factory has been fulfilled with respect to that part.[27] In such a case, the appointment will be recalled in relation to that part of the estate but the factory as a whole does not come to an end.

Duty to account

8.17 At paragraph 7.46 above we proposed that while a factor remains in office his or her duty to account to the beneficiary should be imprescriptible. But there is no reason for a continuing liability once the factor has demitted office or has been discharged. A formal discharge should bring to an end any liability which the factor has to the beneficiaries. In the absence of allegations of dishonesty, it would seem not only reasonable but politic for the factor to be able to draw a line under the administration of the factory and to proceed free from possible further liability to the beneficiaries.

8.18 Accordingly, we propose the following:

48. It should be made clear that a factor's duty to account to the beneficiaries is terminated by discharge.

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[22] Addison, para 29.5. This is similar to the situation where a trustee resigns or dies in office and for whom a discharge from the remaining trustees cannot be obtained. In such cases the trustee (or his or her representatives) can petition the court for a discharge under s 18 of the Trusts (Scotland) Act 1921.

[23] The sheriff principal or Court of Session is given the power to recall any appointment made in the sheriff court under the Judicial Factors (Scotland) Act 1880, s 4(9).

[24] Addison, para 29.5.

[25] *Ibid*.

[26] Walker, p 117.

[27] *Ibid*, p 120. See, for example, *Noble v Brackenbury* (1859) 21 D 1053 where the factory was recalled over only part of the estate over which it was held the factory purposes no longer applied.

Death of a judicial factor

8.19 Where a judicial factor dies undischarged, it is the duty of the Accountant, if the purpose of the appointment is not deemed to have been exhausted and unless those interested in the factory make an application on the Accountant's requisition,[28] to apply to have a new factor appointed. It is the duty of the factor so appointed to investigate the accounts of the former factor and to receive any balance due from the former factor's representatives or cautioners.[29]

8.20 The bond of caution covers the representatives of the deceased factor who have a duty to account until such time as a new factor has been appointed.[30] Indeed the view has been expressed that the representatives have a duty to apply for the appointment of a new factor if nobody else does, so that they can dispose of any factory assets which they hold to a duly authorised person; the petition should crave the discharge and exoneration of the deceased factor and representatives as well as the appointment of the new factor.[31]

8.21 Where a sole judicial factor dies with any property vested in him or her as factor, the factor's executors may append to the inventory of the deceased's estate a note or statement of such property. The confirmation granted in favour of the executors will repeat the note or statement enabling the executors to recover the property and transfer it as may be appropriate.[32]

8.22 Accordingly, we propose the following:

49. In the relatively few cases in which a judicial factor will die in office, the arrangements described at paragraphs 8.19 – 8.21 are satisfactory.

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[28] Judicial Factors (Scotland) Act 1889, s 10.
[29] *Ibid*.
[30] Addison, para 29.5.
[31] *Ibid*. See also *Dalziel (*1898) 5 SLT 255; RCS, rules 61.31 and 61.33; Judicial Factors Rules 1992, rules 19 and 21.
[32] Executors (Scotland) Act 1900, s 6.

Part 9 General options for reform of the office of judicial factor

Introduction

9.1 In this Part we deal with ways in which the law relating to judicial factors might be reformed. While it would in theory be possible to do nothing, we could not conscientiously recommend such a course of action. Accordingly, we have identified two basic options.

9.2 The first option is to improve the operation of the existing system, but without altering the basic structure. In the earlier Parts of this Paper, we have identified various questions as to how the office presently operates and, in the light of the responses to those questions, it would be possible for us to develop a range of recommendations for clarification, modernisation and improvement of the law relating to judicial factors. Judicial factors would continue to be appointed on an *ad hoc* basis in particular cases, but the administration of the office would be streamlined and clarified with the result that those carrying out the function would be better able to perform the duties of their appointment. Since we are persuaded that the office continues to serve a useful purpose, that would be a beneficial exercise.

9.3 The second option would involve the establishment of a new public official, the "Official Judicial Factor" (hereafter referred to as the "OJF").[1] The OJF would normally be appointed whenever a judicial factor was required, but the court would retain a discretion to appoint someone else where it seemed appropriate so to do.[2]

Option 1: improving the status quo

9.4 Option 1 would involve the modernisation of the office in a manner informed by the responses to the questions set out in the earlier Parts of this Paper. That would certainly make the operation of a judicial factory much more efficient, and it is possible that such improvements would lead to an increase in the use made of the office, but it would do little to reduce the cost of an appointment.[3]

Option 2: the Official Judicial Factor

9.5 As stated above, Option 2 would involve the establishment of a new public official, the "Official Judicial Factor". The OJF would operate as the sole judicial factor subject to the court being able to exercise its discretion to appoint some one else if the circumstances warranted it. We do not think that it would make economic sense to establish a new free-standing office; we envisage that the role of the OJF would be assumed by an existing official in charge of one of the analogous public offices so that the functions would form a discrete part of the functions of that office, with separate statutory responsibilities. Most of the work would be carried out by in-house staff but the OJF would be able to engage

[1] As noted above at paras 1.20 - 1.21, this title is provisional only.
[2] See paras 9.11 - 9.12 below.
[3] See paras 10.14 - 10.17 below.

professional assistance as required. We envisage that all relevant costs would be recovered from the estates being managed or from the petitioner.[4]

9.6 Despite our presentation of these two models as options for reform, we do not assume that these are the only ways in which the current system could be altered for the better, and invite any other suggestions consultees may have. Indeed, in addition to Options 1 and 2, we considered an intermediate option. Like Option 2, this alternative would have involved the creation of a new public office but, instead of employing a full-time staff, the OJF would appoint practitioners from a panel of assistant judicial factors on an *ad hoc* basis. We concluded, however, that on balance this proposal had insufficient merit compared with the other two options.

Wider use of the office

9.7 Apart from judicial factors, a number of other public appointees have the power and the duty to ingather and administer estates for various purposes. It may be that the OJF could assume the responsibilities of other public offices with analogous functions. The public bodies to which we have spoken regarding such a consolidation of functions have expressed provisional support.[5]

50. We would welcome consultees' views on the suggestion that the Official Judicial Factor could assume the responsibilities of other public offices with analogous functions.

Appointment and qualifications

9.8 As stated in paragraph 9.5 above, we envisage the office-holder as a public appointee.

9.9 At present, most of those appointed as judicial factors are either solicitors or chartered accountants. On the other hand, most judicial factory work appears to be administrative in nature, requiring no particular professional expertise. The availability of suitable expertise (either in-house or externally) may determine whether the office-holder would require to be professionally qualified as a solicitor or an accountant. It is perhaps worth noting that there are current examples of public officials who are not professionally qualified in a field of direct relevance to their offices.

9.10 Accordingly, we propose the following:

51. It should not be a requirement that the Official Judicial Factor be a professionally qualified person.

The Official Judicial Factor as the default appointee

9.11 We envisage that, whenever an application is made for the appointment of a judicial factor, it would be the OJF who would be appointed. This default position would be subject to the residual power of the court to appoint a judicial factor other than the OJF in cases where it saw fit.

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[4] See paras 9.16 - 9.20 and Part 10 below.
[5] These include the Civil Recovery Unit of the Crown Office.

9.12 Accordingly, we propose the following:

52. Whenever an application for the appointment of a judicial factor is made, the Official Judicial Factor would be appointed subject to the residual power of the court to appoint a judicial factor other than the Official Judicial Factor.

To which court should petitions be made?

9.13 As noted in Part 3 of this Paper, applications for the appointment of a judicial factor are currently competent in the Court of Session or the sheriff court, although in practice almost all applications are made in the former. We see no obvious reason why applications under a new structure should not be competent in either court: arrangements could be made for the OJF to report to the court which had made the appointment.

Powers and duties

9.14 We would envisage that the wider package of powers and duties referred to in Parts 5 and 6[6] would be conferred upon the OJF. This would make applications to the court less frequent, but the factor would have the power, and in some cases a duty, to seek the approval of the court in relation to any unusual use of powers.

9.15 Accordingly, we propose the following:

53. The court should retain a discretion to grant special powers to the Official Judicial Factor in appropriate cases.

Funding

9.16 The general expectation is that factory costs will be borne by the estate.[7] In the usual case the Accountant will fix the factor's commission, normally by reference to an hourly rate for the factor concerned, and will monitor the number of hours spent.

9.17 We understand that the current practice is that, if there is any doubt, the court will require the petitioner to guarantee the costs of the factory to cover the possibility of the estate being exhausted prior to those costs being met. For example, where the Law Society of Scotland seeks an appointment under the Solicitors (Scotland) Act 1980, it is frequently in cases where the reason for the appointment is the imminent financial failure of the solicitor concerned. In such cases the estate may be unable to pay for the costs of a judicial factor, and the expense is borne by the Law Society. In an analogous case, where an administrator is appointed under the Proceeds of Crime (Scotland) Act 1995, and the cost of the administrator cannot be recovered from the property retained, it is the Lord Advocate who bears the expense.

9.18 If it were decided to establish an OJF, we would envisage that, in the normal case, the costs of the Official Judicial Factor's office would be recovered on the same basis, namely, where an estate could not fund the factory, the petitioner would be expected to cover the cost. If other offices, such as the administrators appointed under the Proceeds of

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[6] See also Appendix C.
[7] See also para 3.6 above (cost of petition for appointment) and the Impact Assessment at Part 10.

Crime legislation, were included in the arrangements, then a similar practice could be followed. Over time it would be possible for the OJF, taking into account the different income streams, to work out a scale of charges which would reflect the administrative costs involved in running the office, but which would not seek to make a profit.

9.19 At present, and for obvious reasons, it is difficult to work out precisely how much the OJF option would cost but we have been impressed by the experience of the Director of the Law Society of Scotland's Interventions Department as a model for the OJF. That department comprises a small office with appropriately skilled and informed personnel who run a number of judicial factories in an efficient and cost-effective manner. Much of the necessary work requires no particular professional expertise, but that expertise can readily be accessed when needed.

9.20 Accordingly, we ask the following question:

54. Is the proposal in paragraphs 9.16 – 9.19 an appropriate method of funding for the new office of the Official Judicial Factor or, if not, on what basis could such an office be more appropriately funded?

Supervision

9.21 At present, as set out elsewhere in this Paper, and in particular in Appendix A, judicial factors are supervised by the Accountant. Similarly, the Accountant supervises administrators appointed under the Proceeds of Crime legislation. If the first option identified above were to be adopted, that is to say maintaining but improving the status quo, then we would envisage that supervision of the office would continue to be by the Accountant.

9.22 On the other hand, if the second option were to be adopted, namely the introduction of a new public official, the Official Judicial Factor, it is not so clear that formal supervision by the Accountant would be necessary or desirable. The OJF and the team would acquire experience and expertise in the various difficulties which might present themselves. Subject perhaps to periodic inspection of accounts by Audit Scotland, it is not clear that any further supervision would be required.

9.23 If the court appointed an independent individual, instead of the OJF, we would envisage that the latter would have a supervisory role over that individual.

9.24 Accordingly, we would welcome comments as follows:

55. We invite comment on the proposed supervision arrangements set out in paragraphs 9.21 to 9.23 above.

Discharge[8]

9.25 Discharge would be by the court as the OJF would be an appointee of the court. In circumstances where the persons entitled to the estate were reluctant to reach an agreement as to its division, it might be appropriate for the judicial factor to be able to move for discharge on the basis of what appears to him or her to be a sensible distribution of the

[8] See Part 8.

estate. It would then be for the parties to explain to the court why, in the absence of agreement by them, the proposals made by the OJF were nevertheless inappropriate.

9.26 We suggest that administrative discharge would not be appropriate in relation to the OJF. Where neither the estate nor the petitioner was in a position to fund an application to the court, the OJF would be required to fund it. But where a factor other than the OJF had been appointed it would be the OJF who would grant any administrative discharge.

9.27 Accordingly, we ask the following question:

56. Should discharge of the Official Judicial Factor, in relation to any particular factory, be by the court upon an application by the Factor or by an interested party?

Miscellaneous

9.28 In addition to the particular questions set out above we ask:

57. Do consultees prefer Option 1 (improvement of the status quo) or Option 2 (the establishment of the Official Judicial Factor)?

9.29 We also welcome any comments or suggestions consultees have:

58. We would be grateful for general comments on any aspect of the proposals made in Part 9 and for any suggestions as to alternative ways in which to reform the current system.

Part 10 Impact assessment

Risks and problems with the existing system

10.1 In the various Parts of this Discussion Paper we have described the deficiencies that exist in the current system of judicial factories. These problems relate primarily to the efficiency of the office, in terms of both time and cost, and also to the proper scope of factors' powers and to public awareness of the office.

10.2 Problems with the efficiency of the office:

- The appointment process is slow and cumbersome, which is particularly problematic because many situations where factors are appointed require the prompt appointment of a manager to conserve assets;

- The requirement to find caution[1] slows the appointment process, is of limited utility and can cost a significant amount;

- The great majority of judicial factors are professionally qualified lawyers or accountants who may often be over-qualified for what is essentially an administrative role;

- The current emphasis on preservation of the estate might prejudice the interests of the beneficiaries, where more efficient management might result in greater returns;

- The current requirement that judicial factors lodge accounts of charge and discharge is at odds with modern accounting practice and is seen as unduly onerous; and

- The procedure by which judicial factors are discharged is expensive, time-consuming and ineffective at checking whether estate funds have been properly managed and bringing the judicial factor to account if that is not the case.

10.3 Problems with the legislation:

- The powers listed in the Trusts Acts, which are used as the basis for factors' powers, are often inappropriate. This has resulted in uncertainty, and in factors expanding the default powers in ways not envisaged by the legislation; and

- The governing legislation is found in several disparate enactments, some of which date back to the 19th century. Their substance is now outdated.

10.4 Problems with judicial factors' remuneration:

[1] See paras 7.2 - 7.10 above.

- Factors complain that they are not currently paid at rates competitive with other professional work. This is said to discourage practitioners from taking on factory work; and

- Commission is paid to judicial factors on an annual basis only thus further reducing the incentive to take on factory work.

Evidence of these difficulties

10.5 There are approximately 115 live judicial factories at present with on average 12 new cases arising annually. The assets involved can be sizeable. In the year from April 2008 to March 2009, the total estate value managed was £12,015,677.50. We have identified the problems of the current system (as narrated throughout this Paper and as outlined above) through informal discussion with those involved in judicial factory work. We are aware, however, that there may be other areas where the existing system is deficient, or where we have under- or over-estimated the extent of the difficulties involved. To enable us to assess the impact of the recommendations which we will make in our final report, we would very much like to hear consultees' experiences of judicial factory; the views of both practitioners and those making use of the office are welcome. We would also appreciate information as to what consultees regard as the costs and benefits of the options for reform as discussed in this Paper and as outlined below. In particular, we would be grateful to receive such information from those public offices into which the proposed Official Judicial Factor could be incorporated and from those with responsibility for public functions which could, in the interests of efficiency, be transferred to the Official Judicial Factor.

10.6 Accordingly, we ask the following questions:

59. Does the current system of judicial factory give rise to any difficulties which we have not identified in this Paper?

60. What are the costs and benefits of the options for reform of the office of judicial factor as summarised in Part 9 of this Paper?

Aims and objectives

10.7 In Part 9 of this Discussion Paper we put forward two possible options for reform. The first improves elements of the existing system while retaining the current overall structure. The second option also makes these changes to the basic structure but goes further by proposing a new public official, the Official Judicial Factor, who would carry out all judicial factory work subject to the court having the ability to appoint someone else as judicial factor where it considers it appropriate so to do. The role of the Official Judicial Factor would be assumed by an existing public official so that the functions would form part of the functions of an existing public office. There might be scope for an amalgamation of various public functions.

10.8 With each of our options the aim is to improve significantly the efficiency of the procedures involved in judicial factory work while simultaneously reducing its cost. In the case of the proposed Official Judicial Factor option, we would anticipate particularly marked improvements in efficiency and economy, such that an increase in the use of the office might arise. Below we discuss retaining the status quo, before going on to set out our two options as described earlier in this Paper.

The status quo

10.9 Maintaining the status quo would mean that none of the problems identified throughout this Paper, and summarised above, would be resolved.

10.10 The legislation which was appropriate to the law of judicial factors in 1849 and 1889 is, by reason of age alone, in need of updating. The only recent statute pertaining specifically to judicial factors dates from 1980 and relates solely to the appointment of a factor on the estate of a defaulting solicitor. In addition to the 19th century statutes, judicial factors must look to trusts legislation for some of their powers and duties. This is far from ideal as a judicial factor is not a trustee in all senses of that term. In order to function efficiently, we suggest that there is a need for a clear statement of powers and duties which are fit for purpose and to which third parties who come into contact with a judicial factor can be referred with ease.

10.11 Section 4 of the Judicial Factors Act 1849 provides that a factor "shall close his account of charge and discharge once in every year, on a day to be fixed by the accountant, and within one month thereafter shall lodge such account in the office of the accountant, with the vouchers numbered, and referred to in the account by number." Such a form of accounting is regarded by many as archaic and the requirement to produce original vouchers for each transaction is not in keeping with current accounting practice.

10.12 The requirement to find caution also seems out of place in current times when judicial factors are usually either chartered accountants or solicitors with professional indemnity insurance. Finding caution can cause considerable delay in the appointment procedure which can be critical in a case where a factor requires to take urgent action. Furthermore, the cost of the annual premium, which is paid out of the estate over which the factor is appointed, can mean that, in some cases, the value of the estate will be reduced significantly and, generally, for little purpose. One insurance company, RSA, have told us that percentage rates they have used range from £0.2% to £0.75% though the rates they usually use range from £0.225% to £0.325% and lie mostly around £0.25% to £0.275%, each case being rated on its own merits; the percentage rate applies to the higher of the caution amount or the estimated size of the estate at the outset of the judicial factory but generally the caution amount seems to be set by the Accountant at the estimated size of the estate. RSA do not usually provide bonds for non professionally qualified judicial factors. Another provider, Zurich, told us that, as they do not issue many bonds of caution in relation to judicial factors, they have no set premiums and rate each case individually. They tend to reduce premiums when a bond requires annual renewal.

10.13 For these and the other reasons set out in this Paper, we do not believe that maintaining the status quo is a desirable, or indeed defensible, option.

Option 1: maintaining, but improving, the current system

10.14 This option envisages maintaining the basic features of the current system, while improving those areas which are seen to be in most need of reform.

10.15 *Benefits and costs of Option 1:* The primary benefit of maintaining the current system is that existing practices would not change significantly and thus practitioners would not require to learn new ways of working. The office of judicial factor has existed for

centuries; there may be some merit in retaining the essential features of this well-established office. Improving the existing system would retain its essential characteristics while updating those aspects which are particularly unsatisfactory. Subject to consultees' responses, we would propose the following core improvements:

- Consolidation of the legislation governing judicial factors into a unified statute;
- Requiring greater detail to be given in the appointing interlocutor so that third parties (and the beneficiaries of factory estates) are better informed as to the purpose or purposes of the factory;
- Abolition of the requirement to find caution;
- Replacing the existing method of accounting with something more modern and less onerous;
- Widening of factors' default powers to reduce the need to petition for extra powers;
- Introducing a more pro-active role in relation to investing estate assets instead of merely preserving them;
- Increasing the frequency with which factors are paid; and
- Streamlining the procedure for discharge, to reduce delays and thus expense.

10.16 We envisage that these reforms would improve the efficiency of the office significantly, reducing the administrative burden on factors and thus reducing costs. The abolition of caution and the introduction of a more pro-active role in relation to investing estate assets would, respectively, reduce the cost of setting up the factory and boost the value of some, if not all, estates, thus further reducing the financial burden of having a factor appointed. Paying judicial factors more regularly may also encourage practitioners to take on factory work, providing greater choice for those requiring this service.

10.17 In terms of implementation costs, Option 1 would require very little investment. The reforms listed above could generally be implemented by amending existing legislation to alter the current rules, and would appear to require little or no new infrastructure to put into practice. Certain parties, notably the Accountant and existing judicial factors, would necessarily be required to adjust their current practices; we foresee, however, that these changes could be implemented without significant disruption to existing working patterns.

Option 2: an Official Judicial Factor

10.18 Option 2 relates to our proposed new scheme whereby a new public official, the Official Judicial Factor, would assume responsibility for carrying out judicial factories. The Official Judicial Factor would be equipped with in-house administrative resources to handle all types of judicial factory and, in certain circumstances, expertise of outside professionals would be required. This option would be subject to the discretion of the court to appoint as a judicial factor an individual other than the Official Judicial Factor where it considers that it would be appropriate so to do. In such circumstances, we think that a similar arrangement to the current one would continue, so that the supervisory functions relevant to judicial

factories, currently carried out by the Accountant, would be carried out by the Official Judicial Factor.

10.19 We do not think that it would make economic sense to establish a new office; we envisage that the role of the Official Judicial Factor would be assumed by an existing official in charge of one of the analogous public offices so that the functions would form part of the functions of that office. There might be scope for an amalgamation of various public functions.

10.20 In the same way that the aim of the Bankruptcy (Scotland) Act 1993 (by providing that the day to day administration of sequestrations may be the responsibility of the Accountant in Bankruptcy) was to have a service which was cost effective and value for money, we anticipate that the introduction of the Official Judicial Factor would result in increased efficiencies and savings. Further efficiencies and savings would be made if the functions of those such as administrators under Proceeds of Crime[2] and Terrorism legislation were to be transferred to the Official Judicial Factor.

10.21 To ensure that the Official Judicial Factor would operate as efficiently as possible, the improvements set out in Option 1 would require to be implemented.

10.22 *Benefits and costs of Option 2:* In line with the experience of the office of the Law Society of Scotland's Director of Interventions, we would anticipate that the office of the Official Judicial Factor would gain, over time, a depth of expertise in judicial factory work which would increase efficiency significantly and which would reduce costs. Attendant benefits might include an increase in the level of priority given to the work done, greater accountability (the work would generally be carried out by a single public office which would be subject to the transparency requirements of all such offices) and, as a result of these improvements, greater use being made of the office.

10.23 We think that initial costs would be relatively low if, as we envisage, the role is incorporated into an existing public office where use could be made of existing infrastructures in relation to matters such as information technology and human resources. Whatever existing office the Official Judicial Factor was incorporated into might require only a few extra staff to carry out the day-to-day administration and supervision of factory cases. There would also be some incremental costs regarding matters such as floor space but we envisage that all relevant costs would be recovered from the estates being managed or from the petitioner.[3] Moreover, we would anticipate that, as the staff of the Official Judicial Factor would generally be required to have administrative rather than legal or financial skills, the overall costs would tend to reduce as hourly rates of pay would be generally less.

10.24 The benefit of the court being able to appoint as a judicial factor an individual other than the Official Judicial Factor where it considers that it would be appropriate so to do, would be the added flexibility which this would bring to an area where no two cases are the same. The costs would be the costs relating to Option 1, namely those of maintaining, but improving, the current system although, to ensure that the Official Judicial Factor would

[2] Although we understand that the number of interim administrators appointed in terms of the Proceeds of Crime Act 2002 is very low.
[3] See paras 9.16 - 9.19 above.

operate as efficiently as possible, the improvements set out in Option 1 would require to be implemented in any event.

Part 11 Summary of proposals and questions

1. Should the term "judicial factor" be changed and, if so, to what?

(Paragraph 1.21)

2. Should the present concurrent jurisdiction of the Court of Session and the sheriff court in relation to petitions for the appointment of judicial factors continue, or should that jurisdiction be limited to one or other court?

(Paragraph 3.11)

3. Where appointments of judicial factors are sought in the Court of Session, such petitions should be brought in the Outer House only.

(Paragraph 3.12)

4. Are any practical problems encountered by the absence of the necessary interest to petition for the appointment of a judicial factor?

(Paragraph 3.17)

5. Should the definition of "interest" be widened for the purposes of a petition for the appointment of a judicial factor?

(Paragraph 3.17)

6. Do consultees consider that the usefulness of petitions for the appointment of a judicial factor and the resulting interlocutors would be improved by either:

(a) updating drafting styles, or

(b) requiring that certain items of information be included?

(Paragraph 3.19)

7. Should factory estates be sequestrated into the hands of the judicial factor as a matter of course?

(Paragraph 3.25)

8. For the avoidance of confusion, should another term be substituted for "sequestration" where it is used in the context of suspending the owner's right to administer the estate and vesting such a right in the judicial factor and, if so, what should that term be?

(Paragraph 3.25)

9. Should appointments of judicial factors be publicised, and if so, in what manner?

(Paragraph 3.27)

10. No distinction should be made, as to completion of title, between judicial factories in respect of trust estates and other judicial factories.

(Paragraph 4.19)

11. A judicial factor should be able to complete title to property of any type without the express authority of the court.

(Paragraph 4.19)

12. Should the position be the same as for trustees in sequestration, or should the factor simply have the power to complete title?

(Paragraph 4.19)

13. Section 24 of the Titles to Land Consolidation (Scotland) Act 1868 and section 25 of the Trusts (Scotland) Act 1921 should be repealed. Section 13 of the Judicial Factors (Scotland) Act 1889 and section 1 of the Conveyancing Amendment (Scotland) Act 1938 should be repealed in so far as they apply to judicial factories.

(Paragraph 4.19)

14. Should factors be under a general duty to manage the estate pro-actively for the benefit of the ultimate beneficiary?

(Paragraph 5.7)

15. If factors should have a general duty to manage the estate pro-actively, should that duty be restricted to certain types of case and, if so, to what types?

(Paragraph 5.7)

16. Should factors be under a duty, where parties responsible for the estate are in dispute, to encourage and assist those parties in settling that dispute?

(Paragraph 5.7)

17. Is the current system of accounting for the operation of judicial factories unsatisfactory and, if so, what accounting system should be substituted in its place?

(Paragraph 5.13)

18. Are the current requirements regarding the timing of the lodging of accounts satisfactory?

(Paragraph 5.13)

19. Should judicial factors be subject to a general duty to invest funds rather than simply conserve them?

(Paragraph 5.16)

20. Is it appropriate for there to be duties specific only to appointments under section 11A of the Judicial Factors (Scotland) Act 1889?

(Paragraph 5.25)

21. Should a judicial factor be under a duty to prepare a management plan, agreed with the Accountant, on appointment?

(Paragraph 5.27)

22. There should be a statutory statement of the duties of a judicial factor which could be adjusted by the court to meet the needs of particular cases.

(Paragraph 5.29)

23. Would the duties set out in Part 5 of this Paper form a suitable basis for a statutory statement of the duties of a judicial factor and, if not, what deletions and/or additions do you consider to be appropriate?

(Paragraph 5.30)

24. Where there is misconduct or failure to discharge the duties of the office of judicial factor in some material way, are the remedies available under the current civil and criminal law sufficient?

(Paragraph 5.32)

25. If not, what additional remedy or remedies should be introduced?

(Paragraph 5.32)

26. Should interim judicial factors' duties be the same as those of permanent judicial factors?

(Paragraph 5.38)

27. Should appointments of interim judicial factors be subject to a statutory time limit and, if so, should there be a facility for an interim judicial factor to apply for an extension to that limit?

(Paragraph 5.38)

28. Should the Accountant be required to review the appointment of an interim judicial factor periodically and, if so, should the court have greater discretion in fixing the period between reviews?

(Paragraph 5.41)

29. It should be clarified that it is possible to combine an application for special powers with a petition for the appointment of a judicial factor.

(Paragraph 6.6)

30. Should the powers exercisable by the factor be set out in legislation as a comprehensive list so as to reduce the number of circumstances in which special powers have to be sought?

(Paragraph 6.38)

31. Does the list of powers in Appendix C provide appropriate default powers for judicial factors?

(Paragraph 6.38)

32. In particular, would powers specific to the situation where a factor has been appointed to a sequestrated estate within 12 months of a person's death be useful? See Appendix C, paragraphs 24 – 26.

(Paragraph 6.38)

33. Should interim judicial factors be given the same powers as permanent judicial factors?

(Paragraph 6.40)

34. Should the requirement for judicial factors to find caution be abolished?

(Paragraph 7.10)

35. On what basis should judicial factors be paid?

(Paragraph 7.14)

36. Should any facility to challenge the Accountant's decision as to the remuneration of a judicial factor be put on a statutory basis?

(Paragraph 7.16)

37. Should it be made clear that, where a person suffers loss as a result of some act or omission of the judicial factor (or anyone for whom the factor is responsible) in the course of carrying out his or her duties as factor, damages should generally be payable from the estate with the estate having a right of relief against the judicial factor to the extent that the factor was personally at fault?

(Paragraph 7.24)

38. The ability of a judicial factor to enter into contracts, and the extent to which he or she can do so, should be set out explicitly in legislation.

(Paragraph 7.29)

39. Where a judicial factor enters into a contract as factor and this is known at that time to the other party, it should be made clear that the third party's rights under the contract should be enforceable only against the estate and not against the factor personally.

(Paragraph 7.29)

40. Where a contract relating to the factory estate gives rise to litigation, the action should be raised by, or directed against, the factor, in that capacity.

(Paragraph 7.29)

41. Should it be made clear that liability for the expenses of any litigation undertaken by a judicial factor falls upon the estate with, in appropriate circumstances such as where the factor had engaged in unnecessary litigation either as pursuer or defender, the estate having a right of relief against the factor?

(Paragraph 7.33)

42. Should it be made clear that liability for unjustified enrichment falls upon the estate with, in appropriate circumstances such as where the factor had acted in bad faith, the estate having a right of relief against the factor?

(Paragraph 7.35)

43. It should be made clear that ordinary debts due to or owed by the estate prescribe in the ordinary way.

(Paragraph 7.42)

44. It should be made clear that, so long as a factor remains in office, his or her duty to account to those for whom he or she is managing the estate is imprescriptible.

(Paragraph 7.46)

45. Are the interests of those to whom the estate is to pass sufficiently protected by the requirement, in section 34 of the 1849 Act, that they be called as parties to the petition for discharge?

(Paragraph 8.10)

46. Should the procedure for administrative discharge be extended to cover all types of judicial factory?

(Paragraph 8.13)

47. Should the "writing off" procedure be abolished in favour of a revised administrative discharge?

(Paragraph 8.13)

48. It should be made clear that a factor's duty to account to the beneficiaries is terminated by discharge.

(Paragraph 8.18)

49. In the relatively few cases in which a judicial factor will die in office, the arrangements described at paragraphs 8.19 – 8.21 are satisfactory.

(Paragraph 8.22)

50. We would welcome consultees' views on the suggestion that the Official Judicial Factor could assume the responsibilities of other public offices with analogous functions.

(Paragraph 9.7)

51. It should not be a requirement that the Official Judicial Factor be a professionally qualified person.

(Paragraph 9.10)

52. Whenever an application for the appointment of a judicial factor is made, the Official Judicial Factor would be appointed subject to the residual power of the court to appoint a judicial factor other than the Official Judicial Factor.

(Paragraph 9.12)

53. The court should retain a discretion to grant special powers to the Official Judicial Factor in appropriate cases.

(Paragraph 9.15)

54. Is the proposal in paragraphs 9.16 – 9.19 an appropriate method of funding for the new office of the Official Judicial Factor or, if not, on what basis could such an office be more appropriately funded?

(Paragraph 9.20)

55. We invite comment on the proposed supervision arrangements set out in paragraphs 9.21 to 9.23 above.

(Paragraph 9.24)

56. Should discharge of the Official Judicial Factor, in relation to any particular factory, be by the court upon an application by the Factor or by an interested party?

(Paragraph 9.27)

57. Do consultees prefer Option 1 (improvement of the status quo) or Option 2 (the establishment of the Official Judicial Factor)?

(Paragraph 9.28)

58. We would be grateful for general comments on any aspect of the proposals made in Part 9 and for any suggestions as to alternative ways in which to reform the current system.

(Paragraph 9.29)

59. Does the current system of judicial factory give rise to any difficulties which we have not identified in this Paper?

(Paragraph 10.6)

60. What are the costs and benefits of the options for reform of the office of judicial factor as summarised in Part 9 of this Paper?

(Paragraph 10.6)

Appendix A The Accountant of Court

Introduction

1. Over the years the role of the Accountant of Court has been critical to the successful operation of judicial factories. The office of the Accountant of Court was established by the Judicial Factors Act 1849 in response to the confusion brought about by a lack of specialised supervision of judicial factors.[1] Under the 1849 Act this supervision was restricted in the categories of judicial factors it covered, but was extended in 1889 to all judicial factors.[2] The jurisdiction of the office has changed over the years: it has been combined with, and then separated from, the Accountant in Bankruptcy;[3] and, since the Adults with Incapacity (Scotland) Act 2000, the Accountant is also the holder of the separate office of the Public Guardian. As noted in Part 2, the Accountant has also been given the role of supervising administrators appointed under the Proceeds of Crime and Terrorism legislation. She is accordingly well experienced in the business of supervising judicial factors and others carrying out similar duties.

2. The Accountant must be a "person versant in law and accounts"[4] and has a staff of clerks to assist her. Apart from the office of Public Guardian, the Accountant is to hold no other office and is not to be involved in any other business for profit.[5] As an officer of the Supreme Courts, she reports directly to the Principal Clerk of Session.[6]

Duties and powers of the Accountant

General duty

3. The Accountant's general duty is stated in section 10 of the 1849 Act as follows:

> "The Accountant shall superintend generally the conduct of all judicial factors coming under the provisions of this Act already appointed or to be hereafter appointed, and shall see that they duly observe all rules and regulations affecting them for the time."

4. In order to carry out this function the Accountant has the power - and duty - under the 1849 Act, section 19, to make requisitions and orders on judicial factors where this is considered necessary. If such requisitions and orders are not complied with, the Accountant is to report this to the court. A procedure is set out in the Act for a judicial factor to lodge objections.

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[1] Walker, p 8.
[2] Judicial Factors (Scotland) Act 1889, s 6.
[3] The 1889 Act united these offices. They were then separated by the Bankruptcy (Scotland) Act 1993.
[4] Judicial Factors (Scotland) Act 1889, s 1.
[5] *ibid*, s 2.
[6] Addison, para 1.2. In practice, we understand that the Accountant reports to the Scottish Court Service, Director of Field Services.

5. The Accountant is also under a duty to report to the court any misconduct or failure in duty of a factor[7] and, if she reasonably suspects misconduct or malversation warranting removal or punishment, she is entitled to report this to the Lord Advocate.[8]

Advice and assistance

6. As well as this regulatory function the Accountant must also provide advice and assistance to judicial factors. It may also be necessary, or at least advisable, for a judicial factor to obtain the Accountant's approval before carrying out certain acts, for example, seeking legal advice.[9]

Caution

7. It is the duty of the Accountant to fix the amount of caution to be found by a judicial factor.[10] It is competent for the court to limit the amount of caution[11] but the Accountant can increase this, unless the factor requires her to report to the court in order to have the amount of caution revised.[12] At any time during the subsistence of the factory the Accountant may revise the amount of caution or require the factor to find a new cautioner.[13]

8. Once the judicial factor has found caution the Accountant receives the bond from him or her[14] and must satisfy herself that it is in order. If the appointment is made by the Court of Session, the Accountant then must sign and endorse a certificate stating that caution has been found, the amount of caution and the date.[15] If the appointment is made in the sheriff court, then the Accountant must notify the sheriff clerk that caution has been found to her satisfaction.[16]

9. We have suggested, at paragraphs 7.2 – 7.10 above, that the requirement to find caution could be abolished.

Inventory and accounts

10. The Accountant receives a signed inventory of the estate from the judicial factor. She must examine and verify the inventory and can adjust it if necessary.[17] Once finalised, the Accountant approves the inventory.[18]

11. The Accountant also has duties in relation to the accounts of each factory. She fixes the date for the accounts to be submitted[19] and ensures that they are lodged with her.[20] The submission deadline can be extended for up to three months by her.[21] The Accountant then

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[7] Judicial Factors Act 1849, s 20.
[8] *Ibid*, s 21.
[9] Addison, para 1.4.
[10] RCS, rule 61.9(3); Judicial Factors Rules 1992, rule 9(1). See paras 7.2 - 7.10 above.
[11] Judicial Factors Act 1849, s 27.
[12] RCS, rule 61.9(4). This does not appear in the sheriff court rules.
[13] RCS, rule 61.9(7); Judicial Factors Rules 1992, rule 9(2).
[14] RCS, rule 61.9(5); Judicial Factors Rules 1992, rule 11(1).
[15] RCS, rule 61.9(6).
[16] Judicial Factors Rules 1992, rule 11(2).
[17] Judicial Factors Act 1849, s 12.
[18] *Ibid*.
[19] *Ibid*, s 11.
[20] *Ibid*, s 13.
[21] *Ibid*, s 4.

audits the accounts "on the principles of good ordinary management for the real benefit of the estate and of those interested therein",[22] including the investments made. The accounts are submitted in the form of accounts of charge and discharge and the Accountant requires the original vouchers to be submitted. In the process of the audit, she can require the factor to provide all necessary information and evidence.[23] In practice this can result in extensive correspondence between the Accountant and judicial factors. After the audit the Accountant prepares a report which includes explanations of any corrections made to the accounts.[24] The factor and/or the cautioner have the opportunity to object to this report[25] and it is competent for the cautioner to be heard before the Accountant during the course of the audit.[26]

12. Any party with a beneficial interest in the estate or a succeeding judicial factor can open up the audit of accounts if they can show they have a reason to do so.[27]

13. We have already mentioned, at paragraph 5.12 above, the concern of some judicial factors with the accounting methods required.

Commission

14. A judicial factor's commission is set by the Accountant at the audit at what is seen to be just in each particular case.[28] The decision will be based on a detailed statement of time and trouble submitted by the factor, although the Accountant is not bound by this.[29] In practice the Accountant sets an hourly rate upon which the commission is set. As this rate is often less than a judicial factor's hourly charge out rate, the amount of commission set is often less than the amount claimed by the factor. This is another matter to which we have already referred.[30]

Bank accounts

15. The Accountant has the power to access any bank or building society accounts opened by a factor for the estate he or she is appointed over in order to view the entries in the books of the relevant institution and to take copies of those entries.[31]

Special powers

16. As discussed above at paragraph 6.15, according to the procedure for an application to the court for special powers under section 7 of the 1849 Act, a judicial factor must first apply to the Accountant. She can then make any investigations seen to be necessary and must write a report to be sent to the factor to lodge in process.[32]

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[22] Judicial Factors Act 1849, s 13.
[23] *Ibid*.
[24] *Ibid*.
[25] *Ibid*, ss 15 - 16.
[26] *Ibid*, s 16.
[27] *Ibid*, s 17.
[28] *Ibid*, s 13.
[29] Addison, para 28.2.
[30] At para 7.11 *et seq.*
[31] Judicial Factors Act 1849, s 33.
[32] RCS, rule 61.15; Judicial Factors Rules 1992, rule 17.

17. Where an application is made under the Trusts (Scotland) Act 1961, the Accountant has greater powers. Under section 2 of that Act the Accountant may give her consent for a factor to do certain of the acts mentioned in the Trusts (Scotland) Act 1921, section 4(1). The application to the Accountant must be by letter and supported with any information which she requires. The judicial factor must intimate this application to interested parties and send a certificate of intimation to the Accountant. Objections to the application must then be made to the Accountant within 28 days after the date on which intimation was given. These matters are covered in detail in the relevant rules of court.[33]

Successor factors

18. It is the duty of the Accountant to apply to the court for a successor to a factor who is deceased or is no longer discharging his or her duties as judicial factor where there is still need for a judicial factor over the estate and no other party has made the application.[34]

Discharge

19. As discussed above at paragraph 8.4, where an application for discharge is made to the court, the court will remit the petition to the Accountant for her to report on the application. The procedure is set out in detail in the relevant rules of court.[35]

20. Applications for discharge may also be made in certain circumstances to the Accountant by a limited class of judicial factors.[36] The judicial factor must intimate such an application to interested parties who may make written representations to the Accountant within 21 days. After this period, the Accountant must decide either to issue or refuse the certificate of discharge and intimate this decision to the factor, the Deputy Principal Clerk and any interested party who has made representations. Provision is made for appeals to be made to the court against the Accountant's decision and once the allowed time for appeal has elapsed the Accountant can sign the certificate of discharge.

21. At present factors can also request that the Accountant ends a judicial factory by a summary procedure known as "writing off".[37] This procedure does not, however, formally discharge the factor, creating some uncertainty as to ongoing liabilities. We ask whether this is an appropriate means of ending a judicial factory at paragraph 8.13.

Annual report

22. There is a duty on the Accountant to produce an annual report to the Court of Session on all judicial factories subsisting at the time. We understand that this report was latterly incorporated within the more general annual report produced by the Scottish Courts Service. The current position appears to be that statistics are provided by the Accountant to the Scottish Government as part of the material which is gathered for the annual Civil Judicial Statistics.[38]

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[33] RCS, rule 61.14(2); Judicial Factors Rules 1992, rule 16(2).
[34] Judicial Factors (Scotland) Act 1889, s 10.
[35] RCS, rule 61.33(3); Judicial Factors Rules 1992, rule 21(3).
[36] See para 8.11 above.
[37] See para 8.12 above.
[38] The Civil Judicial Statistics last appeared in a published form in 2002.

Report on diverse practice in the sheriff court

23. Under section 4(7) of the Judicial Factors (Scotland) Act 1880, the Accountant has a duty to report to the Court of Session where it appears that there is an important diversity of judgment or practice in the sheriff courts. The Accountant must specify the practice and ask for a rule to be laid down to ensure uniformity.

Records

24. All records and papers relating to factories which are held in the Accountant's office are to be open for inspection under section 36 of the 1849 Act on the payment of a fee. These papers are not to be lent out; but copies attested by the Accountant can be provided, again on the payment of a fee. The fees are fixed by the court and paid into a fund by the Accountant.

Continuing role?

25. As we have noted at the beginning of this Part, the Accountant's supervisory role has been invaluable in securing the proper administration of judicial factories over the years. If the outcome of this exercise is that the existing system is largely retained, then we have no doubt that there will be a continuing requirement for the expertise and experience which the Accountant provides in that regard. But if it is decided to introduce an Official Judicial Factor as discussed in Part 9 of this Paper, then we wonder whether that role, in relation to judicial factories, will be necessary, to such an extent, in the future.[39]

[39] See paras 9.22 - 9.23 above.

Appendix B Types of judicial factory

Introduction

1. This Appendix looks at the development of different types of factory, including those that have now been abolished, and administrators who are also supervised by the Accountant.

Factor *loco tutoris*

2. This was a factor over the estate of a pupil (girl under 12 or boy under 14) but was abolished by the Age of Legal Capacity (Scotland) Act 1991.

Factor or *curator bonis* over the estate of someone incapable of managing their own affairs (minor/*incapax*)

3. A *curator bonis* administers the estate of a minor child (a child over the age of 12 for a girl or 14 for a boy, and under 16). The purpose of the appointment is to preserve the child's estate. Although a *curator bonis* may be appointed over the property of a child who has attained the age of minority,[1] as may a judicial factor, it seems that if the child has not attained the age of minority, then only a judicial factor may be appointed.[2] This situation remains in spite of the Adults with Incapacity (Scotland) Act 2000 which made it incompetent to appoint a *curator bonis* to anyone aged 16 or over.[3] It must also be noted that normally a child's estate will be managed by a parent or guardian who is not supervised by the Accountant. The appointment of a judicial factor or *curator bonis* would only be appropriate if there were special circumstances, for example, if the estate was particularly large or the parents were incapable of managing it.[4]

4. Under section 9 of the Children (Scotland) Act 1995, the Accountant may apply to the court for the appointment of a judicial factor to administer property owned by or due to a child. Under section 13 of the same Act, where an award of damages has been made to a child, the court may appoint a judicial factor to "invest, apply or otherwise deal with the money for the benefit of the child concerned." The court may also make an order under section 11 in relation to the administration of a child's property, including the appointment of a judicial factor.

5. Section 80 of the Adults with Incapacity (Scotland) Act 2000 makes it incompetent to appoint a tutor-dative or a tutor-at-law to a person aged 16 or over. As far as children are concerned, section 5 of the Children (Scotland) Act 1995 provides that references to tutors

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[1] Age of Legal Capacity (Scotland) Act 1991, s 1(3)(f)(iv).
[2] Scottish Family Law Service, Division C, para C20. Note that previously a factor *loco tutoris* could have been appointed to a child who had not attained the age of minority.
[3] Adults with Incapacity (Scotland) Act 2000, s 80. It has been commented that not to have replaced all forms of curatory is “curious” and observed that Sch 6 to the 2000 Act which repeals parts of the Judicial Factors Act 1849 appears to have had the effect of removing curators from relevant provisions including the definition of judicial factor and the Accountant’s responsibility of supervision. See *Adults with Incapacity Legislation* (2008) annotated by Adrian D Ward, pp 146 - 147.
[4] Scottish Family Law Service, Division C, para C20.

are now to be construed as references to a child's legal representative. Tutors-dative appear to have been responsible for the person, rather than a person's financial affairs, and a tutor-at-law was restricted to the nearest male relative.

6. Paragraph 1 of Schedule 4 to the Adults with Incapacity (Scotland) Act 2000 provides that anyone who was holding the office of a *curator bonis* to someone over the age of 16 on the relevant date will become a guardian with the power to manage the property or financial affairs of the adult.

Judicial factors on partnership estates

7. A factor may be appointed over a partnership estate under the common law or in terms of section 35 and/or section 39 of the Partnership Act 1890. The duties of a factor in these cases will normally be to realise the assets and distribute them.[5] Section 35 deals with the dissolution by the court of a partnership and section 39 with the rights of the partners to have the property of the partnership applied to pay the debts of the partnership. Neither section specifically mentions the appointment of a factor.

Judicial factor to a limited company

8. The court may appoint a judicial factor to a limited company under the general powers given in the Companies Act 2006, sections 994 - 999. It is also competent to appoint a factor at common law, normally at the instance of one of the directors where the relationship between directors is adversely affecting the running of the company, but also at the instance of an aggrieved shareholder where there has been misconduct by the directors. A judicial factor is usually appointed in this instance to carry on the business of the company.[6]

Judicial factor to a charity

9. The Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 gave Scottish Ministers supervisory powers over charities in Scotland and their powers are exercised by the Office of the Scottish Charity Regulator (OSCR). A judicial factor could be appointed over the property of a charity under sections 6 and 7 of the 1990 Act.

10. These sections were repealed by the Charities and Trustee Investment (Scotland) Act 2005, Schedule 4, Part 1, paragraph 7(b). Under section 34 of that Act the Court of Session may appoint a judicial factor, on the application of OSCR, where it appears that there has been misconduct in the management of a charity or where there have been unwarranted representations that an organisation is a charity.

Judicial factor appointed under section 41 of the Solicitors (Scotland) Act 1980

11. The Council of the Law Society of Scotland may apply to the court for the appointment of a judicial factor on the estate of a solicitor under section 41 of the Solicitors (Scotland) Act 1980 where it is believed that his or her liabilities exceed his or her assets or where it is likely that there will be a claim made on the Guarantee Fund. The judicial factor's

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[5] Addison, paras 34.1 - 34.3.
[6] *Ibid* at paras 35.1 - 35.2.

appointment will initially be interim and therefore the role will be, strictly speaking, to conserve the estate. It is likely, however, that the business will be insolvent and will need to be disposed of.[7]

Bankruptcy factor

12. The court could previously appoint a judicial factor under sections 14 or 163 of the Bankruptcy (Scotland) Act 1913. Under section 14 the appointment was for the preservation of the estate before sequestration where this was seen to be appropriate. Under section 163 the appointment was for the administration of the estate of a deceased person where that person had died intestate or where there was no one to administer the estate. The Bankruptcy (Scotland) Act 1913 was repealed by the Bankruptcy (Scotland) Act 1985 (Schedule 8) and section 11A was inserted into the Judicial Factors (Scotland) Act 1889. This allows creditors or interested parties to apply to the court for the appointment of a judicial factor where someone dies intestate or solvency is in question and no one is entitled or prepared to act as executor. The purpose of the appointment is to ingather and realise the estate.

Commissary factor

13. Where a child is entitled to be appointed as executor it is competent to appoint a commissary factor[8] to act as executor in place of the child. This remains competent after the Age of Legal Capacity (Scotland) Act 1991 where the child is under the age of 16. A commissary factor must first find caution[9] in respect of his appointment as factor and then find further caution in respect of his subsequent appointment as executor.

Judicial factor on trust estates

14. The court may appoint a judicial factor over a trust estate under the common law. The purpose of the appointment may be to administer the estate or to realise the estate and distribute it, depending on the purposes of the trust.[10]

Judicial factor where fee is *in pendente*

15. Section 8 of the Trusts (Scotland) Act 1921 provides that where "any property is conveyed to one person in liferent and in fee to persons who, when such conveyance comes into operation, are unborn or incapable of ascertainment, it shall be competent to the court…to appoint…a judicial factor, to hold the said property in trust in place of the liferenter or fiduciary fiar". This is on the application of the liferenter or another having an interest.

16. In Scots law, the fee must be vested in someone and the term "fiduciary fiar" is used to describe a liferenter who holds (normally for his or her unborn children) the fee in a constructive trust.[11]

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[7] *Ibid* at para 36.4.
[8] On commissary factors, see Currie on *The Confirmation of Executors in Scotland* (8th edn by Eilidh M Scobbie, 1995), paras 8.72 - 8.76.
[9] See paras 7.2 - 7.10 above.
[10] Addison, paras 31.1 - 31.5.
[11] Kenneth G C Reid *et al*, *The Law of Property in Scotland* (1996), para 88. See also W A Wilson and A G M Duncan, *Trusts, Trustees and Executors* (1995), paras 6-01 - 6-15.

Judicial factor pending litigation

17. Under the common law, the court may appoint a judicial factor over property pending litigation. The principal duty of the factor under such an appointment is to preserve the property.[12]

Factor *loco absentis*

18. The Act of Sederunt of 13 February 1730 provides that the court may appoint a judicial factor over the estate of an absent person. Under section 2(2)(c) of the Presumption of Death (Scotland) Act 1977, the court may appoint a judicial factor over the estate of a missing person where it has granted decree to the effect that the person has died.

Judicial factor appointed over common property

19. The court may appoint a judicial factor over common property under the common law. This is a rare appointment and it is not clear what a factor's duties would be in this case.[13]

Judicial factor appointed at the court's discretion

20. The Court of Session can appoint a judicial factor under the *nobile officium* where this is necessary to afford protection against loss or injustice.[14] This common law power of the Court of Session has been largely superseded by statutory powers.[15]

Administrators

21. Although not strictly speaking a judicial factor, an administrator under the Proceeds of Crime (Scotland) Act 1995 (the 1995 Act) appears to be treated in the same way by the Accountant.[16] An administrator can be appointed under Schedule 1 to the 1995 Act on the application of the prosecutor to realise the property over which an order (confiscation order, restraint order or suspended forfeiture order) has been made. The Proceeds of Crime Act 2002 (the 2002 Act), Parts 3 and 8, have substantially replaced the 1995 Act, although the 2002 Act has not repealed the relevant provisions for appointing an administrator. The 2002 Act also provides for the appointment of management administrators under section 125 where a restraint order has been made.

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[12] Addison, para 39.2.
[13] Addison, paras 38.1 - 38.2; Walker, p 60; Kenneth G C Reid *et al*, *The Law of Property in Scotland* (1996), para 31; *Bailey v Scott* (1860) 22 D 1105.
[14] Gloag and Henderson, *The Law of Scotland* (12th edn, 2007), para 43.01; 24 *Stair Memorial Encyclopaedia*, para 238.
[15] *Ibid*. See also the Court of Session Act 1988, s 5 and RCS, rule 14.2.
[16] RCS chapter 76 deals with administrators appointed under the Proceeds of Crime legislation.

22. Administrators may also be appointed under Part 2 of Schedule 4 to the Terrorism Act 2000 to take possession of and realise forfeited property. The Accountant exercises a similar role in relation to these appointments as in relation to judicial factors.

Appendix C

Proposed powers applicable to all judicial factors

1. To take possession of, collect and gather in the property of the estate and, for that purpose, to take such actions and such proceedings as may be expedient.

2. To do all such things (including the carrying out of works) as may be necessary for the management or realisation of the estate, heritable or moveable.

3. To grant all deeds necessary for carrying into effect the powers vested in the judicial factor.

4. To carry on the business of the estate or any part of it.

5. To sell the estate or any part of the estate, heritable or moveable.

6. To grant, vary or accept a surrender of a lease or tenancy of any duration of the heritable estate or any part of the heritable estate, and to remove tenants; and to take a lease or tenancy of any property required for the business of the estate.

7. To borrow money on the security of the estate or any part of the estate, heritable or moveable.

8. To draw, accept, make and endorse any bill of exchange or promissory note on behalf of the estate.

9. To exchange any part of the heritable estate for heritable property of like or greater value.

10. To acquire heritable property.

11. To make any kind of investment of the estate (including an investment in heritable property).

12. To appoint nominees to exercise the power of investment.

13. To authorise an agent to exercise any of the judicial factor's investment management functions at the agent's discretion.

14. To appoint any agent to do any factory business which the factor is not competent to carry out and to pay the agent suitable remuneration.

15. To enter into or take over contracts with third parties.

16. To employ and dismiss employees.

17. To pay debts due by the estate without requiring the creditors to constitute such debts where the judicial factor is satisfied that the debts are proper debts of the estate.

18. To concur, in respect of any securities of a company (being securities comprised in the estate), in any scheme or arrangement—

for the reconstruction of the company,

for the sale of all or any part of the property and undertaking of the company to another company,

for the acquisition of the securities of the company, or of control thereof, by another company,

for the amalgamation of the company with another company, or

for the release, modification, or variation of any rights, privileges or liabilities attached to the securities or any of them,

in like manner as if the judicial factor was entitled to such securities beneficially; to accept any securities of the reconstructed or purchasing or new company in lieu of, or in exchange for, all or any of the original securities; and to retain any such securities for any period for which the judicial factor could have properly retained the original securities.

19. To such extent as the judicial factor thinks fit, to exercise any conditional or preferential right to subscribe for any securities in a company, to apply capital money of the estate in payment of the consideration, and to retain any such securities for any period for which the judicial factor has power to retain the holding in respect of which the right to subscribe for the securities was offered (but subject to any conditions subject to which he or she has that power); to renounce any such right; or to assign, for the best consideration that can reasonably be obtained, the benefit of such right or the title thereto to any person, including any beneficiary of the estate.

20. To bring or defend any action or other legal proceedings on behalf of the estate.

21. To refer to arbitration all questions affecting the estate.

22. To put forward a scheme of division of the estate.

23. To petition the court for authority to act at variance with the purposes of the factory and/or to vary the powers already granted.

Proposed powers where a factor is appointed to a sequestrated estate within 12 months of a person's death

24. To petition the court to reduce a gratuitous alienation or restore the relevant property, where the estate was absolutely insolvent at the date of death, and the alienation was completely effectual within five years prior to proceedings to an associated person, or within two years to any other person.

25. To petition the court to reduce an unfair preference or restore the relevant property, where the estate was absolutely insolvent at the date of death, and the unfair preference was completely effectual within six months prior to the proceedings.

26. To petition the court to recall an order for payment or transfer of property in divorce proceedings made within five years prior to proceedings, where the debtor was absolutely insolvent either when the order was made or because of it.

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