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REPORT ON DILIGENCE AND DEBTOR PROTECTION

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CHAPTER 7

DILIGENCES AND PRIORITIES ENFORCING RATES, TAXES AND CROWN DEBTS

Scope and arrangement of Chapter

7.1 In this Chapter, we advance recommendations for the reform of the law and procedure regulating diligence in pursuance of summary warrants granted by the sheriff for the recovery of local government rates and central government taxes (Section A). We propose very limited changes to the special procedures for enforcing betting and gaming duties and customs and excise duties (Section B). Subject to minor exceptions, we recommend the abolition of civil imprisonment for non-payment of rates, tax penalties, and civil fines and penalties due to the Crown (Section C). We recommend the abolition of Exchequer diligence and of the Crown preferences dependent on the execution of such diligence (Section D). We also recommend abolition of the priorities accorded to claims for rates and tax arrears where moveable property is taken by diligence or by assignation from rates or tax defaulters (Section E). Finally, we recommend abolition of imprisonment under *fugae* warrants in those few cases where it remains technically competent (Section F).

Section A. Reform of diligence under summary warrants for recovery of rates and taxes

7.2 Rating authorities,[1] the Inland Revenue[2] and H.M. Customs and Excise[3] have statutory powers to obtain summary warrants for the recovery of rates[4] and taxes.[5] Summary warrants differ from ordinary debt actions in two main ways. First, the warrant is obtained by an *ex parte* application to the sheriff by the collector rather than as a result of obtaining decree for payment in a court action. Secondly, the diligences authorised by a summary warrant and the procedures for executing them differ from those authorised by an ordinary decree.

7.3 We are here mainly concerned with the diligences available to enforce such warrants. To avoid any misunderstanding, we would emphasise that we have not examined the question of principle whether summary warrants authorising diligence should continue to be available to collectors of rates and taxes, or whether they are objectionable as infringing "due process" principles. We have not consulted on that question. In our Consultative Memorandum No. 48 we made it clear that we were not concerned with the procedure for

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[1]Local Government (Scotland) Act 1947, s. 247.

[2]Taxes Management Act 1970, s. 63.

[3]Value Added Tax (General) Regulations 1980 (S.I. 1980/1536), reg. 59; Value Added Tax Act 1983, Sched. 7, para. 6; Car Tax Regulations 1983 (S.I. 1983/1781), reg. 26; Car Tax Act 1983, Sched. 1, para. 3.

[4]Including private improvement expenses (Local Government (Scotland) Act 1947, s. 252) and charges for non-domestic and metered water supply (Water (Scotland) Act 1980, ss. 9(6) and 49(2)) which are recoverable in the same way as rates.

[5]Income tax, capital gains tax, corporation tax, development land tax and petroleum revenue tax: Taxes Management Act 1970, s. 118(1) and Oil Taxation Act 1975, Sched. 2, para. 1(1).

obtaining a summary warrant.[1] As background information, we pointed out[2] that summary warrants procedure "avoids the publicity attendant on the appearance of the debtor's name in court records" (which can lead to "black listing" by credit reference agencies) and that, while a debtor has no opportunity to object to the grant of summary warrant, the public authority creditor incurs strict liability in damages for wrongful diligence if the debtor establishes that the certificate supporting the *ex parte* application was erroneous.[3] In this report, as in our Consultative Memoranda, we assume that summary warrants will continue to be available.

7.4 Summary warrants are widely used. Table 7.A sets out the number of applications for summary warrants disposed of in some recent years.

Table 7.A

	1979	1980	1981	1982	1983
Rates	347	392	408	481	406
Income Tax	728	1,082	475	979	1,921
V.A.T.	2,753	6,752	3,157	10,996	14,487

Source: Civil Judicial Statistics for Scotland, Tables 11.

The above figures for rates applications give a wholly misleading impression of the number of debtors involved since it is customary for rates collectors to apply for a single warrant in respect of many debtors. There are no statistics available for the whole of Scotland for the number of rates debtors placed on summary warrant but in respect of arrears of rates for the rating year 1980/81 in Strathclyde Region (containing about half the population of Scotland) it has been reported that there were 38,482 rates debtors against whom a summary warrant was granted.[4] The figures for V.A.T. and income tax applications probably reflect fairly accurately the number of debtors involved, since it is normal for a separate warrant to be applied for in respect of each debtor. The number of tax warrants will, however, be greater than the figure shown since warrants would also have been applied for in respect of capital gains tax, corporation tax, development land tax and petroleum revenue tax.

7.5 Summary warrant poinding procedure has a "filter" effect similar to that of ordinary poinding procedure. The Keith Report observed[5] that it is the threat of sale rather than the actual execution of the sale which secures payment. The presence of the sheriff officer at the debtor's premises "itself

[1]Consultative Memorandum No. 48, para. 7.2.

[2]*Idem.*

[3]Notwithstanding what is said in the Keith Report, para. 24.2.23, we have not expressed the view that summary methods of recovery of debts without the need for a judgement are appropriate for local rates and central government taxes. Nor have we relied on any argument that rating bodies and tax collectors cannot choose their debtors: indeed, in our Bankruptcy Report, para. 15.3, in the context of Crown preferences in sequestrations, we pointed out that there are other classes of involuntary creditor (such as alimentary creditors and the victims of delicts) who receive no preference.

[4]*The Scotsman*, August 1982.

[5]Para. 24.2.14.

provides a powerful compulsion: . . . in most cases payment is obtained on the spot". It is the practice of many rating authorities to intimate the granting of the summary warrant to debtors in order to promote informal settlement of the arrears. Even after the summary warrant has been sent to sheriff officers for diligence to be done, many officers write to debtors before doing diligence intimating their intention to execute the warrant. The effect of these informal steps in promoting settlement of arrears is especially marked where rates are concerned. The available statistics are shown in Tables 7.B and 7.C.

Table 7.B

Rates summary warrants

	Lothian (1979/80)*	Strathclyde (1980/81)†
Debtors on warrant	7,544	38,482
Poindings executed	1,413	—
Arrangements for sale intimated to debtors	455	1,197
Sales advertised	191	—
Sales executed	7	7

* Information supplied by Lothian Regional Council.
† *The Scotsman*, August 1982.

Table 7.C

[Tax summary warrants (whole of Scotland)]

	Inland Revenue taxes* (1978)	Value Added Tax† (1978)
Debtors on warrant	2,127	3,745
Poindings executed	1,220	2,037
Sales executed	4	Less than 10

* Information supplied by Inland Revenue.
† Information supplied by H.M. Customs and Excise.

Summary warrants and ordinary actions

7.6 Rating and tax authorities may proceed by way of summary warrant, or by ordinary action either in the Court of Session or the sheriff courts. Recovery by way of action is generally used where the liability for, or the amount of, the rates or tax claimed is disputed. A rating authority which obtains a decree for arrears of rates in an action cannot subsequently apply for a summary warrant against the same debtor in respect of the same rates.[1] Where they have already obtained a summary warrant a rating authority cannot proceed by way of action against the debtor unless they abandon the summary warrant

[1]Local Government (Scotland) Act 1947, s. 247(2) proviso.

as regards that debtor[1] and an action for payment of rates arrears cannot be raised once a summary warrant for recovery of those arrears has been "put in force".[2] Although the meaning of this phrase is not entirely clear, it was probably intended[3] to restate the pre-existing law whereby an action could not be raised once diligence had been executed to enforce a summary warrant.[4] The tax authorities may, however, apply for a summary warrant even though they already hold a decree, and they may abandon their summary warrant at any time and proceed instead by way of an action.[5] An extract decree obtained as the result of an action is warrant for all lawful diligence so that there is little or no advantage in obtaining a summary warrant in addition.

7.7 In the interests of uniformity, we consider that the same rules should apply to both the rating and tax authorities. We propose that the raising of an action should be an absolute bar to proceeding by way of summary warrant. Both rating and tax authorities should be entitled to abandon an existing summary warrant in respect of a particular debtor and proceed by way of action against that debtor. Even after a summary warrant has been granted, a dispute as to liability or the amount of rates or tax arrears may arise which may require to be litigated. We consider, however, that once diligence has been commenced in pursuance of a summary warrant, it should not be possible for the rates or tax collector to abandon it and proceed by way of action. A rates or tax defaulter who has suffered diligence under a summary warrant should not be subjected to the trouble and expense of a court action for payment of the arrears to which the summary warrant related. Again, in the interests of uniformity, we recommend that the same rule should apply both to rates and taxes. In the field of rates recovery, the present restriction on changing from summary warrant diligence to ordinary action and diligence seems to cause few problems: any defect in the summary warrant or relative collector's certificate normally becomes apparent before the sheriff officer executes diligence under the warrant.

7.8 We **recommend:**

(1) It should be incompetent for a summary warrant to be granted for the recovery of arrears of rates or taxes due by a debtor if an action has already been raised for payment of those arrears.

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[1]*Govan Police Commissioners* v. *Clark* (1889) 5 Sh.Ct.Reps. 156; *Kilmarnock Town Council* v. *Sloan* (1914) 30 Sh.Ct.Reps. 238; *Lanarkshire County Council* v. *Burns* (1915) 31 Sh.Ct.Reps. 301; *Wright* v. *Craig* (1919) 35 Sh.Ct.Reps. 22; *Staig* v. *McMeekin* (1943) 59 Sh.Ct.Reps. 126.

[2]Local Government (Scotland) Act 1947, s. 247(1) proviso. The warrant must be abandoned before decree is granted.

[3]Hutton, *Local Government (Scotland) Act 1947*, p. 335.

[4]*Lanarkshire County Council* v. *Burns* (1915) 31 Sh.Ct.Reps. 301.

[5]*Wright* v. *Craig* (1919) 35 Sh.Ct.Reps. 22. S. 67 of the Taxes Management Act 1970 provides that tax arrears not exceeding the sum for the time being specified in s. 35(1)(*a*) of the Sheriff Courts (Scotland) Act 1971 (currently £1,000, Sheriff Courts (Scotland) Act 1971 (Summary Cause) Order 1981 (S.I. 1981/842)) may be sued for in the sheriff courts "without prejudice to any other remedy"; while s. 68 provides that any tax may be sued for in the Court of Session sitting as the Court of Exchequer "as well as by the other means specially provided by this Act for levying the tax".

(2) The raising of an action against the debtor for payment of arrears of rates or taxes should render an existing summary warrant for those arrears ineffective as regards that debtor.

(3) It should be incompetent to raise an action against the debtor for payment of arrears of rates or taxes once a poinding, arrestment or earnings arrestment has been executed for recovery of those arrears in pursuance of a summary warrant.
(Recommendation 7.1; Bill, Schedule 5, paragraphs 1, 4, 6 and 7.)

Who should grant and execute summary warrants?

7.9 Summary warrants for rates, value added tax and car tax can only be granted by a sheriff.[1] In the case of Inland Revenue tax debts, a summary warrant can also be granted by the General Commissioners[2] although we understand that this is not modern practice. The power to grant a summary warrant should, in our opinion, be exercised only by sheriffs since in principle a diligence should normally be authorised only by the warrant of a judge. The Keith Report[3] stated that they had "some sympathy in principle with this added judicial oversight".

7.10 Tax summary warrants may be executed only by "the sheriff officers of the sheriffdom"[4] while rates summary warrants may be executed by officers of court[5]—an expression which includes messengers-at-arms. In practice it appears that only sheriff officers are instructed to execute rates summary warrants. Later in this report we recommend that a messenger-at-arms should not as such have authority to execute sheriff court warrants.[6] In line with this recommendation and reflecting current practice, a rates warrant should be executed by sheriff officers only.

7.11 We **recommend:**

A summary warrant should be granted only by a sheriff and diligence in execution of a summary warrant should be carried out only by sheriff officers.
(Recommendation 7.2; clause 103(3) and Schedule 5.)

Diligence authorised by summary warrants

The existing law

7.12 Arrestment is available to enforce summary warrants for rates[7] but not summary warrants for taxes. Where the debtor's wages are arrested the limitation on the amount arrestable set out in section 2 of the Wages Arrestment Limitation (Scotland) Act 1870 (half the balance over £4 per

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[1]Local Government (Scotland) Act 1947, s. 247(2); Taxes Management Act 1970, s. 63(1); Value Added Tax (General) Regulations 1980, reg. 59(*a*); Car Tax Regulations 1983, reg. 26.
[2]Taxes Management Act 1970, s. 63(1).
[3]Para. 24.2.23.
[4]Taxes Management Act 1970, s. 63(2); Value Added Tax (General) Regulations 1980, reg. 59(*b*); Car Tax Regulations 1983, reg. 26(*b*).
[5]Local Government (Scotland) Act 1947, s. 247(2).
[6]Recommendation 8.6 (para. 8.40).
[7]Local Government (Scotland) Act 1947, s. 247(3).

week) does not apply,[1] and in practice the debtor's whole wages are arrested. Poinding is the diligence generally used to enforce payment of rates and taxes. The poinding procedures differ from poindings used to enforce an ordinary decree. Further, the rates poinding procedure differs in many points of detail from the taxes poinding procedure.

7.13 The main differences between the poinding procedure under summary warrants for arrears of rates set out in section 247 of the Local Government (Scotland) Act 1947 and ordinary poinding procedure are as follows:

(i) No charge to pay is served before a summary warrant poinding is executed.

(ii) A summary warrant poinding is not supervised by the sheriff. Thus, the officer does not report the poinding or the sale; no warrant of sale is required and the officer himself makes arrangements for the sale; the sale can take place four days after poinding on three days' notice; and the proceeds of the diligence are not, or at least not normally, subject to audit and taxation by the auditor of court.

(iii) In a summary warrant poinding, the goods are not valued when poinded; there is no "offer back" to the debtor at their appraised value; and no provision is made for the adjudication and delivery of unsold goods at their appraised values to the rating authority.

7.14 The poinding procedure under summary warrants for recovery of Inland Revenue taxes is set out in section 63 of the Taxes Management Act 1970. Virtually identical procedures are provided for the recovery of value added tax[2] and car tax.[3] The tax procedure is similar to the rates procedure in that no charge to pay is served before the poinding is executed and the diligence is not supervised by the sheriff. However, the goods are valued not earlier than five days after the poinding and can be redeemed at their appraised values. The appraised values operate as upset prices at the sale and unsold goods are consigned into the sheriff's hands for a sale by public auction without the upset prices.

Use of arrestment

7.15 At present, summary warrants for recovery of rates authorise the use of arrestments,[4] but diligence authorised by tax warrants is limited to poindings.[5] In Consultative Memorandum No. 48 we proposed[6] that a summary warrant for recovery of tax arrears should also be enforceable by arrestment. All those consulted agreed and it was observed that arrestment would be helpful in recovering arrears of tax from a businessman who had ceased trading, but who had found employment. The Keith Report observed that arrestment would be a useful additional weapon in the Revenue Departments' armoury

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[1]Wages Arrestment Limitation (Scotland) Act 1870, s. 4.

[2]Value Added Tax (General) Regulations 1980, reg. 59.

[3]Car Tax Regulations 1983, reg. 26.

[4]Local Government (Scotland) Act 1947, s. 247(3).

[5]Taxes Management Act 1970, s. 63; Value Added Tax (General) Regulations 1980, reg. 59; Car Tax Regulations 1983, reg. 26.

[6]Proposition 61 (para. 7.23).

and recommended implementation of our proposal.[1] We therefore propose that all summary warrants should authorise the use of arrestment.

7.16 In Consultative Memorandum No. 49, we proposed that it should be competent to enforce rates summary warrants by means of earnings arrestments (such as we now recommend in Chapter 6 of this report), and that if arrestment was to become a competent mode of diligence to enforce tax summary warrants, then earnings arrestments should also be available to enforce payment of tax.[2] No adverse comments were made on consultation and we recommend that earnings arrestment should be competent to enforce all summary warrants. In our discussion of earnings arrestments in Chapter 6 we recommend that the normal rules on the amount exempted from arrestment should apply where the debt is rates or taxes[3] and that such debts should not enjoy any preference in conjoined arrestment orders.[4]

7.17 In Chapter 6 of this report, we also recommend that a charge to pay a sum due under a decree must first be served on the debtor, and the days of charge must expire without payment being made, before an earnings arrestment could be laid.[5] We do not, however, think that a charge should be an essential preliminary step to an earnings arrestment where a summary warrant is concerned, since a summary warrant poinding also requires no prior charge. Charges are, in our opinion, incompatible with the expeditious nature of summary warrant diligence, and in practice most debtors get informal warning before diligence is done against them.

7.18 We **recommend:**

> A summary warrant for the recovery of rates or taxes should authorise an arrestment of the debtor's funds and property other than earnings, and an earnings arrestment (or where appropriate a conjoined arrestment order) against his earnings.
> (Recommendation 7.3; Bill, Schedule 5, paragraphs 1, 2, 6 and 7.)

Poinding

7.19 *Retention of special procedure.* Summary warrant poindings are not supervised by sheriffs: they can also be more expeditious than ordinary poindings since no charge to pay is required and a shorter interval need elapse between poinding and sale. In Consultative Memorandum No. 48 we provisionally proposed[6] that summary warrants should continue to be enforceable by a special poinding procedure rather than by poinding in common form used to enforce normal decrees. Those consulted agreed with this proposal. The O.P.C.S. Defenders Survey found that individual rates defaulters[7] pursued by summary warrant were generally from higher income groups than other

[1]Para. 24.2.25(iii).
[2]Proposition 43 (para. 4.18).
[3]Recommendation 6.11 (para. 6.82).
[4]Recommendation 6.44 (para. 6.244).
[5]Recommendation 6.7 (para. 6.59).
[6]Proposition 56 (para. 7.8).
[7]Many rates defaulters are business organisations: the survey only covered rates defaulters who are individuals.

debtors[1] and the amounts owed were relatively small,[2] that few were unable to pay the arrears (only 29% as opposed to 69% of all debtors); and that proportionately more rates defaulters than other debtors delayed payment on principle (10% of rates defaulters as against 1% of all debtors).[3] It seems therefore that many people delay or refuse payment of rates and taxes long after they would regard it as wrong to keep an ordinary creditor out of his money. This seems to us to justify a more expeditious poinding procedure. Moreover, as we observed on consultation,[4] the absence of judicial control is justified where the creditors are public bodies who retain direct and tight control over the use of diligence and who ought to be entrusted to use their enforcement powers in a fair and responsible manner. No consultee objected to this observation. Finally, the execution of summary warrant diligence would be subject to the new machinery for the inspection of the work of sheriff officers which we recommend in Chapter 8 below.

7.20 We **recommend:**

Summary warrants for rates and taxes should continue to be enforceable by a special statutory poinding procedure rather than by poinding in common form.
(Recommendation 7.4; Bill, Schedule 6.)

7.21 *A uniform statutory poinding procedure.* As noted in paragraph 7.14 above, the statutory poinding procedure for Inland Revenue tax summary warrants differs in many matters of detail from the procedure available for rates summary warrants; also, the value added and car tax provisions are not identical to the Inland Revenue tax provisions. We think that there is no justification for the continuance of these differences and that it would be better if a uniform summary warrant poinding procedure were adopted. We put forward such a proposal in Consultative Memorandum No. 48[5] and all those consulted agreed. We propose for summary warrants to adopt many of the provisions recommended for ordinary poindings in Chapter 5, the main modifications being designed to retain the "summary" nature of the procedure and the absence of supervision by the sheriff. This could have been done by a Schedule to the Bill annexed to our report showing merely the modifications in question, but we believe that it would be much more convenient for readers and users of the legislation to set out in a Schedule[6] a complete code regulating summary warrant poindings even though this code repeats much of the recommended clauses regulating ordinary poindings.[7]

7.22 We **recommend:**

The special statutory poinding procedure should be the same for all summary warrants for rates and taxes.
(Recommendation 7.5; Bill, Schedule 5, paragraphs 1, 2, 6 and 7 and Schedule 6.)

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[1]O.P.C.S. Defenders Survey, pages 13 and 14; Table 2.14.
[2]*Ibid.* Table 3.4.
[3]*Ibid.* Table 4.2.
[4]Consultative Memorandum No. 48, para. 7.8.
[5]Proposition 57 (para. 7.9).
[6]Bill, Sched. 6.
[7]Bill, Part III.

7.23 The procedure is set out at Schedule 6 to the Bill annexed to this report. The procedure would contain many of the safeguards for debtors recommended in Chapter 5 for poindings in common form, e.g. provisions preventing sales in dwellings without the consent of the debtor or occupier and advertisements of sales identifying the debtor unnecessarily.[1] We have not thought it necessary to discuss these safeguards in detail since the arguments for such safeguards were considered fully in Chapter 5. In the following paragraphs, however, we discuss some questions peculiar to the uniform procedure which we recommend.

7.24 *Valuation of poinded goods*. Under a tax summary warrant the debtor's goods are merely inventoried at the poinding stage and valued only after the expiry of at least five days.[2] The valuation operates as a price at which the debtor may redeem his goods[3] and as an upset price at the subsequent sale.[4] No formal valuation of goods poinded under a rates summary warrant is required, although an approximate valuation must be made since the officer is only entitled to poind and sell sufficient goods to satisfy the rates and 10% surcharge due.[5] In practice it appears that many officers do carry out a formal valuation when poinding for arrears of rates. In Consultative Memorandum No. 48, we suggested that goods poinded in pursuance of a summary warrant should be valued.[6] On consultation there was general agreement with that suggestion, but one body put forward the idea that valuation should not be necessary since the goods should be sold for whatever they could fetch. We would reject this idea because we think debtors ought to have the protection of upset or reserve prices in a forced sale of their goods. This protection is particularly important in summary warrant procedure because the sale is arranged by an officer of court without prior approval or subsequent scrutiny of the sale by the sheriff. Moreover, appraisal is essential if, as we recommend, the rates or tax defaulter is to have a right to redeem the goods.

7.25 If goods are to be valued, when should the valuation take place? In Consultative Memorandum No. 48 we suggested[7] that the valuation should be carried out immediately before the sale. Although most of those consulted agreed, we now think that the valuation should be done at the time when the goods are poinded. The debtor's right to redeem his goods at their appraised values within a prescribed period after valuation is an important right in itself and also serves to check undervaluation. This right, which exists at present only in relation to tax summary warrants,[8] should in our opinion be retained and applied to all summary warrants. Yet this right would be almost worthless if valuation were to take place immediately before sale or even on removal for sale. Later in this Chapter we recommend that the sheriff should have

[1]See e.g. Bill, Sched. 6, paras. 10 and 12(4).
[2]Taxes Management Act 1970, s. 63(4).
[3]*Ibid.*, s. 63(5).
[4]*Ibid.*, s. 63(4).
[5]Local Government (Scotland) Act 1947, s. 247(2)(*a*).
[6]Proposition 59 (para. 7.16).
[7]Proposition 59 (para. 7.16).
[8]See 1970 Act, s. 63(5). Under s. 63(3), the tax defaulter may redeem the goods by payment of the tax in arrears and costs (not the appraised value) within five days after the proceedings. Under s. 63(5), at a later stage, it appears that the tax defaulter may redeem the poinded goods on payment of the appraised value within five days after valuation.

power to recall a poinding where the goods have been substantialy undervalued or where the likely proceeds of sale are less than the likely expenses of sale;[1] again valuation immediately before sale would take away much of the usefulness of these provisions. Valuation at the time of poinding avoids the need for the officer to make an extra visit to the debtor's premises, and it allows the debtor adequate time to redeem his goods or to seek recall of the poinding. It also assists the officer to decide how many goods to poind and helps the collector of rates to consider whether the diligence is worth pursuing further. The common extra-statutory practice in rates recovery procedure of valuing the goods at the time of poinding suggests that valuation should be carried out when the goods are poinded.

7.26 In tax recovery procedures the valuation is supposed to be carried out by two persons appointed by the officer, the intention being, it is thought, that they should be skilled valuators,[2] but the officer himself acts as the valuator in practice. When we considered this problem in the context of poindings in common form, we recommended that the officer should value the goods himself, but that in exceptional circumstances a skilled valuator could be appointed.[3] The Inland Revenue, in commenting on our proposals regarding appraisal, expressed concern at valuation by officers alone since many goods poinded for tax debts are commercial goods which officers may not be able to value correctly. We share this concern, but it would be far too expensive to require the appointment of specialist valuators in every case. We recommend instead that the officer should be entitled to call in a specialist valuator. Officers are, we think, sufficiently familiar with the problems of valuation to recognise cases where they themselves cannot properly value the goods.

7.27 In relation to ordinary poindings, we recommend above that debtors should be entitled to apply to the sheriff for recall of the poinding, or to object to the granting of a warrant of sale, on the ground that the goods were substantially undervalued.[4] The entitlement to apply for recall should in our opinion be extended to summary warrant poindings; the objection to warrant of sale cannot be extended since we recommend that, as under existing law, there should be no separate warrant of sale in summary warrant poindings. In order to prevent applications for recall on the eve of a sale, we suggest that an application for recall should be competent only before arrangements for the sale or removal of his goods for sale have been intimated to the debtor.

7.28 A tax debtor is entitled to redeem his goods before sale on payment of the appraised value, provided he does so within five days after the valuation.[5] This right is valuable since it serves as a check to undervaluation. We recommend that it should become a feature of the proposed summary warrant poinding procedure, the period for redemption being 14 days after the poinding and that the debtor should have a further opportunity to redeem

[1]Recommendation 7.9 (para. 7.42).
[2]Taxes Management Act 1970, s. 63(4).
[3]See paras. 5.89 and 5.95 above.
[4]Recommendations 5.29 (para. 5.137) and 5.30 (para. 5.146).
[5]Taxes Management Act 1970, s. 63(5).

the pointed goods within seven days after notification to him of the date of sale, or of removal and sale.[1]

7.29 In a sale under a tax summary warrant, the appraised value of an article operates as an upset price (the price at which bidding commences for it). In our consideration of ordinary poindings in Chapter 5 we recommended that the appraised value should operate as a reserve price (the price below which an article will not be sold to the bidder) in order to enable the auctioneer to obtain a better price in the interests of both the creditor and the debtor.[2] We further recommend that the creditor should have the option of disclosing the reserve at the auction. We would extend both these recommendations to summary warrant sales.

7.30 We **recommend:**

(1) In summary warrant poinding procedure, the goods should be valued at their open market value at the time of poinding. The valuation should be carried out by the officer except in special cases where a specialist valuator should value the goods.

(2) The debtor should have an opportunity and right to redeem any of his goods by payment to the officer of their appraised values within 14 days after the execution of the poinding and within seven days after notification to the debtor of the date of sale or removal and sale.

(3) The debtor should be entitled to apply to the sheriff for recall of the poinding on the grounds that the goods were substantially undervalued, at any time up to the officer's intimation to him of the date arranged for the sale or removal of his goods for sale.

(4) In any auction of goods in pursuance of a summary warrant the appraised values of the goods should be treated as reserve prices. The creditor need not disclose the existence of a reserve price or its amount to bidders.
(Recommendation 7.6; Bill, Schedule 6, paragraphs 5(1)(*b*); 5(5); 7; 11(2); 14(1).)

7.31 *Sale of poinded goods*. One major difference between a summary warrant sale and an ordinary poinding sale lies in the treatment of unsold goods. In ordinary poinding procedure, unsold goods are adjudged and delivered to the creditor, the debtor being credited with their appraised value. The creditor may then sell them at his own expense, retain them for his own use, or abandon them to the auctioneer or the debtor. By contrast, in summary warrants for the recovery of rates, no upset price is fixed and the goods may be sold for whatever price they may fetch, or may be exposed for sale on several occasions. In summary warrants for the recovery of taxes, goods which fail to reach their upset price are consigned in the hands of the sheriff[3] to be:

> ". . . rouped, sold and disposed of by order of the sheriff, in such manner and at such time and place as he shall appoint . . .".

[1]We recommend similar periods in relation to poindings in common form; Recommendations 5.19 (para. 5.95) and 5.31 (para. 5.150).
[2]Recommendation 5.42 (para. 5.199).
[3]Value Added Tax (General) Regulations 1980, reg. 59(*g*); Taxes Management Act 1970, s. 63(7) (sheriff principal or sheriff).

In neither rates nor tax summary warrant procedure is any provision made for the delivery of unsold goods to the creditor at the appraised values.

7.32 In Consultative Memorandum No. 48, we suggested that if goods poinded under a summary warrant were not sold they should be adjudged to the rating or tax authority and the debtor should be credited with the appraised value as occurs with unsold goods in poindings in common form.[1] The majority of those commenting approved this suggestion.

7.33 The first argument put forward by those commentators who opposed our suggestion was that the rating and tax authorities would have no use for unsold goods adjudged to them. But this argument applies equally to other poinding creditors. In any event, collectors could avoid having to deal with unsold goods by arranging with the auctioneer that the goods should be sold to the highest bidder whether or not the appraised value was reached. Provided the debtor was credited with the appraised value or the amount of the highest bid, whichever was the greater, there could be no objection to such an arrangement.[2]

7.34 Those commentators opposed to our suggestions also feared that crediting the debtor with the appraised value of unsold goods would result in an unwarranted reduction in the debt. We can see no reason, however, for treating the rating and tax authorities differently from other creditors in this respect. Our earlier recommendation allowing appointment of specialist valuators[3] will, we think, help prevent serious discrepancies arising between the appraised value of poinded goods (especially valuable commercial goods) and the price they fetch at auction. Moreover, where goods have been appraised at too high a value, the rating or tax authority may obtain damages from the officer or valuator if he has failed to exercise the requisite degree of skill in carrying out his appraisal.

7.35 In our opinion, delivery of goods to the rates or tax authority at the appraised values provides a simple and satisfactory method of terminating the summary warrant poinding procedure. It also helps to safeguard the debtor from having his goods disposed of at an undervaluation in a sale not subject to judicial supervision.

7.36 We **recommend:**

Where goods poinded under a summary warrant are exposed for sale, the appraised value should operate as a reserve price. The ownership of goods which are not sold because the highest bid fails to reach the reserve price should pass to the rating or tax authority, unless the authority authorises the auctioneer to sell the goods to the highest bidder. The debtor should be credited with the appraised value or the amount of the highest bid whichever is the greater.
(Recommendation 7.7; Bill, Schedule 6, paragraph 14(3) to (6).)

7.37 *Release of articles and recall of poinding.* In Chapter 5 of this report,

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[1]Proposition 59 (para. 7.16).

[2]We have made a similar recommendation for sales under ordinary poinding procedure. See Recommendation 5.43 (para. 5.203) above.

[3]Recommendation 7.6 (para. 7.30) above.

dealing with ordinary poinding procedure, we recommended an extension of the range of household and other goods exempt from poinding so that a creditor would not be entitled to poind and sell tools of trade and articles reasonably required to enable the debtor and his family to continue to live in the house.[1] If exempt articles were poinded, the sheriff on application by the debtor, would be empowered to order that they be released from the poinding. We do not think that the rating and tax authority should have any greater powers of sale over goods than ordinary creditors have[2] and accordingly we propose that our above-mentioned recommendation should be extended to summary warrant poindings.

7.38 We also recommended as regards ordinary poindings that the sheriff should have power, on application by the debtor, to release particular articles from a poinding on the ground that it would be unduly harsh for them to be sold.[3] This power could be useful where the articles, although not exempt from poinding, nevertheless ought to be released having regard to the particular circumstances of the debtor. Cases where such a discretionary power might be useful include family photograph albums, small items of personal jewellery such as a wedding ring, or where articles essential to the debtor's business had been poinded although non-essential goods were available for poinding. We consider that this recommendation should also apply to summary warrant poindings.

7.39 We **recommend:**

The sheriff should have power on an application by the debtor made within 14 days of the execution of the poinding to release an article from the poinding on the grounds that:

(*a*) it is exempt from poinding; or

(*b*) continuation of the poinding or the sale of the article would be unduly harsh.

(Recommendation 7.8; Bill, Schedule 6, paragraphs 1 and 6.)

7.40 While we do not think that a poinding in pursuance of a summary warrant should be controlled by the sheriff in the same way as an ordinary poinding,[4] we consider that the sheriff, on application by the debtor, should be able to intervene and recall a summary warrant poinding in certain circumstances. Where the poinding is invalid[5] or has ceased to be effective,[6] the debtor should be entitled to apply for its recall at any time before the goods are sold. The other grounds of recall we recommend for ordinary poindings are that it would be unduly harsh in the circumstances for the sale to take place, that the goods are in aggregate substantially undervalued, and

[1]Recommendations 5.9, 5.10 and 5.11 (paras. 5.48, 5.51 and 5.57).

[2]The Law Reform (Diligence) (Scotland) Act 1973 (which exempts certain household goods from poinding) applies to summary warrant poindings.

[3]Recommendation 5.13 (para. 5.65).

[4]In ordinary poindings procedure the poinding has to be reported to the court, a warrant of sale sought, the arrangements made for sale approved by the sheriff, the sale reported to the sheriff, and the account of the sale audited by the auditor of court.

[5]E.g. where the poinding has not been properly executed.

[6]E.g. where the debt has been settled.

that the likely proceeds of sale will not exceed the likely expenses of sale.[1] We would extend these grounds to summary warrant poindings since the possibility of recall would serve as a check to undervaluation and to diligence being used punitively without any benefit accruing to the creditor. In recommending the introduction of these discretionary powers, we are not suggesting that the rating and tax authorities act oppressively at present.

7.41 The powers described in the proceding paragraph will under our proposals only be available up to the time of granting warrant of sale in ordinary poinding procedure, in order to prevent an application being made on the eve of sale. In summary warrant procedure, however, the warrant of sale is contained in the summary warrant itself; the officer makes the arrangements for sale himself in consultation with the creditor. We think that the time after which an application for recall should be incompetent in summary warrant proceedings should be when the officer intimates to the debtor the arrangements made for sale or for the removal of the debtor's goods to other premises for the purposes of sale.

7.42 We **recommend:**

> The sheriff should have power, on application by the debtor or of his own accord at any time before the sale, to recall a summary warrant poinding on the ground that it is invalid or has ceased to have effect. The sheriff should also have power, on an application made by the debtor before intimation by the officer to the debtor of the arrangements made for the sale of the debtor's poinded goods or their removal for sale, to recall the poinding on the ground that a sale would be unduly harsh, the goods were in aggregate substantially undervalued, or that the likely proceeds of sale will not exceed the likely expenses of sale.
> (Recommendation 7.9; Bill, Schedule 6, paragraph 7.)

7.43 *Warrant to open shut and lockfast places.* While an extract decree authorising poinding in common form automatically includes a warrant to open shut and lockfast places,[2] the relevant statutues and subordinate legislation are silent as to whether such a warrant is deemed to be included in the grant of a summary warrant. We think this matter should be put beyond doubt by including a warrant to open in the summary warrant. We would reject the alternative of granting a warrant to open only on application by the creditor since in that case every rating and tax authority would, as a matter of practice, include such an application in any application for a summary warrant.

7.44 In order to prevent unnecessary forcible entry to dwellinghouses, we have recommended in connection with ordinary poindings that an officer's powers of entry and warrants to open shut and lockfast places should not entitle him to enter dwellinghouses where no one or only children under 16 are present without prior intimation of his intention to enter or prior authorisation from the sheriff.[3] We would extend this recommendation to summary warrant poindings.

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[1]Recommendation 5.29 (para. 5.137).

[2]Debtors (Scotland) Act 1838, Scheds. 1 and 6; Writs Execution (Scotland) Act 1877, s. 3; Sheriff Courts (Scotland) Extracts Act 1892, s. 7(1).

[3]Recommendation 5.18 (para. 5.85).

7.45 We **recommend:**

(1) A summary warrant should be deemed to include a warrant to open shut and lockfast places in the debtor's occupancy for the purposes of executing a poinding and sale under the summary warrant.

(2) It should not be competent for an officer to enter a dwellinghouse which is unoccupied or in which no person over 16 years of age is present in pursuance of a warrant to open shut and lockfast places unless the officer had previously intimated to the debtor (and in the case of occupation by children under 16 years, the social work department) his intention to enter or had obtained prior authority from the sheriff.

(Recommendation 7.10; Bill, Schedule 6, paragraphs 4 and 24.)

7.46 *Witnesses to officer's execution of diligence.* In executing a poinding in pursuance of an ordinary decree the officer is required to be accompanied by two witnesses. By contrast, no witnesses are necessary where the officer is executing diligence under a tax summary warrant,[1] on the grounds that the procedure is intended to be expeditious and no report of poinding or sale is made to the court and accordingly no question of attestation by witnesses arises. Rates summary warrants are probably in the same position as tax summary warrants, although in practice many officers are accompanied by witnesses in executing poindings for rates. We accept that witnesses are unnecessary and this is reflected in our recommended summary warrant poinding procedure which requires no witnesses for poindings in pursuance of both rates and tax summary warrants.

7.47 *Notification of auctions to tax authorities.* Section 63(9) of the Taxes Management Act 1970 provides that every auctioneer who sells any goods or effects by auction shall give to the collector of taxes at least three days' notice of the date of the sale and the name and address of the person whose goods are being sold. Section 63(10) makes an auctioneer who fails to comply liable to a £50 penalty. Similar provisions occur in the corresponding value added tax and car tax legislation.[2] The Keith Committee observed that the purpose of section 63(9) is to allow the collector the opportunity of claiming the proceeds of sale of goods if he is aware that the person on whose behalf they are being sold is in default with the payment of tax. The provisions cover all auctions, not merely auctions of poinded goods. On the suggestion of the Inland Revenue, the Keith Report[3] recommended the repeal of these provisions which stem from an Act of 1812[4] and are now virtually a dead letter. We respectfully endorse this recommendation, and have omitted the provisions from the Bill annexed to this report.

7.48 We **recommend:**

In line with the recommendation of the Keith Report, the duty of an auctioneer to intimate an auction of moveables imposed by section 63(9)

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[1]*Norman* v. *Dymock* 1932 S.C. 131, construing s. 97 of the Taxes Management Act 1880, re-enacted with minor amendments in s. 63 of the Taxes Management Act 1970.

[2]Value Added Tax (General) Regulations 1980, reg. 59(*i*); Car Tax Regulations 1980, reg. 26(*h*).

[3]Para. 19.7.1, sub-para. (*c*).

[4]52 Geo. III c. 95, s. 20.

and (10) of the Taxes Management Act 1970 should be abolished. (Recommendation 7.11; Bill, Schedule 5, paragraph 2.)

Review of diligence under summary warrant

7.49 The Keith Committee in the context of discussing our proposal for a uniform code to regulate the recovery of rates and taxes by summary warrant diligence recommended[1] that an explicit grievance procedure along the lines of section 249 of the Local Government (Scotland) Act 1947 should be extended to tax summary warrants in place of the existing common law remedies. Section 249(1) provides that an owner of goods sold under a rates summary warrant who feels aggrieved may apply to the sheriff who shall determine the dispute or claim of damages summarily. Subsection (2) of that section prohibits questioning of the summary warrant or any proceedings under the warrant by any other legal proceedings.

7.50 Section 249 of the 1947 Act derives from section 354 of the Burgh Police (Scotland) Act 1892 which is in turn derived from section 92 of the General Police and Improvement (Scotland) Act 1862 and section 86 of the Poor Law (Scotland) Act 1845. It is not clear whether the present section is to be regarded as providing aggrieved persons with a simple remedy, or protecting rating authorities from proceedings other than summary applications to the sheriff, although the latter appears to have been the intention behind the corresponding provision in the Poor Law (Scotland) Act 1845. The express prohibition in section 249(2) of the 1947 Act of legal proceedings other than by way of application to the sheriff has not in fact prevented the courts from entertaining an action of damages for wrongous diligence in respect of an arrestment which had proceeded on an invalid summary warrant,[2] a suspension of a poinding where the rates had been paid prior to the poinding,[3] an action of reduction of a summary warrant where the assessment had been paid,[4] and an interdict of a threatened poinding in respect of poor law rates where by error the defaulter's property had been entered twice in the Valuation Roll.[5]

7.51 We are grateful to the Keith Committee for drawing our attention to section 249. But in our opinion it would not be right to provide for the exclusion of common law remedies. In the first place, as is shown in the preceding paragraph, a purported exclusion of common law remedies may well be ineffectual. Secondly, an aggrieved person may need to raise an action to reduce a summary warrant, or the certificate of execution of an arrestment or of an earnings arrestment, or a schedule of poinding, and the remedy of reduction is not available in the sheriff court. Thirdly, the remedies of interdict and of suspension and interdict should be retained since, paradoxically, the courts might often be prepared to grant interim interdict in urgent cases more speedily than they would grant an order under section 249(1) notwithstanding its summary nature.

7.52 We would give effect to the substance of the Keith Committee's

[1]Para. 24.2.24.
[2]*Grant* v. *Magistrates of Airdrie* 1939 S.C. 738.
[3]*Hutchison* v. *Magistrates of Innerleithen* 1933 S.L.T. 52.
[4]*Ferguson* v. *Malcolm* (1850) 12 D. 732.
[5]*Sharp* v. *Latheron Parochial Board* (1883) 10 R. 1163.

recommendation not by extending section 249 to tax summary warrants, but by repealing it and by introducing into our recommended uniform summary warrant procedure the safeguards for debtors, such as applications to recall poindings, recommended for ordinary poindings in so far as they are compatible with the different procedure. These safeguards would, however, be without prejudice to any existing common law remedies. In the case of earnings arrestments, the provisions on recall and resolution of disputes recommended in Chapter 6 should apply without modification to earnings arrestments executed in pursuance of summary warrants since the arrestment procedure is the same whatever debt it enforces.

7.53 We **recommend:**

(1) Section 249 of the Local Government (Scotland) Act 1947 (which provides for a summary procedure for the review of summary warrant proceedings on application by an aggrieved owner of the poinded goods) should be repealed.

(2) Without prejudice to any other competent remedy:

(*a*) the provisions allowing a debtor to apply for the recall of a poinding or the release of articles from a poinding which are recommended for ordinary poindings should be competent in summary warrant poindings subject to such modifications as are necessary in view of the different procedure;

(*b*) the provisions allowing applications to be made for the recall of, and the resolution of disputes relating to, earnings arrestments proceeding on court decrees should be competent for earnings arrestments proceeding on summary warrants.
(Recommendation 7.12; clauses 78 and 92; Schedule 6, paragraphs 6, 7, 21, 22; Schedule 9.)

Surcharge on arrears

7.54 As soon as a summary warrant in respect of arrears of rates is granted, the rating authority becomes entitled to a 10% surcharge in addition.[1] The summary warrant does not, in contrast to an ordinary decree, render the debtor liable for the authority's expenses in obtaining the warrant or for interest on the arrears[2] at the legal rate from the date of granting the warrant until paid. The surcharge can be regarded as recompensing the authority for their work in pursuing debtors, and in obtaining the summary warrant and for the lack of interest chargeable on the arrears. But it may be a large sum if the arrears are large and may bear little relation to the actual loss suffered by the authority. In Consultative Memorandum No. 48 we proposed,[3] that the surcharge should not be abolished nor replaced by a right to interest at a prescribed rate. We expressed the view that in times of high interest rates a 10% surcharge was not an unreasonable penalty, and it was easily calculated, whereas interest is so troublesome to calculate that creditors very rarely attempt to recover it.

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[1]Local Government (Scotland) Act 1947, s. 247(2). The 10% surcharge is not a fee to the officer such as arises in tax summary warrants: see para. 7.58.

[2]Arrears of rates do not bear interest.

[3]Proposition 60 (para. 7.21).

7.55 No surcharge becomes exigible on the granting of a summary warrant for arrears of taxes, but interest is often, but not always, due on the arrears.[1] In Consultative Memorandum No. 48 we asked for views[2] as to whether a surcharge should be introduced, but suggested that it might be inappropriate because of the provisions relating to interest.

7.56 On consultation there was general agreement that the rates surcharge should be retained, but there was no support for introducing a similar surcharge for tax summary warrants. The Board of Inland Revenue commented that it would not be acceptable to introduce a surcharge for taxes applicable to one part only of the United Kingdom. While we would adhere to our proposals to retain the rates surcharge and not to introduce a tax surcharge we think that the present level of rates surcharge (10%) can result, in the case of a large assessment, in payment of a sum far in excess of any loss suffered by the rating authority as a result of late payment. We therefore suggest that the amount of the surcharge should be reviewed or a sliding scale adopted.

7.57 We **recommend:**

> The existing statutory surcharge due to a rating authority by the debtor on the granting of a summary warrant against him should be retained, but the level of the surcharge (presently 10%) should be reviewed. Surcharges should not be introduced for tax summary warrants.
> (Recommendation 7.13; Bill, Schedule 5, paragraphs 1 and 2.)

Officer's fees and abolition of ten per cent commission for tax warrants

7.58 An officer executing a summary warrant for recovery of taxes is entitled to claim a statutory commission of 10% of the amount of tax due (in the words of the statute) "for the trouble of the officer".[3] Once the poinding has been executed, the goods are held for a period during which they may be redeemed on payment of the tax plus commission. If a sale is carried out, the proceeds of the sale are applied first towards satisfaction of the tax and then towards the commission. In addition, the officer is allowed the expenses of maintaining the goods and the expenses of the sale (e.g. the cost of advertisement, removal expenses etc.).

7.59 The officer's commission often bears no relation to the work done by him and while it may in some cases be inadequate remuneration, it often far exceeds the prescribed fees chargeable in connection with poindings in common form and is penal in effect.[4] If the defaulter is to be penalised, the penalty should be payable to the tax authority rather than the officer. In Consultative Memorandum No. 48 we proposed[5] that the officer's commission should be abolished and that officers executing tax warrants should be

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[1]Inland Revenue taxes usually carry interest, but interest is remitted if it does not exceed a prescribed sum (currently £30, Finance Act 1980, s. 62). Value added tax arrears do not carry interest.

[2]Proposition 60 (para. 7.21).

[3]Taxes Management Act 1970, s. 63(5); Value Added Tax (General) Regulations 1980, reg. 59; Car tax Regulations 1983, reg. 26.

[4]In *Cuthbert and Wilson* v. *Shaw's Trustee* 1955 S.C. 8, Lord Patrick observed (at p. 13) that the Taxes Management Act "has quantified the sums due by the Crown's debtor to the sheriff officer at a sum far in excess of any merit involved in his services".

[5]Proposition 60 (para. 7.21).

remunerated in accordance with the normal prescribed fees. Those consulted agreed, including H.M. Customs and Excise and the Inland Revenue, and we adhere to the proposal. We revert in Chapter 9 below to the recovery by tax collectors and other creditors of diligence expenses from debtors.

7.60 The Society of Messengers-at-Arms and Sheriff Officers commented that an officer's official duties in executing a tax summary warrant should include collection of the arrears of tax (often by agreed instalments) and accounting for them to the collector.[1] If remuneration by prescribed fees was to be introduced, the Society suggested that officers should be entitled to charge a fee for this aspect of their work. In Chapter 8 we recommend that the collection by officers of debts constituted by decree should become part of an officer's official functions, the collection fee being borne by the creditor and not by the debtor.[2] In our view, this suggestion should also be adopted for summary warrant collection work.

7.61 We **recommend:**

(1) The statutory commission of 10% of the tax due payable to an officer executing a summary warrant should be abolished. Instead the creditor should be liable to the officer in the first instance for payment of the officer's diligence expenses charged in accordance with the table of fees prescribed by act of sederunt but with a right to recover the expenses from the debtor as recommended in Recommendations 9.7 to 9.9.

(2) The sheriff officer executing a summary warrant should be entitled to charge the rating or tax authority prescribed fees for collecting and accounting for sums paid to him by the defaulter in satisfaction of the sums due. The defaulter should not become liable for such fees.
(Recommendation 7.14; Bill, Schedule 5, paragraphs 1 and 2.)

Execution of summary warrants outwith sheriffdom

7.62 Sheriff court extract decrees in summary[3] or ordinary[4] causes can be executed anywhere within Scotland without further procedure. But a summary warrant which is to be executed outwith the sheriffdom of the sheriff granting it must first, (under section 13 of the Debtors (Scotland) Act 1838) be endorsed by the sheriff clerk of the sheriffdom within which execution is to take place.[5] Besides being an extra step, endorsation gives rise to practical difficulties with rates warrants where one summary warrant often applies to many hundreds of debtors.[6]

7.63 Section 251 of the Local Government (Scotland) Act 1947 makes similar, and to some extent overlapping, provision for the execution of a summary warrant for rates, by enacting that if any person liable in payment of any rates removes to any place beyond the area of the rating authority,

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[1]Taxes Management Act 1970, s. 63(3).

[2]Recommendation 8.22(*a*) (para. 8.125).

[3]Summary Cause Rules, rule 11.

[4]Ordinary Cause Rules, rule 16.

[5]Alternatively a warrant of concurrence may be obtained under section 13 from a clerk of court in the Court of Session, after which the warrant can be executed anywhere within Scotland.

[6]In the case of taxes, separate warrants are usually applied for and granted in respect of each debtor.

it shall nevertheless be lawful to put into execution any warrant within or beyond the area of the authority, provided that such warrant is first endorsed by the sheriff of the county within which the warrant is to be executed. Apart from the practical difficulties associated with endorsement of rates warrants, section 251 does not deal with the situation where the person liable to pay rates remains within the area of the rating authority, but has arrestable funds or poindable goods situated outwith the area. In these cases endorsement of the summary warrant under the provisions of the Debtors (Scotland) Act 1838 is necessary.[1]

7.64 In Chapter 9 of this report we recommend[2] that warrants of concurrence should be abolished on the grounds that they are an unnecessary formality. Any decree, warrant or order of a sheriff would therefore be capable of being executed anywhere within Scotland without further procedure. This recommendation would solve the practical problems associated with endorsement of rates summary warrants and would make section 251 of the 1947 Act redundant.

7.65 We **recommend:**

Diligence on a summary warrant should be capable of being executed anywhere within Scotland without endorsement of a warrant of concurrence and in consequence section 251 of the Local Government (Scotland) Act 1947 should be repealed.
(Recommendation 7.15; clause 116 and Schedule 9.)

Section B. Betting, Gaming and Excise duties

7.66 The procedure for the recovery of betting, gaming and excise duties is even more abbreviated than the summary warrant procedure for the recovery of rates and taxes. The warrant to poind is signed by a "proper officer" of H.M. Customs and Excise rather than a sheriff, and the poinding and sale may be carried out by any person authorised by that officer.[3] The warrant also authorises sale of the poinded goods by public auction after giving six days' notice of the sale. Arrestment is not competent to recover these duties.

7.67 We propose only minor changes in these procedures. The warrant for diligence should, we think, be granted by the sheriff rather than an officer of the creditor department as diligence is a judicial process. The warrant ought to be executed by sheriff officers, since, as we pointed out in Consultative Memorandum No. 48,[4] poinding by a person appointed by the creditor infringes a basic principle of diligence that it should only be executed by an officer of court instructed by the creditor.[5] It appears that in practice all Customs and

[1] 1838 Act, s. 13.
[2] Recommendation 9.5 (para. 9.26).
[3] Betting and Gaming Duties Act 1981, s. 29; Customs and Excise Management Act 1979, s. 117.
[4] Para. 7.25.
[5] *Stewart* v. *Reid* 1934 S.C. 69. At p. 75 Lord Sands remarked "While to have one's household goods seized and sold up by an officer of the law may be regarded as Kismet, to have them seized and sold by an employee of the creditor may perhaps be regarded as tyranny".

Excise poindings are carried out by sheriff officers[1] so that our recommendation to allow execution by sheriff officers only would merely reflect current practice.

7.68 To call the provisions for recovering excise duties and penalties "poinding" is, we think, a misnomer. In poindings, the goods must belong to the debtor, whereas in the recovery of excise duties, goods in the possession of the debtor or his agent can be seized. In poindings, all the debtor's goods are liable to be poinded, whereas in the recovery of excise duties only goods liable to duty, and materials and machinery connected with their manufacture, can be seized. In poindings, goods which do not belong to the debtor at the time of poinding cannot be poinded, whereas in the recovery of excise duties, goods, materials and machinery belonging to the debtor at the time when the duty was charged and which are subsequently in the possession of third parties (except good faith purchasers) can be seized. We propose that the term "taking possession" should be used instead of "poinding". The proposal applies also to procedures for the recovery of betting and gaming duties which also differ from poinding procedures.

7.69 We **recommend:**

> The procedure for recovery of betting, gaming and excise duties should be called "taking possession" instead of "poinding". A warrant to take possession of articles and sell them by public auction should be granted only by a sheriff and should be executed only by sheriff officers.
> (Recommendation 7.16: Bill, Schedule 7, paragraphs 29 and 31.)

Section C. Civil imprisonment for non-payment of rates, taxes, and fines and penalties due to the Crown

7.70 The Debtors (Scotland) Act 1838 lays down procedures for the imprisonment of debtors which were appropriate to a period when civil imprisonment was used as a general creditor's diligence but are still in theory competent in a very limited class of debts which we describe below. In the case of Court of Session decrees for payment, and even in documents of debt registered for execution in the Books of Council and Session, it is still provided that, where payment is enforceable by imprisonment, the warrant in the extract decree or document has effect as a warrant to charge on pain of imprisonment for failure to pay during the days of charge.[2] On the expiry of the days of charge without payment, the certificate of execution of the charge is registered in the register of hornings and a certificate of registration is issued by the keeper of that register.[3] Application is then made to the Petition Department of the Court of Seassion, and "if there be no lawful cause to the contrary" a clerk of that Department endorses a docket, called a "*fiat*", which has the effect of a warrant to officers of court (instructed by the creditor) to search for and apprehend the debtor and take him to one of Her Majesty's prisons.[4] A similar process is enacted for sheriff court decrees and extracts

[1]Keith Report, para. 24.2.5.
[2]R.C. 65; Writs Execution (Scotland) Act 1877, ss. 1 and 3.
[3]1838 Act, s. 5.
[4]1838 Act, s. 6: "*fiat*" is short for "*fiat ut petitur*", meaning roughly "let the application be granted".

from the books of a sheriff court,[1] involving the issue by the sheriff clerk (within a year and a day of the expiry of the charge) of a *fiat* authorising imprisonment.[2]

7.71 It will be seen that both procedures are administrative in character involving the automatic grant by a clerk of court of warrant for imprisonment in cases where the papers presented to him are in order. This is in contrast to the modern legislative trend which makes warrant for civil imprisonment dependent on a decision by a judge exercising an equitable jurisdiction.

7.72 When civil imprisonment as a general creditor's diligence was abolished by the Debtors (Scotland) Act 1880,[3] an exception was made for "Taxes, fines and penalties due to Her Majesty" and local government rates.[4] Whereas the Civil Imprisonment (Scotland) Act 1882 required an alimentary creditor, after the expiry of a charge without payment, to apply to the sheriff for a warrant of committal and gave the sheriff power to refuse warrant if the failure to pay aliment was not wilful,[5] no corresponding provision was made for rates and tax defaulters or other Crown debtors owing civil fines or penalties. The 1882 Act did limit the period of a rates defaulter's imprisonment to six weeks for each year's arrears,[6] but that provision did not apply to tax defaulters in relation to whom the maximum period of civil imprisonment is 12 months.[7]

7.73 The Local Government (Scotland) Act 1947, section 247(5) provided that where goods or effects cannot be found to be poinded for the payment of rates, it shall be lawful for the sheriff by warrant to commit the defaulter to prison (for up to six weeks[8]), "there to be kept without bail until payment is made or security for payment is given". This provision appears in a section concerned mainly with diligence under summary warrants, and its effect appears to be to make imprisonment conditional on an unsuccessful attempt to poind under such a warrant. The provision does not seem to affect the 1838 Act procedure for enforcing payment of rates in pursuance of a court decree. We understand, however, that since 1972 there has been no civil imprisonment of rates defaulters in Scotland.[9]

7.74 The Crown Proceedings Act 1947, section 26(2)[10] limited the types of taxes in respect of which civil imprisonment was competent to death duties and purchase tax. These taxes have since been replaced by capital transfer tax and value added tax respectively, and civil imprisonment for default in payment of those taxes is not competent. The 1947 Act, section 26(3), however, saved any procedure available for enforcing an order or decree in favour of the Crown for the recovery of any fine or penalty. While in strict law, therefore, penalties imposed for failure to pay tax still appear to be

[1]Sheriff Courts (Scotland) Extracts Act 1892, s. 7(1) and (3); 1877 Act, ss. 2 and 3.

[2]1838 Act, ss. 10 and 11.

[3]S. 4.

[4]An exception was also made of civil imprisonment for failure to pay aliment with which this report is not concerned.

[5]1882 Act s. 4; *Hardie* v. *Hardie* 1984 S.L.T. (Sh.Ct.) 49.

[6]1882 Act, s. 5.

[7]Debtors (Scotland) Act 1880, s. 4, proviso.

[8]1882 Act, s. 5.

[9]In 1958, the McKechnie Report, para. 127 observed that there had not been any imprisonment for failure to pay rates since 1950.

[10]As read with s. 49(2).

enforceable by civil imprisonment under the 1838 Act procedure, failure to pay the tax itself is not now enforceable by civil imprisonment under that procedure (or indeed under Exchequer diligence procedure to which we revert later). We understand that in practice the Revenue Departments do not exercise their right to obtain warrant for imprisonment for tax penalties under the 1838 Act and that they recover the tax penalties by other means such as summary warrant diligence or ordinary diligence, which are conveniently applicable both to the tax and to the tax penalties.

7.75 We think that the procedure for imprisonment in the Debtors (Scotland) Act should be abolished. This, together with other reforms proposed below,[1] would enable Parliament to abolish the register of hornings and sweep away many out-of-date pre-Union enactments. As we have seen, the procedure is not used for the recovery of rates and taxes, and associated penalties. There remain, however, other fines and penalties due to the Crown imposed in civil proceedings. Of these, probably the most important, actually or potentially, are fines imposed for contempt of a civil court and for breach of an order under section 91 of the Court of Session Act 1868 (which enables the Court of Session, on summary petition, to order the restoration of possession of property in certain circumstances, and to order specific performance of any statutory duty, subject to conditions and penalties, including fine and imprisonment). Fines imposed for contempt of court in civil proceedings (e.g. breach of interdict) are recoverable as a penalty due to the Crown by the Secretary of State,[2] acting through the Scottish Courts Administration. In the case of a fine imposed by the Court of Session, the interlocutor imposing the fine is transmitted to the Scottish Courts Administration who then normally attempt to recover the fine by informal letters demanding payment. If these attempts fail, an *ex parte* application under the Exchequer Court (Scotland) Act 1856, section 13, is made by the Director of the Scottish Courts Administration to the Lord Ordinary in Exchequer Causes in the Court of Session, accompanied by a certificate showing the balance due and stating that he has been unable to recover it. The Lord Ordinary is required to grant an Exchequer decree which is enforceable (in theory by sheriffs principal) by the special modes of Exchequer diligence discussed below. These include a procedure for registration of an expired charge in the register of hornings and the issue by a sheriff principal of a warrant for imprisonment which is executed by a messenger-at-arms or sheriff officer and has similar effects to a warrant for imprisonment under the 1838 Act.[3] We understand that in recent years the procedure for imprisonment under the 1856 Act has not been used to recover fines for contempt of court nor indeed taxes or their associated penalties. We also understand that in recent years, cases of fines imposed by the sheriff courts for contempt of court in civil proceedings have not been transmitted to the Scottish Courts Administration for enforcement. It may be that the sheriffs treat a civil contempt in the same way as a criminal fine and use the procedures for recovery of fines under the Criminal Procedure (Scotland) Act 1975.

[1]The abolition of the Exchequer diligence of civil imprisonment, and reforms outlined in Chapter 9.

[2]Transfer of Functions (Treasury and Secretary of State) Order 1974 (S.I. 1974/1274).

[3]Exchequer Court (Scotland) Act 1856, ss. 33 and 34.

7.76 In civil contempt cases, the court possesses a common law power to imprison for contempt as well as a power to fine. While there is a dearth of authority on this matter, in principle it would seem that the court can use the power of imprisonment in cases where the person in contempt has not paid any fine which has been imposed. The nature and incidents of imprisonment on default of payment of a fine for contempt are not free from doubt. It is not, for example, clear whether default in payment of the fine is itself to be treated as a contempt, or whether, if the court grants warrant for imprisonment on default in payment of the fine, the imprisonment has to be treated as a new punishment for the original contempt rather than for the default in payment. Both of these views imply that a person who is imprisoned on default in payment of a fine for contempt and who then pays the fine cannot claim to be liberated from prison as of right. A different approach is to treat imprisonment on default in payment of the fine as a means of coercing the person in contempt to make the payment with the result that payment would imply liberation as of right. The latter approach, which corresponds to the modern statutory law on default in payment of criminal fines,[1] seems at first sight to be preferable from the standpoint of social and legal policy.

7.77 We recommend in Section C of this Chapter that Exchequer decrees should be enforceable by the ordinary modes of diligence and that the special modes of exchequer diligence should be abolished. This would mean that a decree under section 13 of the 1856 Act would be enforceable by poinding, arrestment and earnings arrestment. We consider that the procedures for civil imprisonment under the 1856 Act as well as the 1838 Act should be abolished. In view of the quasi-criminal character of contempt of court, we consider that imprisonment for default in payment of a fine imposed for contempt should be retained. We think, however, that the decision whether to imprison for default in payment of a fine for contempt should normally be taken by the judge or court which imposed the fine, after enquiry as to the reason for the default. The procedures for civil imprisonment under the 1838 and 1856 Acts are thus inappropriate. In our view, for the reasons given in paragraph 7.76, the scope and nature of the court's powers to imprison for default in payment of a fine for contempt require to be clarified, and the procedures for dealing with such defaults require review. We note, for example, that there is no precise equivalent in Scotland of section 16(1) of the Contempt of Court Act 1981 under which in England and Wales payment of a fine for contempt of a superior court may be enforced, in the court's option, in like manner as a civil money judgment or as a criminal fine. We have, however, not consulted on this matter and do not advance specific recommendations but we draw the matter to the attention of the competent authorities.

7.78 In the case of any other civil fines and penalties due to the Crown, it would seem reasonable to expect that the statute under which the fine or penalty is imposed should provide expressly that it is enforceable by imprisonment of the defaulter (if that is Parliament's intention) and by what procedure. There must be few instances of civil fines and penalties due to the Crown (other than fiscal, contempt, or 1868 Act cases) but one such example which we have traced is that of fines imposed on a solicitor for professional

[1]See e.g. Criminal Procedure (Scotland) Act 1975, ss. 407(1C) and 409(1).

misconduct.[1] At present, these are recovered by the Scottish Courts Administration (representing the Secretary of State) which may obtain a decree under the 1856 Act, section 13, if required. If imprisonment in default of payment of such a fine is to be competent, we think that Parliament should expressly provide for it, that imprisonment should not be dependent on the irrelevant accident that the fine or penalty happens to be payable to the Crown, and that generally speaking imprisonment should only be competent if a judge decides that imprisonment in default is appropriate.

7.79 In the limited class of civil debts where imprisonment remains competent (rates and civil fines and penalties due to the Crown), the proviso to section 4 of the Debtors (Scotland) Act 1880 enacts that no person shall be imprisoned for a longer period than 12 months.[2] Section 15(2) of the Contempt of Court Act 1981 provides that the maximum penalty which may be imposed for contempt in *inter alia* civil proceedings in the sheriff court is to be three months' imprisonment, or a fine of £500, or both. The section does not however expressly state what maximum term of imprisonment may be imposed in those cases if a fine imposed for contempt is not paid, but we doubt whether it could ever be argued that any such imprisonment could exceed the maximum period provided for in the section as a direct sentence of imprisonment. On this view, there is a conflict between the proviso to section 4 of the 1880 Act and section 15 of the 1981 Act so far as these provisions apply to contempt in civil proceedings in the sheriff court. Moreover, the maximum penalty under section 15(2) of the 1981 Act for contempt of court in civil proceedings in the Court of Session is two years' imprisonment or a fine or both, and again a conflict arises between that provision and the proviso to section 4 of the 1880 Act. For this reason we propose that that proviso should be repealed. There are no maximum limits on the powers of the Court of Session to fine and imprison under the 1868 Act, section 91, and repeal of the proviso would remove an apparent conflict between that section, insofar as it applies to imprisonment for failure to pay a fine under that section, and the 1880 Act, section 4. It is for consideration whether the new statutory limits in section 15(2) of the 1981 Act should apply to fines and imprisonment under the 1868 Act, section 91: that question however falls outside the scope of this report.

7.80 We **recommend:**

(1) Civil imprisonment for failure to pay rates and fines and penalties due to the Crown, together with the procedure for civil imprisonment prescribed by the Debtors (Scotland) Act 1838 on the administrative *fiat* of a clerk of court and the corresponding procedure for imprisonment under the Exchequer Court (Scotland) Act 1856, sections 33 and 34, should be abolished, subject to the qualification mentioned in the following paragraph.

(2) The foregoing recommendation is not intended to remove the powers of the court to grant warrant for civil imprisonment on default in payment of a fine imposed by the court either:

[1] Solicitors (Scotland) Act 1980, ss. 53 and 55. In Chapter 8, we recommend that the courts should have power to fine officers of court for misconduct: Recommendation 8.12(4)(*c*) (para. 8.84).

[2] The maximum period of imprisonment of aliment defaulters is six weeks as mentioned at para. 7.22 above.

(*a*) for contempt of court in civil proceedings; or

(*b*) for breach of an order for restoration of possession, or for specific performance of a statutory duty, under section 91 of the Court of Session Act 1868.

The competent authorities should, however, consider whether the powers of the court to grant such warrants, and the legal effect of such warrants, should be clarified and whether the courts should be empowered by statute to use the machinery for enforcement of criminal fines as a means of recovering fines for contempt in civil proceedings.

(3) The proviso to section 4 of the Debtors (Scotland) Act 1880 (which limits the maximum period of civil imprisonment for debt to 12 months) should be repealed as inconsistent with the limits provided by section 15(2) of the Contempt of Court Act 1981 in relation to contempt of court.

(4) The competent authorities should consider whether the maximum limits on fines and imprisonment for contempt in Court of Session proceedings provided by section 15(2) of the 1981 Act should apply to sentences of fines and imprisonment imposed by the Court of Session under section 91 of the Court of Session Act 1868.
(Recommendation 7.17; clause 100(3); Schedule 7, paragraph 9; Schedule 9.)

Section D. Abolition of Exchequer diligence

7.81 The Exchequer Court (Scotland) Act 1856 provides special modes of diligence, under special forms of warrant, for the enforcement of Crown debts constituted by a decree of the Court of Session exercising the jurisdiction of the Court of Exchequer in Scotland.[1] That jurisdiction, originally vested in the separate Court of Exchequer in Scotland by the Exchequer Court (Scotland) Act 1707 and transferred to the Court of Session by the above Act of 1856, is defined by the Act of 1707[2] in very wide terms as covering "all the revenues and duties and profits" appertaining to the Crown, all forfeited lands and "all the remedies and means for the recovering of the same"; all forfeitures and penalties "due and payable in Scotland by force or virtue of any law or statute touching on or relating to the customs and excise or by force or virtue of any penal or other laws or statutes whatsoever and also all fines issues forfeitures or penalties . . . arising to . . ." the Crown; and all actions, securities, prosecutions and remedies concerning the same. Accordingly, the core of Exchequer causes consists in actions for the recovery of central government taxes due to the Board of Inland Revenue and the various customs, excise and other duties due to the Board of Customs and Excise.

7.82 The specific warrants and modes of diligence in execution sanctioned by the 1856 Act are somewhat anachronistic. The warrant for diligence is addressed to "all sheriffs of counties", [scil. sheriffs principal] "and each of them, conjunctly and severally" and requires them "to put this decree in execution in manner underwritten". The sheriff principal is to cause a charge to be served under the decree. The debtor is charged to pay the sum in

[1]Ss. 28–34; 36.
[2]S. 7.

question to the sheriffs principal "or one or other of them" on the Crown's behalf. The sheriff principal is under a duty to put the decree into execution and to account for the sums collected to the instructing officer or government department. In 1958, the McKechnie Report[1] observed that where a sheriff is required to execute Exchequer cause warrants under the 1856 Act, the sheriff grants warrant to one of his sheriff officers to do what is to be done in the sheriff's name.[2] At the present time, however, we understand that the Boards of Inland Revenue and of Customs and Excise, or their solicitors, send extract Exchequer decrees directly to a messenger-at-arms or sheriff officer for enforcement rather than to a sheriff principal.

7.83 Exchequer decrees are enforceable by arrestment and charge, poinding and sale, and (in a few cases[3]) charge and imprisonment. Where the sheriff causes an arrestment to be used, the arrestment is in ordinary form. The 1856 Act provides that:

> "such arrestment shall operate to transfer to the Crown, preferably to all other creditors of the Crown debtor, all right to and interest in the arrested fund competent to the Crown debtor, to such extent as may be requisite to satisfy and pay the entire debt due to the Crown, including interest and expenses; . . ."[4]

The arrestee is entitled "to pay to such sheriff on behalf of Her Majesty" all funds of the Crown debtor to the extent of the debt, interest and expenses.[5] If the arrestee fails to do so, the Crown may use not only an action of furthcoming but all other diligences against the arrestee for recovery of the debt.[6] The effect is that in a competition between an Exchequer decree arrestment and an ordinary arrestment, the Exchequer arrestment has priority unless the creditor in the ordinary arrestment had obtained decree of furthcoming before the Exchequer arrestment was used.[7] If this provision is construed literally, it does not seem to apply where the Exchequer decree is sent by the Revenue Department concerned directly to a messenger-at-arms or sheriff officer (rather than through the sheriff principal) for enforcement. In recent times there have been cases of competitions in which the Inland Revenue have not relied on the privilege of Exchequer arrestments in litigation.[8]

7.84 It is competent to arrest on the dependence of an Exchequer cause action,[9] but it appears that the foregoing preference over ordinary arrestments applies only to arrestments in execution of Exchequer decrees and not to the arrestment on the dependence either at the time when it was laid, or at or after the time when decree was pronounced.

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[1]Para. 32.

[2]The 1856 Act, s. 28 provides that the special form of warrant addressed to the sheriffs is a sufficient warrant to any messenger-at-arms or sheriff officer to execute charge, arrestment and poinding in terms of the Exchequer warrant.

[3]Namely, fines and penalties for failure to pay tax but not the tax itself: Debtors (Scotland) Act 1880, s. 4; Crown Proceedings Act 1947, ss. 26(2) and (3). See paras. 7.72 and 7.74 above.

[4]1856 Act, s. 30.

[5]*Idem.*

[6]*Idem.*

[7]Bell *Commentaries* vol. ii, p. 69; *Borthwick* v. *Lord Advocate* (1862) 1 M. 94.

[8]See e.g. *Lord Advocate* v. *Royal Bank of Scotland* 1977 S.C. 155.

[9]1856 Act, s. 10.

7.85 The provisions on the equalisation of arrestments and poindings in section 10 of the Bankruptcy (Scotland) Act 1913 do not appear to affect the preference of Crown arrestments.[1]

7.86 The main difference between an Exchequer poinding instructed by the sheriff principal and an ordinary poinding is that under an Exchequer poinding the whole moveable effects of the Crown debtor "without exception" may be poinded.[2] This seems to us altogether unjustifiable.[3] The procedure has at least one other anachronistic feature not now observed.[4]

7.87 The procedure for civil imprisonment of a tax defaulter[5] (which is now confined to cases of failure to pay tax penalties and not failure to pay the tax itself[6]) is not now used by the Revenue Departments, nor, as indicated at paragraph 7.75 above, is it used to enforce fines imposed for a contempt of a civil court. In Section C of this Chapter, we recommended the abolition of the procedures for civil imprisonment under the Debtors (Scotland) Act 1838 and the 1856 Act.

7.88 In our view, the other special modes of Exchequer diligence should also be abolished as anachronistic and obsolescent.[7] Exchequer decrees should contain warrants to execute diligence in common form (including the new diligence of earnings arrestment). So far, we have assumed that the relevant provisions of the 1856 Act have not been impliedly repealed by the Crown Proceedings Act 1947, section 26(1), which provides:

> ". . . any order[8] made in favour of the Crown against any person in any civil proceedings to which the Crown is a party may be enforced in the same manner as an order made in action between subjects, *and not otherwise*". (Emphasis added).

It seems likely that the effect of this provision is to make Exchequer diligence incompetent for the enforcement of all debts, such as Inland Revenue taxes and Customs and Excise duties, other than the debts mentioned in the "saving" provisions in section 26(3) of the 1947 Act, namely fines and penalties due to the Crown. Fiscal penalties, however, are normally enforced along with the taxes and duties to which they relate. It seems to us, therefore, that

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[1]The section provides that arrestments and poindings within the statutory period shall be ranked *pari passu* as if they had all been used of the same date. It thus appears to contemplate equalisation of those diligences which, if they had been used of the same date, would have ranked *pari passu*. An Exchequer arrestment is not such a diligence. See now Bankruptcy (Scotland) Bill 1984, Schedule 7, para. 10, which, so far as material, is in the same terms as the 1913 Act, s. 10.

[2]1856 Act, s. 32.

[3]It is for example inconsistent with the Law Reform (Diligence) (Scotland) Act 1973 (exemptions from poinding of goods in the debtor's residence) which applies *inter alia* to poindings under summary warrants for the recovery of taxes.

[4]E.g. where goods exposed for sale are not sold, the sheriff principal is supposed to retain the goods for the Crown's benefit and dispose of them subject to any directions from the public officer who instructed the poinding.

[5]1856 Act, ss. 33 and 34.

[6]Debtors (Scotland) Act 1880; Crown Proceedings Act 1947, s. 26(2) and (3); paras. 7.72 and 7.74 above.

[7]We note that the McKechnie Report, para. 122, recommended that Exchequer diligences should be modified "in such a way that they more nearly conform to the normal forms of diligence on Scottish decrees".

[8]Defined by s. 38 to include a judgment, decree, etc.

Exchequer diligence has already been made generally incompetent by the 1947 Act and, since it is not now used in those few cases where it remains technically competent, it should be abolished.[1] This would give full effect to the principle enshrined in section 26(1) of the 1947 Act.

7.89 We envisage that Crown arrestments would no longer have a special preference over arrestments by subjects,[2] and all arrestments would rank *inter se* by priority of date of execution. Crown arrestments would also rank *pari passu* with other arrestments under the legislation on equalisation of diligences.[3]

7.90 *The writ of extent preference.* Section 42 of the 1856 Act preserves for the Crown the previous preference accorded to the Crown in respect of moveable property under a writ of extent. A like preference is conferred on the Crown by the execution of any charge at the instance of the Crown, or, where the Crown debtor is deceased, by the execution of a poinding or arrestment on the Crown's behalf. The charge or diligence is "deemed and taken to be equivalent in all respects to the teste of a writ of extent, according to the existing law and practice".[4] The result is that the Crown obtains a preference over other creditors if a charge is executed on its behalf before the debtor is divested of his property. (It is thought that this provision is confined to Exchequer diligence.) Thus, for example, if a charge on an Exchequer decree is executed under section 31 of the 1856 Act even after the date of the debtor's sequestration and before the debtor is divested of his property by the act and warrant appointing the trustee, the preference is established.[5] Further, an Exchequer charge would confer on the Crown priority over a diligence (such as an arrestment, poinding or sequestration for rent) by a subject provided that, at the date of the charge, the debtor had not been divested, e.g. by a warrant sale.

7.91 This seems to us to be another anachronism. Writs of extent were abolished in 1856 in Scotland, and were later also abolished by the Crown Proceedings Act 1947 in England and Wales.[6] We understand that the Crown does not have a similar preferance in England and Wales and we do not think that creditors executing diligence in Scotland should be in a worse position than their counterparts in England in competition with Crown enforcement procedures. If, as we recommend, Exchequer diligence is abolished, we think that the opportunity should be taken to abolish the out-of-date preference based on writs of extent. We understand that this preference is not now relied on by the Revenue Departments.

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[1]It should be observed that section 26(3) of the 1947 Act also saves "proceedings brought by the Crown for . . . the forfeiture or condemnation of any goods, or the forfeiture of any ship or any share in a ship": this saving does not seem relevant to Exchequer diligence.

[2]If this is not accepted, then the Crown should at least be bound to pay the expenses of any prior arrestment creditor.

[3]See para. 7.85 above.

[4]As Graham Stewart explains (at p. 456): "Writ of Extent was the process by which before 1856 Crown debts were recovered out of the debtor's moveable estate and the teste was the signature of the judge to the warrant initiating the proceeding. Under it the Crown acquired, at the issuing of the writ, i.e. the date of the teste or *fiat*, a preferential claim to all goods, money, and debts then belonging or due to the debtor".

[5]See *The Admiralty* v. *Blair's Trustee* 1916 S.C. 247, at pp. 253, 262, 266.

[6]1947 Act, ss. 13 and 23, Schedule 1, para. 1(4).

7.92 We **recommend:**

(1) The special diligences for the enforcement by the sheriff principal of Exchequer decrees should be abolished, and such decrees should be enforceable in the same manner as other decrees for payment.

(2) As regards Crown preferences acquired by virtue of Exchequer diligence:

(*a*) an arrestment under an Exchequer decree should no longer by itself confer on the Crown a special preference in a competition with an ordinary arrestment; and

(*b*) a charge or other diligence should no longer be deemed equivalent to the teste of a writ of extent and accordingly should no longer give the Crown a preference in a competition with diligences by other creditors over the debtor's moveable property, or in a competition with a trustee in a sequestration or liquidator of a company.

(Recommendation 7.18; clause 100(5).)

Section E. Prior claims for rates or taxes against persons taking moveables by diligence or assignation

7.93 One of the remedies of the Inland Revenue collector of taxes has been judicially described as "the very peculiar one of taking advantage, without any question of insolvency, of anyone else's diligence on the moveables belonging to the Crown's debtor".[1] Thus, the Taxes Management Act 1970, section 64 provides:

> "(1) No moveable goods and effects belonging to any person in Scotland, at the time any tax became in arrear or was payable, shall be liable to be taken by virtue of any poinding, sequestration for rent, or diligence whatever, or by any assignation, unless the person proceeding to take the said goods and effects pays the tax so in arrear or payable:
>
> Provided that where the tax is claimed for more than one year the person proceeding to take the said goods and effects may on paying the tax for one whole year proceed as he might have done if no tax had been so claimed.
>
> (2) If the said person neglects or refuses to pay the tax so in arrear or payable, or the tax for one whole year, as the case may be, the tax claimed shall, notwithstanding any proceeding at his instance for the purpose of taking the said moveable goods and effects, be recoverable by poinding and selling the said moveable goods and effects under warrant obtained in conformity with the provisions contained in section 63 above."[2]

This provision applies to taxes recoverable by the Board of Inland Revenue,[3] but not for example to value added tax, car tax, betting and gaming duties or customs and excise duties recoverable by the Board of Customs and Excise, although such taxes and duties have a preference in sequestrations and liquidations. It will be seen that the privileged claim under section 64 differs from the Exchequer diligence preferences in so far as it arises even though the collector of taxes has not used any diligence: it is not a rule regulating

[1] *Campbell* v. *Edinburgh Parish Council* 1911 S. C. 280, 290, per Lord President Dunedin.

[2] Section 63 provides for diligence under summary warrant.

[3] I.e. income tax, corporation tax, capital gains tax, development land tax (as modified by subs. (3)) and other assessed taxes.

competitions between diligences but makes a creditor executing diligence against moveables, and even a person to whom moveables are assigned, liable for another person's debt.

7.94 Under the Local Government (Scotland) Act 1947, section 248, the collector of rates of a local authority has a similar privileged claim for up to one year's rates arrears owed by a debtor subjected to diligence[1] or making an assignation. An important difference is that by a proviso to section 247(2), inserted in 1956,[2] the collector of rates cannot recover from the person taking the goods and effects "any sum exceeding the amount recovered by that person under deduction of the expenses of and incidental to the taking of such goods and effects and their preservation and sale". Thus, although the 1947 Act provides for a privileged claim against a person taking moveables by diligence or assignation from a rates defaulter, the claim is more in the nature of a preference in the proceeds of the diligence or assignation than is the Inland Revenue's claim under the 1970 Act. Both sets of provisions, however, make the creditor or assignee liable for another person's debt.

7.95 It seems to us that the provisions of the 1947 Act, section 248, as well as the 1970 Act, section 64, are open to serious criticism both as to their general policy of conferring anomalous privileges on central and local government fiscal debts outside bankruptcy proceedings and as to the detailed provisions for giving effect to that policy.[3]

Defects in the present law

7.96 First, under both the rates and tax enactments, the creditor or assignee of a rates or tax defaulter must pay the defaulter's arrears before the defaulter's moveable goods are "taken" by the creditor's diligence or by the assignation. While the corresponding English provision on tax requires payment to be made before the sale or removal of the defaulter's goods,[4] the Scottish enactments do not make it clear at what stage of the various diligences the moveable goods of the debtor are to be treated as "taken": the possibilities include the stage when the goods are attached by poinding or arrestment; or when they are physically taken or removed for sale (if that is done); or when the poinded or arrested goods are either sold or delivered to the poinding or arresting creditor in default of sale. There is a similar uncertainty in relation

[1]The 1947 Act, s. 248 provides that no moveable goods and effects of the rates defaulter shall be liable to be taken "by virtue of poinding, sequestration or diligence or by any assignation . . .". Here "sequestration" means sequestration for rent or feuduty under the landlord's or superior's hypothec, not sequestration under bankruptcy legislation: see *Sinclair* v. *Edinburgh Parish Council* 1909 S.C. 1353.

[2]Valuation and Rating (Scotland) Act 1956, s. 34, implementing a recommendation of the Departmental Committee on *Valuation and Rating* (1954) Cmd. 9244 (Chairman: The Hon. Lord Sorn), para. 159.

[3]While we did not seek comments on these provisions in the Consultative Memoranda preceding this report, we have paid regard to comments on the topic made to our former Working Party on Diligence. Opinion was divided. Bodies representing local authorities wanted to retain the privilege for rates. Some bodies representing solicitors adopted the proposal of the McKechnie Report, para. 117 that the privilege for taxes should be limited in the same way as the privilege for rates. Others favoured abolition of both the rates and the tax privileges.

[4]Taxes Management Act 1970, s. 62(1).

to sequestration for rent and other diligences.[1] There is no legal procedure whereby a creditor can require the Inland Revenue or local authority to disclose the debtor's tax or rates arrears before proceeding to poind or to arrest the debtor's moveable property. As one commentator observed to our former Working Party on Diligence: "The normal result of an enquiry about a third party's tax position would presumably be a plea of confidentiality by H.M. Inspector of Taxes". While practice varies, we understand that enquiries to official collectors about arrears are generally not made until after a warrant of sale has been granted and indeed until the actual sale is imminent. This practice is no doubt influenced by the provisions of section 63(9) and (10) of the 1970 Act (requiring auctioneers to intimate impending sales of moveables to the collector of taxes) which the Keith Report recommended should be repealed as obsolete, a recommendation which we endorsed above.[2] In practice the provisions of section 63(9) and (10) are only obeyed in the case of sales under judicial warrant. They relate only to central government taxes and do not require intimation to be made to collectors of rates. Intimation to the collector at a late stage can be very unsatisfactory since the creditor's right to poind is restricted by the general law to goods of a value not exceeding the amount of his debt and expenses, and these would not normally suffice to cover privileged tax or rates arrears as well as the debt. So, as a result of the priority, the ordinary creditor may not only lose the whole benefit of his diligence but may be left without a practical remedy having regard to the restrictions on second poidings on the same premises for the same debt developed by judicial decisions and Practice Notes[3] which do not make any exception for cases where the official collectors scoop the pool. Intimation at an early stage of the procedure would also be unsatisfactory since it would entail extra work and expense in a large number of cases with no practical result. Either the privileged rates or tax arrears will be due, in which case the creditor is likely to be deterred from proceeding with his diligence or they will not be due, in which event, the work and cost of intimation will not have benefited anyone.

7.97 Second, as noted above, while the prior claim of a collector of rates is now limited to the net proceeds of the ordinary creditor's diligence by the proviso to section 248(2) of the 1947 Act (which proviso was inserted by the Valuation and Rating (Scotland) Act 1956, section 34), there is no corresponding provision in the 1970 Act, section 64, limiting the prior claim of the collector of taxes. The only reason for this discrepancy seems to be that the insertion of the proviso in section 248(2) of the 1947 Act was recommended by an advisory body whose terms of reference did not extend to the priority for taxes.[4] The McKechnie Report recommended that a creditor meeting a claim by the collector of taxes should be allowed the expenses of his diligence.[5] It seems to us, however, that this recommendation does not go far enough. The proviso to section 248(2) of the 1947 Act restricts the privileged claim

[1]The priorities have been held to apply to all diligences against moveables including poinding of the ground (*Campbell* v. *Edinburgh Parish Council* 1911 S.C. 280) and attachment of rents under decrees of maills and duties (*Bow* v. *Shaw* (1914) 30 Sh.Ct.Reps. 138).

[2]See paras. 7.47 and 7.48.

[3]See para. 5.131 above.

[4]The Sorn Report on *Valuation and Rating* cited above (footnote 2 to para. 7.94).

[5]Paras. 116 and 117.

not only by deducting the creditor's expenses from it but also by limiting the creditor's liability to the net proceeds (if any) of his diligence in cases where the rates arrears exceed those proceeds.

7.98 It seems to us altogether unjustifiable that an ordinary creditor executing diligence against a debtor should become automatically liable for the whole of that debtor's tax arrears for a year. The ordinary creditor's debt may be small, the goods attached may be of little value, and the year's tax arrears may be large. The collector of taxes has no duty to intimate his prior claim and the ordinary creditor's liability arises solely from the execution of otherwise lawful diligence. Over the years, there have been some very hard cases (decided mainly in the sheriff court and involving priority claims for rates before the law was changed). For example, a creditor sold goods under a sequestration for rent and the proceeds did not cover the expenses of the diligence: it was held that by selling the debtor's effects, the creditor became liable for the whole arrears of rates.[1] In another case, it was held that the creditor was liable only for the gross amount realised by a warrant sale (i.e. without deduction of expenses).[2] While this would remove some of the injustice, and legal arguments supporting it can be conceived, it requires the court to strain the wording of the section and does not remove the injustice entirely since the creditor would still not be able to deduct expenses from the proceeds of his diligence paid to the collector of taxes. It was suggested in the same case that a creditor executing a poinding may escape liability for arrears by restoring the poinded goods; but this right, if it exists, is of no help to a creditor who has already sold the goods under warrant. We understand that in practice the collectors of taxes never demand sums in excess of the net proceeds of diligence, but on a literal construction of the section the creditor appears to be liable for the whole year's arrears.

7.99 Third, the scope of the priorities whether for rates or taxes is arbitrary, creates somewhat strange anomalies, and seems to have been delimited haphazardly by historical accident. Though enacted in a modern statute, the tax priority stems at latest from an Act of 1803.[3] In more recent decades successive Governments, not surprisingly, have omitted to extend it to new taxes. It is not clear why in principle the priority should apply to Inland Revenue taxes but should not apply to value added tax, car tax, customs and excise duties and betting and gaming duties. These are preferential debts in sequestration under bankruptcy legislation and in liquidations.[4] The anomaly will be made even worse if the law on preferential debts in sequestrations and liquidations is amended as mentioned in paragraph 4.85 above. The situation will then be that local government rates and Inland Revenue assessed taxes,

[1] *Parish Council of Rathven* (1896) 4 S.L.T. 40: see also *Adamson* v. *Ambrose* (1858) 1 Guthrie's Select Cases 315; *Stirlingshire C.C.* v. *Stirlingshire Property Investment Co. Ltd.* (1908) 24 Sh.Ct.Reps. 320; and cases cited at para. 7.99.

[2] *Lanarkshire C.C.* v. *Hamilton's Trs.* 1934 S.L.T. (Sh.Ct.) 51.

[3] 43 Geo. III c. 150, s. 33. This Act, which consolidated earlier legislation on assessed taxes and adapted them for Scotland, was consolidated by the Taxes Management Act 1880, s. 88 of which preserved the tax collector's prior claim and applied throughout Great Britain. That section was in turn re-enacted with modifications for Scotland by the Inland Revenue Act 1884, s. 7(2), from which the 1970 Act s. 64 derives. The corresponding provision for England and Wales is now contained in the 1970 Act, s. 62.

[4] Bankruptcy (Scotland) Act 1913, s. 118; Companies Act 1985, s. 614 and Sched. 19.

(but not VAT and other Customs and Excise taxes and duties) will be prior claims in diligence but not preferential debts in sequestrations and liquidations, whereas VAT and other Customs and Excise taxes and duties (but not rates and Inland Revenue taxes) will be preferential debts in sequestrations and liquidations but will not be prior claims in diligence. Such inconsistency seems unjustifiable. Another oddity is that the claim for priority applies in terms only to "moveable goods and effects", an expression which on a literal construction seems apt to cover corporeal moveables, but not incorporeal moveable property and *a fortiori* not money. On the other hand, in several sheriff court cases it has been held that the claim covers money which has been arrested, or attached by decree of maills and duties, or assigned.[1] The priority applies to the remedy (maills and duties) by which the holder of a bond and disposition in security attaches the rents of the secured property but apparently not the remedy by which the holder of a standard security attaches those rents because the former happens to be a common law diligence whereas the latter is a recent creation of statute.[2] The priority does not apply to diligences against, or dispositions of, heritable property though in sequestrations and liquidations, rates and taxes have priority in the proceeds of the bankrupt's heritable property as well as his moveable property.

7.100 Fourth, the prior claim even applies in cases of "moveable goods and effects . . . liable to be taken . . . by any assignation" by the rates or tax defaulter. In a sheriff court multiple-poinding, the claim for priority has been held to apply to an intimated assignation of money so that a subsequent arrestment by a collector of rates was preferred.[3] It should be observed that if the prior claim does indeed apply where moveables are assigned, then the claim can be made even where the collector of rates or taxes has not executed diligence against those moveables. Moreover, on a literal construction of section 64, the priority applies even where the assignee takes the assigned moveable property without notice of the tax arrears and for onerous consideration. The potentially wide-ranging application of the priority to assignations is little known and rarely invoked, but seems to us to be exorbitant.

7.101 Fifth, the 1947 Act, section 248(2) and the 1970 Act, section 64(2) enable the collector of rates or taxes to execute diligence by summary warrant poinding where the moveables have been "taken" by poinding or other diligence without meeting the collector's prior claim. This provision seems to operate even where the goods have been sold in a warrant sale by the ordinary creditor to a purchaser for value taking without notice of the collector's prior claim. Such a purchaser losing his goods in this way could no doubt claim damages from the tax defaulter's ordinary creditor who ought to have paid the arrears, but this provision seems to us to be potentially unfair to bona fide purchasers at auction sales. It seems likely that this power is

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[1] *Wood* v. *Glasgow Corporation* (1912) 28 Sh.Ct.Reps. 91 at p. 93; *Bow* v. *Shaw* (1914) 30 Sh.Ct.Reps. 138; *Wood* v. *Glasgow Corporation* (1916) 2 S.L.T. (Sh.Ct.) 242; *Cameron* v. *Neil* (1926) 42 Sh.Ct.Reps. 171.

[2] Conveyancing and Feudal Reform (Scotland) Act 1970, s. 11 and Sched. 3, standard condition 10(3); s. 24.

[3] *Cameron* v. *Neil* (1926) 42 Sh.Ct.Reps. 171. Concerning the words "or by any assignation", the sheriff remarked (at p. 181): "I have found no authority as to their meaning or application. It may be that they are subject to construction and are not applicable to every assignation, e.g. to an absolute assignation which transfers property".

rarely, if ever, used by the official collectors and it is one which, in our view, they ought not to possess.

Proposal for abolishing the prior claims for rates and taxes

7.102 Faced with the choice between recommending reform of the priorities for rates and taxes or abolition, we have no hesitation in recommending abolition. The arguments adduced in the past in favour of the priorities are broadly the same as the arguments for conceding preferences to rate and taxes in sequestrations under bankruptcy legislation, e.g. that central and local government do not choose their creditors; that they cannot obtain securities for their debts; that unlike commercial creditors or even electricity and gas boards, they cannot refuse to give services to defaulters in the future.[1] We considered fully and rejected these and other arguments in our Report on Bankruptcy.[2] As mentioned above,[3] in the context of the Bills amending the law on bankruptcy sequestrations and liquidations presently before Parliament, it has been accepted by the present Government that the preferential status for rates and Inland Revenue assessed taxes should be abolished, but the preferential status of VAT and other Customs and Excise taxes and duties should be retained.

7.103 Even on the basis that rates and taxes, or any of them, should receive priority in sequestrations under bankruptcy legislation, we do not think that a similar priority should be accorded to rates and tax collectors out of the diligences of ordinary creditors. First, the debtor may not be insolvent and, even if he is, he may have sufficient assets to satisfy diligence by the collector of rates or taxes.

7.104 Second, it cannot be said that abolition of the priority in diligence for rates and Inland Revenue taxes would amount to a new breach of the principle that the priorities in diligence should be the same as in sequestration: that principle has never been fully implemented in legislation. Since the priority for taxes was introduced, the types of preferential debts in bankruptcy sequestrations have multiplied greatly and even if local government rates and Inland Revenue assessed taxes cease to have preferential status, there will still be several categories of preferential debts under bankruptcy legislation including PAYE deductions, value added tax, car tax, betting and gaming duties, social security contributions, contributions by insolvent employers to occupational pension schemes, and wages, salaries and other benefits to employees of a bankrupt.[4] The legal processes of sequestration and liquidation are well designed to enable the claims of all creditors to be ranked and preferred, but the various individual modes of diligence are far less appropriate for that purpose unless an action of multiple-poinding is raised. While we sympathise with the view that the rules on the ranking of creditors' claims on a debtor's property should be the same whether those rules are applied in diligences, sequestrations (or liquidations), or other legal processes, it seems to us that there are practical constraints against applying sequestration preferences in diligences. A new statutory duty to intimate diligences to all

[1]See the McKechnie Report, paras. 111–5, which favoured the retention of the priorities.
[2]Chapter 15.
[3]Paras. 4.85 and 7.99.
[4]See para. 4.85 above; Bankruptcy (Scotland) Bill 1984, clause 48 and Sched. 3.

preferential creditors would be impractical and, in the many cases where no prior claim exists, no useful result would be served. Moreover, to replicate in the domain of diligence the rules of ranking in sequestrations, complicated machinery would have to be provided whereby preferred creditors executing diligence, including summary warrant diligence, could share rateably the fruits of that diligence with other preferred creditors. There is furthermore a difference in principle between diligence and sequestrations so far as the privileges of rates and taxes are concerned. In a sequestration, the rates or tax collector is ranked and preferred on property of the debtor vested in the trustee. In diligence, the privilege is not, or not merely, a preference in the proceeds of the debtor's property but takes the form of rules making one person liable for the rates or tax arrears of another person; requiring payment of the arrears before the goods are "taken" by diligence (though in the case of rates the amount will ultimately be limited to the net proceeds of the diligence); and allowing the collector to execute diligence against goods as if the creditor's diligence has not been executed. These rules seem to us to be exorbitant and anomalous, in the case of rates where the extent of liability is restricted to the amount of the net proceeds of the diligence, and even more so in the case of tax where there is apparently no restriction at all. Rates and tax collectors possess the valuable privilege of executing summary warrant diligences. This should suffice to protect the public purse.

7.105 Third, we concede that in matters of fiscal legislation, it is generally accepted that cross-border uniformity is desirable so far as differences between the different legal systems of the United Kingdom allow. In England and Wales, however, whereas tax collectors have a privileged claim[1] similar to tax collectors in Scotland, we understand that local rating authorities do not have a privileged claim, outside bankruptcy proceedings, corresponding to claims for rates under the Scottish Act of 1947, section 248. Of the two English analogies, we think that the rule relating to rates is to be preferred. In any event, the prior claim of the tax collector in Scotland seems wider than in England since it applies to cases where money is "taken" and prevails over a landlord's sequestration or diligence for rent[2] whereas as we understand it, the prior claim of the collector in England extends only to "goods and chattels" not money, and does not apply to enforcement at the suit of a landlord for rent.[3] Finally, abolition of the priorities for rates and Inland Revenue taxes would avoid the unjustifiable anomaly mentioned in para. 7.99 above, namely that rates and Inland Revenue taxes are preferred in diligence but (as a result of legislation presently before Parliament) not in bankruptcy proceedings whereas exactly the reverse is true of VAT and other Customs and Excise taxes and duties.

7.106 We **recommend:**

The priorities for recovery by official collectors of one year's arrears of rates and taxes, where moveable goods and effects are taken by diligence or assignation in Scotland, should be abolished.
(Recommendation 7.19; clause 100(4).)

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[1]Taxes Management Act 1970, s. 62.
[2]See para. 7.99.
[3]1970 Act, s. 62.

Section F. Fugae warrants

7.107 When the Debtors (Scotland) Act 1880, section 4 abolished civil imprisonment as a general creditor's diligence, it provided that nothing in the Act should "affect or prevent the apprehension or imprisonment of any person under a warrant granted against him as being *in meditatione fugae* . . ." that is, contemplating abscondence. A *fugae* warrant for imprisonment was a diligence on the dependence relating to a debt due but not yet constituted, or in security of a future or contingent debt. The creditor deponed that the debtor was contemplating abscondence and, on cause shown, could obtain a warrant for the debtor's imprisonment until he found caution for the debt. A *fugae* warrant was an ancillary diligence only competent where the debt, when constituted by decree, was enforceable by imprisonment under the decree.[1] It is thus no longer competent for alimentary debt because, since 1882, the procedure for imprisonment for aliment is not authorised by the alimentary decree but by a special warrant of the sheriff on a separate application where the failure to pay was wilful.[2] *Fugae* warrants appear thus to be technically competent only in those very few cases where imprisonment on decrees is still competent, i.e. for fines and penalties connected with central government taxes and duties and for rates.[3] The diligence has long been in disuse.[4] The abolition of civil imprisonment under the Debtors (Scotland) Act 1838 and the Exchequer Court (Scotland) Act 1856 recommended above would necessarily entail the abolition of the last vestiges of *fugae* warrants, and a repeal of the provisions of the 1880 Act, section 4 saving such warrants.

7.108 We **recommend:**

> *Fugae* warrants should be abolished.
> (Recommendation 7.20; Bill, Schedule 9 (amendment of Debtors (Scotland) Act 1880, section 4).)

[1] *Kidd* v. *Hyde* (1882) 9 R. 803; *Hart* v. *Anderson's Trs.* (1890) 18 R. 169.
[2] Civil Imprisonment (Scotland) Act 1882, s. 4; *Glenday* v. *Johnston* (1905) 8 F. 24.
[3] Maclaren, *Court of Session Practice* (1916) p. 56.
[4] McKechnie Report, para. 140.

CHAPTER 8

OFFICERS OF COURT

Section A. Introduction

8.1 In this Chapter we put forward recommendations for reform of the system of administration of officers of court (messengers-at-arms and sheriff officers). The topics include the legal and administrative arrangements for the appointment, training, organisation, discipline and control of officers of court and the regulation of their standards of conduct. The present system is in part founded on the principle that officers of court on the one hand hold a public office with the exclusive right to execute court warrants for citation and diligence, yet on the other hand are independent contractors who receive instructions from litigants or creditors in much the same way as commercial agents receive instructions from their principals. There are, however, important differences between officers of court and commercial agents which stem from the public nature of their office within the judicial system. Officers have a duty to act when instructed and cannot pick and choose their clients; their fees are regulated by act of sederunt and they are subject to the disciplinary authority of sheriffs principal (or, in the case of messengers, Lyon King of Arms). An officer of court may operate as a sole practitioner, as a partner in a firm of officers or as an employee of a self-employed officer or firm of officers.

8.2 In Chapter 2 we considered[1] whether the present system of independent contractor officers of court should be replaced by a Court Enforcement Office similar to the Enforcement of Judgments Office in Northern Ireland whereby diligence would be authorised, controlled and executed by the Office. We concluded that the present system of execution of diligence, reformed along the lines recommended in this report, should be retained.

8.3 Another option which we put forward in Consultative Memorandum No. 47[2] was the replacement of fee-paid independent contractor officers of court by state-salaried officers employed within the Scottish Court Service who would execute citation and diligence on receipt of instructions from creditors in the same way as officers of court do at present. The difference between this option and the Court Enforcement Office is that creditors would remain in control of the diligence with salaried officers, whereas the Office would select the appropriate diligence and decide to what extent it should be pursued.

8.4 The first argument in favour of salaried officers is that the remuneration of officers of court by way of fees paid by creditors is allegedly inconsistent with their status as public officers executing decrees of court and acting impartially as between debtors and creditors, and creates a risk that excessive diligence will be done because an officer's remuneration will depend on the volume of work. We think that it is inevitable that officers who execute

[1]See paras. 2.79 to 2.110.
[2]Paras. 4.1 to 4.17.

diligence on behalf of creditors will be associated in the public eye with creditors and that this will be so however the officers are paid. The reforms recommended in this report should provide sufficient safeguard against excessive diligence, and moreover it would not be in the long term interests of an officer to encourage creditors to incur unnecessary diligence expenses.

8.5 Secondly, the introduction of salaried officers would enable officers to be located in the remote areas of Scotland and so enable diligence to be done in those areas more cheaply and quickly. While diligence in the remote areas does present problems it is not clear how extensive these are at present. We do not think that it would be reasonable to suggest a major change in the system to overcome some of the difficulties which creditors may experience in pursuing debts in outlying areas when we consider that the change would be unnecessary and undesirable for the more populous areas where by far the greatest volume of diligence is carried out. Moreover, it is questionable whether a change to salaried officers would do much to meet the problem of the outlying areas. It is doubtful how far public funds would or should be expended in maintaining officers in remote areas where they would probably be less than fully employed.

8.6 Thirdly, it has been argued that salaried officers forming part of the Scottish Court Service would be more amenable to control by the courts than are independent contractors, and hence more publicly accountable. We do not find this argument persuasive. An officer of court at present has no security of office and can be dismissed at the pleasure of the sheriff principal;[1] on the other hand the sheriff principal might have little direct control over state salaried officers, especially if they were organised so that the officers executing diligence were under the supervision of senior officers. Later in this Chapter we recommend[2] improved methods for dealing with complaints against officers of court and we also recommend provisions empowering the courts to inspect the work of officers of court even in the absence of complaint. These recommendations will in our opinion enlarge the courts' supervisory role and make officers of court more accountable for the way in which they carry out their duties.

8.7 No complaints regarding the overall efficiency of the service presently provided by officers of court emerged on consultation; indeed the majority of those consulted took the view that independent fee-paid contractors were likely to provide a more efficient and cost-effective service than state-salaried officers. Another argument for retention of the present system is that it operates at minimal direct cost to public funds. We think it unlikely that a system of state-salaried officers and ancillary staff could be made self-financing without a considerable increase in the level of fees presently chargeable for diligence.

8.8 Another way of restructuring the present system of officers of court would be to transfer the functions of appointment, discipline and control from the courts to an executive branch of government. We proposed in Consultative

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[1]See para. 8.74 below.
[2]Recommendations 8.10 to 8.12.

Memorandum No. 51[1] that such a change should not take place and on consultation there was unanimous approval of our proposal. Diligence (the object of which is the enforcement of court orders) is in all material respects a judicial proceeding and not an administrative or executive function.[2] Officers of court also execute citation which is undoubtedly a step in judicial proceedings. Transfer of control of diligence to central government would be open to objection on the ground that the enforcement of court orders would be liable to be affected, or to appear to be affected, by political considerations, and would thus infringe the constitutional principle of the independence of the courts.[3]

8.9 We would reject both the above options—introducing state-salaried officers and making officers of court a branch of government. The arguments in favour of state-salaried officers are in our opinion unconvincing, and there is a danger that such a change would result in a more expensive and less effective enforcement service than that presently provided by officers of court. Scotland is not unique in having independent contractor fee-paid officers of court; the enforcement officers of the High Court of England and Wales (the sheriff's officers) and many European countries (such as the *huissiers* in France) are independent contractors. The system of officers of court has served Scotland reasonably well and we conclude that the present system should be retained with improvements in accordance with the recommendations we put forward in the remainder of this Chapter.

8.10 We **recommend:**

> The present system whereby citation and diligence is executed by independent contractor fee-paid officers of court should be retained (subject to various reforms) and should not be replaced by salaried officers employed within the Scottish Court Service or a central government department.
> (Recommendation 8.1; clauses 101–111.)

Section B. Organisation and control of officers of court

8.11 Standing the retention of the present system of independent contractor fee-paid officers of court we consider in this Section how best such a service should be controlled and organised. Officers of court are at present divided into two classes, messengers-at-arms and sheriff officers.

8.12 Messengers-at-arms are appointed by the Lord Lyon King of Arms after a favourable report has been received on the applicant's knowledge of the law and practice relating to the duties of messengers from a senior messenger-at-arms appointed to conduct such an examination. Powers of control and dismissal over messengers are vested concurrently in the Lord

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[1]Proposition 1 (para. 2.10).

[2]For example attachment of property by diligence brings it within the protection of the court; the courts supervise poindings, grant warrants of sale and recall or restrict arrestments; and the report of a poinding, when submitted to the court, thereby creates a pending court process. The forms and procedure in diligence may be changed by act of sederunt and diligence fees are prescribed by act of sederunt.

[3]In the leading case of *Stewart* v. *Reid* 1934 S.C. 69, Lord Sands (at p. 74) disapproved of "the enforcement of diligence by departmental officials, whether national or local" as being an "intrusion of the bureaucratic into the realm of the judicial" and observed that officers of court should be "free and independent of the control of any administrative body".

Lyon and the Court of Session, although in modern practice these powers are exercised by the Lord Lyon.[1] All Court of Session and Lyon Court writs generally require to be executed by a messenger, but in certain circumstances a sheriff officer may act instead.[2] Messengers are also entitled to execute warrants of the sheriff's ordinary court. On 1 January 1985 there were 88 messengers. It is thought that all practising messengers are also sheriff officers.[3]

8.13 A sheriff officer seeking a commission in a sheriffdom is appointed by the sheriff principal of that sheriffdom. The appointment is made only after examiners appointed by the sheriff principal have satisfied themselves as to the applicant's knowledge of the law and practice of citation and diligence. The officer's commission may cover the whole sheriffdom, or be restricted to a particular court district or districts, or to an area defined in some other way.[4] The officer is subject to the disciplinary jurisdiction and control of the sheriff principal who may suspend or revoke the commission. In general, sheriff officers are entitled to execute only sheriff court warrants, but they may in certain circumstances execute Court of Session warrants as well.[5] On 1 January 1985 there were 146 sheriff officers, many of whom held more than one commission.[6]

Retention of messengers-at-arms and sheriff officers

8.14 The first question to be considered is whether two separate classes of officers of court should continue to exist, or whether they should be replaced by a single class of officer competent to execute decrees and warrants of any court in Scotland. Such a proposal was rejected by the McKechnie Report,[7] but fusion into one service would not necessarily mean that all officers would execute the decrees of all courts in Scotland, as the McKechnie Report assumed, since it would be possible to have one service of court officers and yet impose limits on the territorial competence of individual officers. The arguments for and against fusion turn largely on what new arrangements would be made on such matters as the appointment, training, discipline, control and territorial competence of officers in a fused service, and the level and mode of regulation of fees.

8.15 By itself, therefore, the question of fusion is not of great importance, but we can see no compelling reason in favour of fusion. First, we argue below[8] that the Court of Session and the sheriffs principal should control the officers who execute the decrees of their respective courts, and it seems to us that the distinction between messengers-at-arms and sheriff officers provides a convenient method of achieving this. Second, it can be argued that messengers-at-arms should have a nationwide competence since the Court of

[1] See para. 8.21 below.

[2] Execution of Diligence (Scotland) Act 1926, s. 1; see para. 8.35 below.

[3] A survey conducted for us disclosed that in 1980 there were 74 messengers-at-arms and all practising messengers were also sheriff officers. For many years, only persons who are sheriff officers have applied for appointment as messengers-at-arms.

[4] See paras. 8.41 to 8.43 below for a discussion of a sheriff officer's powers to execute warrants in other sheriffdoms.

[5] Execution of Diligence (Scotland) Act 1926, s. 1.

[6] In 1980 there were over 120 sheriff officers.

[7] Paras. 206–7.

[8] See paras. 8.17 to 8.28.

Session has a nationwide jurisdiction, whereas sheriff officers should have a territorially limited competence corresponding to the limited territorial jurisdiction of the sheriff courts to which their commissions apply. Third, we understand all practising messengers-at-arms are also sheriff officers[1] so that a wide measure of fusion already exists. Messengers-at-arms are generally recruited from the more senior sheriff officers, and within the service tend to be regarded as having a higher status than sheriff officers, even though, with the exception of inhibitions, there are only minor differences between diligence on Court of Session warrants and diligence on sheriff court warrants.[2] Fourth, since fusion would not serve any very useful purpose, some weight should be given to history and tradition, and the avoidance of change for its own sake. On consultation all commentators, with one exception, agreed with these arguments, of which the first is the most important.

8.16 We **recommend:**

> The separate offices of messenger-at-arms and sheriff officer should be retained and should not be replaced by one service of court officers authorised to execute warrants of all courts within Scotland.
> (Recommendation 8.2; clauses 103 and 130.)

Control of sheriff officers

8.17 Earlier in this Chapter we considered and rejected the idea that officers of court should become part of the Scottish Court Service or employees of a department of central government. Another possible model for the service of officers would be that they should be self-regulating and self-disciplining with a professional organisation that controls and supervises them. Most, but not all, of the officers of court holding commissions are members of the Society of Messengers-at-Arms and Sheriff Officers,[3] which was established in 1922 by the amalgamation of two local societies of officers. The Society performs many useful functions. For example, it acts as a channel of communication between officers and the various authorities concerned with the law and practice of citation and diligence. It represents the interests of its members, and indeed officers generally, when consulted on an informal basis by the Court of Session as to proposed amendments to the acts of sederunt regulating fees payable to officers for executing diligence. It advises its members on practical problems concerned with the execution of diligence and has produced styles for use by officers in executing diligence. It has sponsored a manual on diligence for use in training officers, as a first step towards a training scheme for officers. But we do not favour self-regulation. Since messengers-at-arms and sheriff officers are officers of the courts charged with the functions of enforcing warrants for diligence and other warrants of the courts, we think that they should continue to be appointed, disciplined and controlled by the courts. It follows from this that the Society of Messengers-at-Arms and Sheriff Officers should remain a voluntary association

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[1]At least, this was true in 1980 and we believe the situation has not changed materially since then. We recommend below (para. 8.56) that messengers-at-arms should be recruited from the ranks of sheriff officers.

[2]The differences in citation are more significant.

[3]In 1980, of the 126 officers of court holding commissions, 113 were members. The corresponding figures for January 1985 are 146 and 136.

rather than become a body, membership of which is compulsory, and expulsion from which would terminate an officer's commission.

8.18 Control of officers of court could be achieved within the judicial system by the establishment of a new central authority within that system having powers to appoint, discipline and control all officers of court and also to make and review rules regulating officers of court and the administration of diligence generally. The arguments in favour of central control include the following. First, a central authority would be able to set and enforce nationwide standards for the training, qualification, discipline and control of officers of court. Second, a central authority would be able to exercise the same functions in relation to messengers-at-arms and sheriff officers thus ensuring a uniform approach in the control of all officers of court. Third, the small number of practising officers (about 140) may suggest that control should be exerciseable by one authority, rather than by seven or eight authorities (the six sheriffs principal, the Lord Lyon and/or the Court of Session). Fourth, many sheriff officers hold commissions in more than one sheriffdom and, indeed, some firms operate throughout Scotland. Finally, the principle of local control by sheriffs principal of officers entitled to enforce sheriff court decrees has already been breached to some extent. Warrants of the sheriff's ordinary court may be executed by messengers-at-arms,[1] and sheriff court warrants may be executed outwith the jurisdiction of the court of origin by officers of the court of the place of execution, over whom the sheriff principal of the court of origin has no control.[2] While the former practice can and we think should be abolished, the latter practice is too convenient to admit of abolition.

8.19 Although the above arguments are attractive in some respects, we do not think a compelling case has been made for establishing a new central authority over officers of court. We remain of the view that the functions of appointment, supervision and discipline of sheriff officers are best exercised locally in the sheriffdoms where the sheriffs principal can take primarily into consideration the need to provide an efficient service by officers who are familiar with the community within which their commissions require them to operate. No support for a new central authority emerged on consultation,[3] although two bodies suggested that the relevant functions in respect of sheriff officers, as well as messengers-at-arms, should be entrusted to the Lord Lyon. Either of these solutions would mean that the courts would no longer have power to control the officers responsible for executing their warrants. The principle of control by the courts, on which the present system is largely based, is we think sound and should be retained and strengthened.[4] Nationwide standards for the training, qualification, discipline and control of officers of court (messengers as well as sheriff officers) can be achieved without establishing a central authority with executive powers.[5] The present structure of sheriff courts with full-time sheriffs principal who frequently consult one

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[1]*Thornton, Applicant* 1967 S.L.T. (Sh.Ct.) 71.

[2]Ordinary Cause Rules, rule 16; Summary Cause Rules, rule 11.

[3]Consultative Memorandum No. 51, para. 2.9 and Proposition 1 (para. 2.10).

[4]In Recommendation 8.6 (para. 8.40 below) we recommend that a messenger-at-arms should be excluded from all sheriff court work except in districts for which he or she holds a commission as sheriff officer.

[5]See paras. 8.29 to 8.34 below, where we recommend the establishment of an advisory body to advise the Court of Session on the making of rules regulating officers of court.

another on matters of common interest seems capable of coping with any problems thrown up by the existence of large firms of sheriff officers whose operations transcend the boundaries of particular sheriffdoms.

8.20 We **recommend:**

Sheriff officers should not become a self-regulating and self-disciplining service. The functions of appointment, supervision and control of sheriff officers should continue to be exercised by sheriffs principal and should not be transferred to a new central authority having such functions in respect of sheriff officers and messengers-at-arms.
(Recommendation 8.3; clauses 104–7.)

Appointment and control of messengers-at-arms

8.21 At present, the function of appointing messengers-at-arms lies within the exclusive jurisdiction of the Lord Lyon while the functions of control and discipline have, following a chequered history, become vested in the Lord Lyon and Court of Session concurrently.[1] The powers of suspension and deprivation from office are in current practice exercised by the Lord Lyon acting on a complaint, or of his own accord, or on remit from the Court of Session.[2]

8.22 We argued above that the main justification for retaining the distinction between messengers-at-arms and sheriff officers is that each court, or group of courts, should control its own officers. On this principle, it seems to us that the primary responsibility for appointing, controlling, supervising, suspending and dismissing messengers-at-arms should be transferred from the Lord Lyon to the Court of Session. It appears to us that there is a wide divergence between the functions of the Lord Lyon in respect of messengers-at-arms and Lyon's other functions. Sir Thomas Innes of Learney, a former Lord Lyon, in an article in the *Encyclopaedia* listed sixteen functions entrusted to the Lyon King of Arms.[3] Fifteen of these functions relate to heraldry, genealogy and public ceremonial. The remaining function, the appointment, control and discipline of messengers-at-arms, does not appear to us to have any significant generic connection with the other functions, which belong rather to what in constitutional theory is known as "the dignified part of the Constitution" rather than its functional part. In our Consultative Memorandum No. 51, we therefore suggested that the powers and jurisdiction to appoint, discipline and control messengers-at-arms presently vested in the Lord Lyon should be transferred to the Court of Session.[4]

8.23 On consultation, the Lord Lyon observed that messengers-at-arms were not the officers of any one court but rather "Officers of the Sovereign competent to execute the decrees of any of the Sovereign's Courts" and that this concept should remain as a general principle though he conceded that it is now probably desirable that messengers-at-arms should not execute the decrees of the sheriff court. The courts in question would include the Court

[1] *Encyclopaedia*, vol. 9, pp. 622–7.
[2] *Ibid.*, p. 626; Mackay, *Practice of the Court of Session* p. 233; R.C. 56.
[3] Vol. 9, pp. 335–6.
[4] Proposition 12 (para. 4.9).

of Session, the Court of the Lord Lyon and the High Court of Parliament, and it might include new courts constituted in the future. The badge or insignia of the messenger-at-arms is the blazon (bearing the Royal Arms) and wand or baton of office presented by the Lord Lyon which the messenger should display when executing diligence.[1] The Lord Lyon remarked:

> "As Messengers-at-Arms are called such because they bear the Royal Arms, it seems also entirely appropriate that the control of those who bear the Royal Arms or Ensigns of Public Authority of the Sovereign should be in the hands of the Lord Lyon King of Arms, who is the Sovereign's Principal Officer of Honour in Scotland and the Officer to whom the Armorial Prerogative in Scotland has been assigned by sundry statutes".

The Lord Lyon further observed that the Officers of Arms and the messengers-at-arms are members of, and regard themselves as forming, a single corps and that it is competent for Officers of Arms—Heralds of Arms or Pursuivants of Arms—to execute decrees in the same way as messengers-at-arms, though it was not suggested that Heralds or Pursuivants in fact do so in current practice.

8.24 The proposed transfer of control was strongly opposed by the Society of Messengers-at-Arms and Sheriff Officers. Indeed, they argued that if change were necessary to achieve uniformity of standards throughout Scotland and the easy control and discipline of all officers of court, the Lord Lyon was the perfect instrument to achieve such uniformity and control. The Law Society of Scotland took broadly the same view. The few other bodies who commented supported the proposal.

8.25 The vast bulk of the work undertaken by messengers-at-arms is citation and diligence on Court of Session warrants if one excludes sheriff court warrants which we recommend below[2] should be executed only by sheriff officers. We remain of the view that the Court of Session should itself exercise a judgment as to how many messengers-at-arms should be appointed, and who is suitable to be appointed, and should also be responsible for exercising supervisory and disciplinary functions over messengers-at-arms.

8.26 It clearly emerges from our consultation, however, that the historic connection between the Lord Lyon King of Arms and the messengers-at-arms is highly valued and we see no reason why that connection should be severed completely. Indeed, if messengers-at-arms are to retain their traditional title, it seems appropriate that the functions of granting commissions to messengers-at-arms and depriving them of their commissions should continue to be exercised by the Lord Lyon. We suggest, therefore, that an application for appointment as messenger-at-arms should be made to the Court of Session. A judge of the Court of Session nominated by the Lord President should be required to be satisfied that the applicant is suitable, both in terms of knowledge and character, and that there is a need for an additional messenger.

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[1]*Encyclopaedia*, vol. 9, pp. 617–8. The blazon is a piece of silver bearing the impression of the Royal Arms which is attached by a chain and ring to a small ebony wand or baton. Where obstruction of messengers-at-arms amounting to the offence of deforcement takes place the theory is that the messenger-at-arms should "break" the wand or baton by slipping the ring down the baton: see para. 8.142 below.

[2]Recommendation 8.6 (para. 8.40).

On being so satisfied the judge would issue a finding to this effect. The applicant would then petition the Lord Lyon for a commission as messenger giving as evidence of suitability the judge's finding to this effect. In accordance with current practice, the Lord Lyon would interview the applicant, take the applicant's oath to perform the duties of messenger faithfully and then present the applicant with a commission and the blazon and baton of office. Similarly, where as a result of disciplinary proceedings before a judge of the Court of Session an interlocutor is pronounced finding that a messenger should be suspended from practice or deprived of office, that interlocutor should be sent to the Lord Lyon who would suspend or deprive as the case may be.[1] It should cease to be competent to bring proceedings in the Lyon Court for deprivation or suspension from the office of messenger-at-arms.

8.27 Our recommended changes regarding messengers-at-arms would not prevent the Lyon Court from appointing other officers to execute the warrants of that court, although we would expect the current practice of enforcement by messengers-at-arms to continue. Lyon Court diligence is highly specialised and we have regarded it as outwith the scope of this report.

8.28 We **recommend:**

(1) The primary function of appointment, supervision, control and discipline of messengers-at-arms should be transferred from the Lyon King of Arms to the Court of Session. The Lord Lyon should, however, retain formal functions in connection with the appointment, suspension and deprivation of office of messengers-at-arms and the Lyon Clerk should continue to keep the Roll of Messengers-at-Arms.

(2) An application for appointment as messenger should be heard by a judge of the Court of Session who if satisfied that the applicant is suitable should pronounce an interlocutor containing a finding to this effect.

(3) The Lord Lyon on receiving the interlocutor of the Court of Session should, after interviewing the petitioner, administer the oath to perform a messenger's duty faithfully, present the petitioner with a commission as messenger-at-arms and insignia (blazon and baton) of office, and instruct the petitioner's name to be entered in the Roll of Messengers.

(4) A Court of Session interlocutor finding that a messenger should be suspended from practice or deprived of office should be transmitted to the Lord Lyon who should suspend or deprive (as the case may be) the messenger and instruct an appropriate amendment to be made to the Roll of Messengers-at-Arms.
(Recommendation 8.4; clauses 103(1) and (5) and 104–7.)

Regulatory powers of the Court of Session

8.29 At present, the Court of Session regulates by act of sederunt the fees of sheriff officers[2] and (with the consent of the Lord Lyon) messengers-at-arms.[3] There is no obligation on the Court to consult the Sheriff Court Rules

[1]See also para. 8.90 below.
[2]Sheriff Courts (Scotland) Act 1907, s. 40.
[3]This is an inherent common law power.

Council or to obtain the concurrence of the Treasury. It is understood that changes in the fees are usually made following representations to the Lord President of the Court of Session by the Society of Messengers-at-Arms and Sheriff Officers. Officers' fees are now regularly varied to keep pace with inflation.

8.30 There are rules regulating the standards of conduct of messengers-at-arms and related matters in the Rules of the Court of Session[1] most of which derive with few modifications from the Regulations of the Lord Lyon (sanctioned by the Court of Session) of 11 March 1772.[2] There are no similar enactments applying to sheriff officers although to some extent the gap is filled by the common law.

8.31 Earlier in this Chapter we recommended[3] that sheriff officers and messengers should be appointed and controlled by the sheriffs principal and the Court of Session respectively, and rejected the notion of a central authority with executive powers to control all officers of court. But if nationwide standards of training, qualification, discipline, supervision and conduct are to be achieved, uniform rules and standards on these matters will be necessary.

8.32 In Consultative Memorandum No. 51 we proposed[4] that there should be a code of rules regulating the conduct of, and other matters relating to, officers of court, and that to that end the Court of Session's regulatory powers over officers should be extended so as to allow them to make rules regulating and controlling the service of officers of court. This proposal met with unanimous approval.

8.33 We also proposed,[5] following broadly a recommendation of the McKechnie Report,[6] that a standing advisory body should be established to advise the Court of Session on the making and revision of the rules mentioned above. All those consulted agreed. There is in our opinion a strong case for a standing council in which matters of concern to the administration of diligence can be debated, to which problems which have been identified can be referred and in which policy can be formulated by persons representative of the various interests involved. In our Memorandum we called the standing advisory body "the Officers of Court Council", but in the light of comments received, we now consider "the Advisory Council on Messengers-at-Arms and Sheriff Officers" to be a more appropriate title, since advocates and solicitors are also officers of court. For convenience, however, we do use the term "officers of court" in this Chapter and elsewhere[7] to refer to messengers-at-arms and sheriff officers.

8.34 We **recommend:**

(1) The Court of Session's existing powers to make rules regulating

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[1]Rules 47–62.
[2]Campbell on *Citation* p. 485.
[3]Recommendation 8.3 (para. 8.20) sheriff officers, Recommendation 8.4 (para. 8.28) messengers-at-arms.
[4]Proposition 2 (para. 2.17).
[5]Proposition 2(2) (para. 2.17).
[6]Paras. 211–2.
[7]See clause 130 of the draft Bill annexed to this report.

messengers-at-arms and prescribing fees for citation and diligence should be replaced by wider statutory powers to make rules regulating and controlling the service of officers of court.

(2) A new standing body, which may be called the Advisory Council on Messengers-at-Arms and Sheriff Officers, should be established to advise the Court of Session on rules to be made under the foregoing powers and generally to keep under review all matters relating to officers of court.

(3) The Advisory Council should consist of a judge of the Court of Session (who should act as chairman) appointed by the Lord President of the Court of Session, five other members also appointed by the Lord President (including two sheriffs principal, two officers of court and a solicitor), and one member appointed by the Secretary of State for Scotland. The Secretary of the Council should be a full-time clerk of session or sheriff clerk appointed by the Secretary of State.
(Recommendation 8.5; clauses 101 and 102.)

Messengers-at-arms and the sheriff courts

8.35 The scope of the functions of messengers-at-arms and sheriff officers respectively is regulated by a mixture of common law rules, statutory provisions and rules of court on the meaning and effect of warrants,[1] and the provisions of the Execution of Diligence (Scotland) Act 1926. Subject to section 1 of the 1926 Act (enabling a sheriff officer to act as a messenger in any county where there is no resident messenger and in any of the islands of Scotland), all warrants of the Court of Session are required to be executed by a messenger-at-arms. After a long period of uncertainty, it appears to be accepted that warrants of the sheriff's ordinary court may be executed by messengers as well as by sheriff officers.[2] Warrants of the sheriff's summary cause court are generally executed by sheriff officers only,[3] although it has been suggested that messengers are not completely excluded.[4] Apart from that, section 2(2)(*b*) of the 1926 Act (as amended) authorises a messenger resident in the sheriffdom where a summary cause charge or arrestment is to be executed to execute the charge or arrestment by registered or recorded delivery letter in cases where postal execution is competent.[5]

8.36 In Consultative Memorandum No. 51, we proposed[6] that messengers should be authorised by their commissions to execute Court of Session warrants only, while sheriff officers (subject to section 1 of the Execution of Diligence (Scotland) Act 1926) should be restricted to sheriff court work. It is undesirable that a person should be refused a commission as a sheriff officer for a sheriffdom, and yet have authority to execute warrants of the courts in

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

[2]*Thornton, Applicant* 1967 S.L.T. (Sh.Ct.) 71; *Meridian Mail Order Co Ltd* v. *Lennox* (unreported, 1 February 1973, Sheriffdom of Ayr and Bute at Kilmarnock). We deal with the execution of summary warrants for rates and taxes in Chapter 7.

[3]Summary Cause Rules, rule 6(3).

[4]T. C. Gray "The Summary Cause Rules 1976" 1977 S.L.T. (News) 129 at p. 132.

[5]See s. 2(1)(*a*) and (*b*).

[6]Proposition 4 (para. 2.26).

that sheriffdom in the capacity of a messenger. Furthermore, sheriffs principal cannot effectively control the number of officers of court available to execute decrees of their courts if messengers have an inherent authority to execute sheriff court decrees. Execution of sheriff court decrees by messengers-at-arms is inconsistent with the general principle that each court or group of courts should be responsible for appointing and controlling the officers executing their warrants.

8.37 Our proposal was approved in principle by all those consulted, though as already indicated, the Lord Lyon made the point that messengers-at-arms have authority to execute warrants of all courts of the Sovereign (including the High Court of Parliament and the Lyon Court) and that, subject to the exclusion of sheriff court warrants, this principle should remain. We accept this argument. It should suffice that messengers-at-arms are precluded by statute from executing warrants of the sheriff court.

8.38 We make no recommendations as to criminal warrants. In the nineteenth century, messengers-at-arms and sheriff officers executed the warrants of courts of criminal jurisdiction, and, although in modern practice such warrants are now invariably executed by police constables, the old authority of messengers-at-arms and sheriff officers has not been abolished and indeed has been recently confirmed by statute[1] at least in relation to warrants of citation.

8.39 Our proposed prohibition of messengers from executing sheriff court civil warrants would also extend to enforcement of writs registered for execution in any sheriff court books. Thus writs registered for execution in the Books of Council and Session would be enforceable by messengers only;[2] while writs registered for execution in the books of a sheriff court would be enforceable by sheriff officers only. In Consultative Memorandum No. 51, we drew attention[3] to statutory provisions making an order of certain tribunals or enquiries enforceable "in like manner as a recorded decree arbitral".[4] Since registration of the order in either the sheriff court books or the Books of Council and Session seems to be unnecessary, it is not clear whether messengers or sheriff officers or both are authorised to carry out diligence to enforce the order. This doubt has, however, been recently removed in relation to the orders of industrial tribunals by legislation under which such an order has the same effect as an extract registered decree arbitral bearing a warrant of execution issued by the sheriff court of any sheriffdom in Scotland.[5] We think that this legislative formula should apply generally in place of the statutory style quoted above.

8.40 We **recommend:**

(1) Messengers-at-arms should not be authorised by their commissions as messengers to execute warrants of the sheriff courts (including writs registered for execution in any sheriff court books), without prejudice

[1]See Criminal Justice (Scotland) Act 1980, s. 25(1) inserting new definition of "officer of law" in the Criminal Procedure (Scotland) Act 1975, s. 462(1).

[2]Subject to the Execution of Diligence (Scotland) Act 1926, s. 1.

[3]Para. 2.25.

[4]Town and Country Planning (Scotland) Act 1972, s. 267(8); Patents Act 1977, s. 93(*b*); Education (Scotland) Act 1980, Sched. 1, para. 8.

[5]Employment Act 1980, Sched. 1, paras. 27 and 29.

to their authority to execute warrants of a particular sheriff court by virtue of their commissions as sheriff officers.

(2) Where a statute provides that a tribunal or inquiry order is enforceable "in like manner as a recorded decree arbitral" it should be amended to provide that the order is enforceable in like manner as an extract registered decree arbitral bearing a warrant of execution issued by the sheriff court of any sheriffdom in Scotland.
(Recommendation 8.6; clause 103(3) and Schedule 7, General Amendment and paragraphs 17, 24, 25 and 30.)

Territorial competence of sheriff officers

8.41 Messengers are authorised to execute the warrants of the Court of Session anywhere in Scotland, reflecting the nationwide jurisdiction of the Court of Session. The basic common law rule on the territorial competence of sheriff officers is that officers are authorised by their commissions to act only within the court district or other area for which their commissions were granted. This rule has been extensively modified by statutory provisions. Warrants of the sheriff court arising out of summary causes may be executed either by an officer of the court granting the warrant or an officer holding a commission for the place where the warrant is to be executed,[1] and since September 1983 this rule applies also to ordinary causes,[2] thus implementing a proposal we made in Consultative Memorandum No. 51.[3] It has to be conceded that these statutory provisions breach the principle of local control in that they allow officers commissioned to act in one area to act in other areas without holding commissions to that effect. Nevertheless we think that the rule allowing an officer holding a commission for the place of execution to execute warrants of courts outwith the sheriffdom is convenient and economic and should not be abolished.

8.42 We agree with the McKechnie Report that it would be undesirable for a commission granted by one sheriff principal to authorise the officer to act throughout Scotland.[4] If sheriff officers were to have a nationwide competence, individual sheriffs principal could no longer exercise any control over the number of officers available to execute the decrees of their courts and there would be a risk that a few large city-centred firms might obtain a virtual monopoly of business.

8.43 We **recommend:**

A sheriff officer should not be entitled to enforce a warrant of any sheriff court anywhere in Scotland. The existing rules whereby a warrant for diligence granted by a sheriff court is executed either by an officer of the court which granted the warrant or an officer holding a commission for the place where the warrant is to be executed should be retained.
(Recommendation 8.7; clause 116.)

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[1]Summary Cause Rules, rule 11.
[2]Ordinary Cause Rules, rule 16.
[3]Proposition 10(2) (para. 3.41).
[4]Para. 209.

Section C. Appointment, supervision and discipline

8.44 Having recommended that sheriff officers should be appointed and controlled by the sheriffs principal[1] and messengers-at-arms primarily by the Court of Session,[2] we now turn to consider the detailed arrangements for the appointment, training, organisation, discipline, supervision and control of officers of court.

Appointment and training

8.45 As the McKechnie Committee observed,[3] most new sheriff officers receive their initial training while working with an experienced officer of court. Some officers become "apprentices" on leaving school, and are sheriff officers for the whole of their working lives; other officers are recruited much later in life and have held other jobs.[4] Table 8.A (giving the results of a survey conducted in 1979/80) shows the age of sheriff officers at the date of their first appointment. Over half (56%) of the officers obtained their first commission before the age of 25 years. Relatively few officers enter the service as a major second career and only 17% obtained their first commission when over 40 years of age. As Table 8.B (giving the results of a survey conducted in 1979/80) shows, there is a wide variation in the length of "apprenticeship" or training served by sheriff officers: 58% of sheriff officers served an apprenticeship or training period of less than three years.

8.46 To obtain a commission as a sheriff officer the applicant presents a petition to the sheriff principal. Normally if the officer holds a commission for another district no examination will be held; if an examination is needed, the sheriff principal usually appoints a panel of examiners which may be composed of solicitors and/or senior sheriff officers. Examinations are usually oral. It was represented to us that this practice gives rise to a diversity in standards.[5]

8.47 In Consultative Memorandum No. 51 we proposed[6] that uniform examination standards and training qualifications applicable throughout Scotland should, if possible, be introduced by act of sederunt.[7] These proposals were generally approved on consultation. They would almost certainly require the introduction of written examinations set by a central examining body and a formal programme of practical training supervised by it. Attempts have been made in the past by the Society of Messengers-at-Arms and Sheriff

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[1]Recommendation 8.3 (para. 8.20).

[2]Recommendation 8.4 (para. 8.28).

[3]Para. 213.

[4]A survey of officers of court conducted in 1979/80 disclosed that of the 126 officers who participated in the survey, 27 entered the service of sheriff officers upon leaving school or shortly thereafter. A further 12 officers had been in H.M. Forces (generally national service) and 29 officers had been previously employed in the police force, the sheriff clerk service, or as an employee (typist for example) in a sheriff officer's firm. Insufficient information was available to classify the prior occupations of the remaining 48 officers.

[5]The procedure is similar to that which at one time regulated the admission of law agents as procurators in local sheriff courts. The Royal Commission on the Courts of Law in Scotland, Fourth Report (1870) p. 42 argued that this led to a diversity in standards and that "there should be one general examination applicable to agents throughout all Scotland." This recommendation was implemented by the Law Agents (Scotland) Act 1873.

[6]Proposition 5 (para. 3.6).

[7]The McKechnie Report (para. 213) made a similar suggestion.

Officers to introduce a formal scheme of apprenticeship or training.[1] One barrier to such a development was the absence of an up-to-date manual of practice, but such a manual has recently been published under the auspices of the Society.[2] The Law Society of Scotland in commenting on our proposals, suggested that part of the training of sheriff officers should include instruction by experts in the valuation of furniture and other goods, and that there should be an examination by a valuator of an applicant's skill in this field. We would support this suggestion in view of the importance of correct valuation in poindings.

8.48 We do not wish to make recommendations in this report as to the details of the training and examination of aspiring officers of court. These matters should, we think, be regulated by the Court of Session after consulting the Advisory Council on Messengers-at-Arms and Sheriff Officers. We

Table 8.A

Age when first appointed

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

*2 not stated

Table 8.B

Length of apprenticeship

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

*2 not stated

[1]See Consultative Memorandum No. 51, para. 3.5.
[2]Maher, *A Textbook of Diligence* (1981); *Updating Supplement* (1985).

understand that the Society of Messengers-at-Arms and Sheriff Officers is currently working on a programme for training sheriff officers which could be of assistance in the preparation and implementation of regulations on apprenticeship and training and qualifications. We propose that a person who completes the required programme of training successfully would receive a certificate of competence to perform the work of a sheriff officer.

8.49 As mentioned above, an applicant wishing to obtain a commission as a sheriff officer presents a petition to the sheriff principal. The procedure, which is not regulated by act of sederunt, is at the discretion of the sheriff principal, who normally orders that the application should be made known publicly, for example by advertisement on the notice board of the relevant sheriff court-house.[1] The sheriff principal orders an examination to be made, if necessary, of the applicant's knowledge of the law and practice of citation and diligence; makes an assessment, on the basis of testimonials or otherwise, of the applicant's character, reputation and general suitability to hold office; and assesses whether it is expedient to appoint an additional sheriff officer in the districts or sheriffdom for which a commission is sought. Objections to the application may be lodged.

8.50 In considering an application for appointment as sheriff officer, the sheriff principal has regard to the interest of the applicant, to the interest of any objectors opposing the application and to the public interest, which is paramount.[2] Important factors in determining the public interest are that there should be an adequate but not excessive number of sheriff officers for the relevant district; that a single officer or firm of officers should not have a monopoly of business so that a choice is available to creditors; that the officer should be a person of good character; and that the officer should preferably have knowledge of the local community. Where contested applications occur, it is usually because other sheriff officers holding appointments in the relevant district claim that there is already an adequate provision of officers in that district. The total volume of warrants for citation and diligence emanating from a particular sheriff court is finite, so that a surplus of officers could well result in existing officers' businesses ceasing to be viable.

8.51 The Society of Messengers-at-Arms and Sheriff Officers remarked, in commenting on our proposals for a formal programme of training, that it was "essential for the recruitment of officers of court that any qualification must be seen as worthwhile obtaining" and not left "to the problematical question of 'obtaining' a commission". We think, as did all those who commented on this aspect, that there should be no change in the sheriff principal's discretionary powers in appointing officers so that other factors besides the applicant's competence can be taken into consideration. We do not think that the existence of these discretionary powers would devalue the certificate of competence; it seems clear that an application for a commission should be

[1]The procedure was at one time prescribed in general terms by model "Rules and Regulations" agreed by the sheriffs principal on 11 December 1867: these are set out at (1868) 12 Journal of Jurisprudence 156–7. The rules were circulated to the sheriffs in order that they might, if so advised, adopt them in their counties by an act of court. The present practice is broadly the same as laid down in those model rules.

[2]Few cases have been reported, but see *Lewis, Petitioner* 1963 S.L.T. (Sh.Ct.) 6, *Thornton, Applicant* 1967 S.L.T. (Sh.Ct.) 71.

incompetent unless the applicant holds such a certificate. If a certificate of competence were to become an essential precondition to an application for appointment, it would clearly be "worthwhile": it cannot, however, be treated as a passport to a commission in any sheriffdom of the applicant's choice. It might be provided that the sheriff principal would not be entitled to refuse an application for a commission on the ground of lack of knowledge if the applicant held a certificate of competence. We prefer, however, to leave the precise effect of any certificate of competence to be regulated by act of sederunt.

8.52 In our Consultative Memorandum No. 51, we noted that in one sense the organisation of sheriff officers is beginning to transcend the boundaries of sheriffdoms since, for example, one group of associated firms has officers with commissions in all sheriffdoms and maintains offices in many parts of Scotland.[1] While this feature is very different from the original mode of organisation of officers' firms, there seems nothing inherently wrong in such a development provided that the officers in the branch offices of large firms know the local community and perform their functions properly, and provided that the centralising trend does not go too far with the result that monopolies arise and creditors have no real choice of firms to instruct. We think that control of the balance between large and small firms is best left to the sheriffs principal to determine in the light of local circumstances. When an application is made for an appointment, the sheriff principal can review the position and, by either making or refraining from making the appointment, can ensure that there is a balance between there being sufficient work for the officers of court and enough choice for creditors to stimulate efficiency by competition.

8.53 The procedure in an application to the Lord Lyon for appointment as messenger-at-arms is similar to the procedure in an application for a sheriff officer's commission.[2] The applicant is referred by the Lord Lyon to the Lyon Macer or another senior messenger-at-arms who examines the candidate on the relevant law and practice and reports the results of the examination to the Lord Lyon. If the report is favourable, the Lord Lyon interviews the applicant before administering the oath and issuing a commission and the insignia of office. As in the case of sheriff officers no apprenticeship or professional qualification is required by law for appointment as messenger.[3]

8.54 As recommended above,[4] application for appointment as messenger would in future be made in the first instance to the Court of Session, although the commission as messenger would be granted by the Lord Lyon. We recommend that the further training qualifications necessary for appointment as messenger and the examination of the applicant's competence should be regulated by the Court of Session after consultation with the Advisory Council on Messengers-at-Arms and Sheriff Officers. The Court of Session in disposing of an application for appointment as messenger should be entitled to consider

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[1]Para. 3.13.

[2]See *Encyclopaedia*, vol. 9, p. 618.

[3]*Idem.* The McKechnie Report's statement (at para. 213) that a six years' apprenticeship was required before appointment as messenger-at-arms seems to have been an error.

[4]Recommendation 8.4 (para. 8.28).

not only the applicant's competence but also his or her general suitability and the need for an additional messenger.

8.55 We understand that all practising messengers-at-arms are also sheriff officers, and that for many years all applicants for appointment as messenger-at-arms have been sheriff officers. In our Consultative Memorandum No. 51, we suggested that this practice should be placed on a formal basis by providing that a person should be eligible to apply for, and to hold, a commission as messenger-at-arms only if he or she holds a commission as sheriff officer.[1] Our suggestion, which was generally approved on consultation, would be consonant with the establishment of national training standards for sheriff officers and would enhance the standing of messengers-at-arms. The Society of Messengers-at-Arms and Sheriff Officers agreed that only a sheriff officer should be entitled to apply for appointment as messenger, but suggested that an officer should be entitled to resign a sheriff officer's commission while retaining a commission as messenger-at-arms. The purpose of the Society's suggestion was to enable a senior officer in a firm of officers to resign as a sheriff officer while retaining a commission as messenger so that a newly trained assistant could apply to be appointed as sheriff officer to the vacancy thereby created. While we have some sympathy with this suggestion, it would entail setting up a separate system of authorisation of extra-official activities by the Court of Session for the few officers who held commissions as messengers only.[2]

8.56 We **recommend:**

(1) In order to secure uniformity of training standards and qualifications throughout Scotland, the Court of Session, after consulting the Advisory Council on Messengers-at-Arms and Sheriff Officers recommended above, should prescribe by act of sederunt rules governing the training and qualifications of sheriff officers and messengers-at-arms. The rules should regulate the apprenticeship of entrants to the sheriff officers' service, and require the holding of written examinations and the issue of certificates of competence to undertake the work of messenger-at-arms or sheriff officer.

(2) Consideration should be given by the competent authorities, after consulting the Society of Messengers-at-Arms and Sheriff Officers, to the introduction of a formal programme for the training of messengers-at-arms and sheriff officers using methods appropriate to the small numbers of persons who enter the service at any one time.

(3) The procedure to be followed in applications for a commission as messenger-at-arms or sheriff officer should be regulated by act of sederunt made by the Court of Session after consulting the Advisory Council on Messengers-at-Arms and Sheriff Officers. Such an application should not be competent unless the applicant holds the prescribed messenger's or sheriff officer's certificate of competence, as the case may be.

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[1]Proposition 11(1) (para. 4.5).

[2]We recommend in Recommendation 8.19 (para. 8.110) below that extra-official activities of sheriff officers should be authorised by the sheriffs principal from whom they hold commmissions.

(4) No change should be made in the existing powers of the sheriffs principal to grant a commission as sheriff officer having regard to the interests of the applicant, and to the public interest which should continue to be paramount. The Court of Session, in disposing of an application for appointment as messenger-at-arms, should have similar discretionary powers.

(5) A person should be eligible to apply for and to hold a commission as messenger-at-arms only if he or she holds a commission as sheriff officer.
(Recommendation 8.8; clauses 101(1) and 103(2) and (4).)

Firms and employees

8.57 Officers of court may be self-employed persons conducting their own business, partners of a firm of officers of court (consisting perhaps of both messengers-at-arms and sheriff officers) or employees of an officer or firm of officers. In the survey of officers of court showing the position at the end of 1979, 121 were actively working as sheriff officers and were organised in 34 separate "businesses" (including in the term "business" a firm, a group of associated firms and a sole practitioner's business). In 14 of these businesses, the work was done by a sole practitioner who did not employ any other officer; in four firms, all of the officers (two or three) were partners. One group of firms had three partners and 19 employees; one business had one principal and eight employees; one group of firms had two partners and six employees; and one business had one principal and five employees. Each of the remaining 12 businesses had no more than five officers with an equal or almost equal balance between principals and employees.

8.58 Rule 52 of the Rules of the Court of Session provides that:

> "No messenger shall be the servant of any particular master during the time he continues in office, under the pain of deprivation."

This rule which derives from the Lord Lyon's regulations of 1772 is not interpreted in practice as preventing a messenger from being the employee of another messenger. No equivalent enactment or rule of law applies to sheriff officers: the case of *Stewart* v. *Reid*[1] however can be taken as establishing that a sheriff officer cannot be the employee of a local authority or other employer under a commission in terms of which dismissal by the employer would entail deprivation of the commission. The case does not prevent a sheriff officer from being the employee of another sheriff officer where dismissal from employment would not terminate the commission.

8.59 We see nothing wrong in the practice of messengers-at-arms and sheriff officers employing other messengers and sheriff officers to execute citation and diligence. We understand that some officers do not wish to assume the responsibility of partnership status and it would be wrong to require them to do so.

8.60 While it has been suggested that the organisation of sheriff officers in

[1]1934 S.C. 69.

firms is in some way undesirable,[1] there was no dissent on consultation from our view that the practice should be retained. It is a long-standing and highly convenient feature of the independent contractor system. It allows for the sharing of costs, which may be heavy since officers often require to be backed up by a considerable office staff and have to pay for office premises, stationery and equipment, cars for use by officers, and other expensive overheads; in busy firms it allows the continuous manning of the firm's place of business by an officer while other officers are executing citation or diligence; it permits continuity of business during holidays, sickness and other interruptions in the work of particular officers; and it creates the opportunity for new officers to gain experience by working with other more experienced officers.

8.61 We **recommend:**

Provision should be made by act of sederunt to make it clear that an officer of court may be employed under a contract of service by another officer of court or firm of officers to execute citation and diligence, and that officers of court are permitted to organise themselves in firms.
(Recommendation 8.9; clause 101(1)(*a*).)

Supervision of officers

8.62 Jurisdiction to discipline officers of court for misconduct is generally speaking exercised only where there has been a complaint, perhaps by the individuals concerned or by Members of Parliament on behalf of their constituents. In the absence of complaints, checks on the conduct of officers in executing citation and diligence made by courts of their own accord are limited. In the diligence of charge, poinding and warrant sale, the poinding is reported to the court but the report does not set out the expenses charged. It is only in those rare cases where a sale is executed that a report giving a full account of the diligence expenses is made and taxed by the auditor of court. Arrestments in execution are never reported to the court and arrestments on the dependence are only reported in those rare cases when the arrestment is used prior to the service of a sheriff court initial writ. The only check on arrestment fees occurs in the few cases where there is an action of furthcoming or other action in which fees are claimed. Apart from these cases, the question whether diligence has been regularly executed may occasionally come before the court if the diligence is challenged by the debtor or a third party in other legal proceedings. [2]Thus the court has neither the duty nor the opportunity to audit the vast bulk of diligence fees and outlays charged by officers of court, and control by the courts of other aspects of execution of diligence is in practice restricted to irregularities which appear on the face of reports of poinding or sale submitted to them, or which are the subject of a specific complaint.

8.63 In raising the question of supervision of officers' conduct, we do not intend to imply that irregularities occur on any significant scale. We think it essential, however, that enforcement officers with power to enter dwelling-

[1]*Lawrence Jack Collections* v. *Hamilton* 1976 S.L.T. (Sh.Ct.) 18 at p. 20.

[2]For example, in an application for withdrawal of goods owned by a third party from a poinding, or in proceedings for reduction of a poinding, suspension of a charge, interdict of a sale of a third party's goods mistakenly poinded, or damages for wrongful diligence.

houses, to take possession of property, to arrest debtors (in civil imprisonment cases) and bankrupts, and to take possession of children (under child delivery orders) should be subject to independent supervision by the courts whose orders they execute. A reformed system should not simply leave it to people to complain to the courts; it is for the courts to act positively and of their own accord to ensure that standards of conduct are maintained. The law should give them the powers needed for this purpose. We adopt a similar approach to the audit of fees discussed later.[1]

Supervision of conduct

8.64 In Consultative Memorandum No. 51 we suggested[2] that sheriffs principal should have power, even in the absence of any complaint, to appoint a suitable person or persons to inspect at public expense the work of a sheriff officer or officers in executing diligence and to make enquiry as to paid extra-official activities. We proposed similar powers for the Court of Session in relation to messengers-at-arms.[3] These proposals were broadly accepted by those consulted, although reservations were expressed about random use of the power in the absence of complaint or reasonable suspicion of misconduct. While we appreciate the arguments behind these reservations, limiting inspections to officers against whom complaints were made would not represent any material improvement on the present system. The mere possibility, however remote, that officers of court could be subject to "spot checks" would help to ensure that standards of conduct were maintained. The sort of persons who we think might act as inspectors are senior officers of court, solicitors, accountants and former sheriff clerks. The sheriff principal should, however, have freedom to appoint any person with skills suitable to tackle the inspection in question, and we have framed our recommendation accordingly.

8.65 In the absence of special provision, the existence of parallel powers of the Court of Session and the sheriffs principal to conduct inspections would create difficulties, because most firms of officers consist of or include both messengers-at-arms and sheriff officers and because virtually all messengers-at-arms are also sheriff officers. It would be difficult in practice for an inspector to examine the work of an officer or firm of officers in relation only to their work as messengers or only to their work as sheriff officers with separate reports to the Court of Session and the sheriff principal limited to the work of officers in their separate capacities of messengers and sheriff officers. We suggest therefore that where the Court of Session decides that the work of a messenger or firm of messengers should be inspected, it should request the appropriate sheriff principal to appoint an inspector so that the inspection will also cover the officer's work as sheriff officer. Similarly where a sheriff principal wishes to appoint an inspector to examine the work of any officer holding both offices or a firm of officers that includes one or more messengers, the concurrence of the Court of Session should be requested so that the inspector would have authority to examine all the work. The report of the inspection should then be submitted to both the Court of Session and the sheriff principal.

[1]Paras. 8.67 to 8.73.

[2]Proposition 9 (para. 3.35).

[3]Proposition 12(4) (para. 4.9).

8.66 We **recommend:**

(1) A sheriff principal should have power, even in the absence of a complaint, to appoint a suitable person or persons to inspect the work of any sheriff officers in executing citation and diligence and to make enquiry as to paid extra-official activities and to report.

(2) Where an inspection would involve officers who are messengers-at-arms as well as sheriff officers, the sheriff principal should request the concurrence of the Court of Session to the inspection so that the work of the officers in both capacities can be examined. The person conducting the inspection should submit the report to the Court of Session and to the sheriff principal.

(3) The Court of Session should have power, even in the absence of a complaint, to direct a sheriff principal to appoint a suitable person or persons to inspect the work of any messengers in their capacity as messengers as well as sheriff officers and the work of sheriff officers associated in business with them. The person conducting the inspection should submit the report to the Court of Session and to the sheriff principal.

(4) The expenses of an inspection and report should be chargeable to the Exchequer.

(Recommendation 8.10; clause 104.)

Audit and taxation of diligence expenses

8.67 In the great majority of diligence cases, the fees and outlays charged by officers of court to the creditor, and recoverable by the creditor from the debtor, are not audited and taxed[1] by the court. There is mandatory provision for audit and taxation only in those few cases where a warrant sale has been executed.[2] Debtors and creditors have, it is thought, a legal right to require expenses to be taxed but few creditors and fewer debtors ever exercise that right. In our Consultative Memorandum No. 51,[3] we invited suggestions and discussed three options for extending the arrangements for audit, namely: (*a*) an audit by the auditor of court at and in respect of each and every step in diligence; or (*b*) an audit at two stages in the poinding process (on lodging the report of poinding and at the end of the proceedings following the grant of warrant of sale) and after an arrestment has been laid; or (*c*) a system of "spot checks" of diligence processes.

8.68 We have derived considerable assistance from comments made on our Consultative Memorandum. There was general agreement with our view that the first option should be rejected on the ground that it would entail a very considerable increase in the work load of court staff and officers of court. We also reject the second option, which would require arrestments to be reported to the court for the sole purpose of audit of fees. As the Law Society of

[1]"Taxation" and its verb "to tax" are the technical terms of Scots law denoting the procedure by which the auditor of court allows or disallows expenses and outlays claimed by one party to litigation or diligence from the other party, or by solicitors, messengers-at-arms or sheriff officers from the clients instructing them.

[2]This provision was made by Practice Notes of the sheriffs principal following criticisms made in *Cantors Ltd* v. *Hardie* 1974 S.L.T. (Sh.Ct.) 26 at p. 30 of the lack of such provision.

[3]Paras. 3.26 to 3.30; Proposition 8 (para. 3.30).

Scotland emphasised, the need to prevent abuses in this field has to be balanced against the need not to increase the expenses of the procedure borne by creditors and ultimately debtors. Such expenses would include not only the fees of the auditor of court but also the fee of an officer if required to attend at a taxation.

8.69 Our recommended solution is therefore a variant of the third option and involves four elements. First, reports of poindings, which are already reported to the courts, should contain an itemised statement of the fees, mileage charges and outlays incurred in serving the charge and executing the poinding, and these expenses should be liable to random checking by the auditor of court.

8.70 Second, we would adopt the helpful suggestion made by the Law Society of Scotland and the Society of Messengers-at-Arms and Sheriff Officers that every diligence form served on the debtor should state the fees, mileage charges and outlays incurred. The requirement to itemise diligence expenses would in itself help to prevent errors. The forms should notify the debtor and creditor (in non-technical language) of their right to have the fees and outlays taxed, but warning them that they may have to bear the cost of taxation. If the auditor of court discovered that overcharging had occurred, the court, acting on a report by the auditor of court, should have power to adjust the diligence expenses, to order repayment of fees or other sums found to have been overcharged and to order the officer to pay the expenses of audit and any subsequent procedure. If, however, the diligence expenses were found on audit to be correct, the debtor or creditor requesting the audit should be made liable for the audit fee. In the case of arrestments proceeding on a Court of Session decree, taxation of the expenses should be carried out by the Auditor of the Court of Session, and any orders as to liability for any amount overcharged, and the expenses of audit and further proceedings, should be pronounced by a judge of that court. The expenses of a poinding proceeding on a Court of Session decree, however, should be subject to taxation by the auditor of the sheriff court which supervises the poinding, and the relevant orders should be made by the sheriff of that court. We reject the idea that the expenses in every report of poinding should be audited, as this would place a considerable burden on the sheriff court staff (many thousands of poindings are executed and reported each year).[1] All reports of sale are remitted to the auditor of court for audit and taxation of the fees and outlays charged by the officer of court and the auditor's fee is chargeable against the debtor. We think the auditor's fee should be waived in these circumstances since the taxation is not carried out at the debtor's request.

8.71 Third, we have recommended[2] that the Court of Session and the sheriffs principal should have power to order an inspection of officers' work. This power could be used to make random checks on the fees being charged by the officer concerned since the inspector could check the fees while investigating other matters or an inspector could be appointed simply to carry out a spot check on fees. Spot checks should be carried out at public expense since neither the creditor nor the debtor would have any say in the selection of

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[1]See Chapter 2, Tables 2A (page 14) and 2B (page 19).
[2]Recommendation 8.10 (para. 8.66).

expenses to be audited. Liability to random spot checks would maintain officers' awareness of the need to calculate their fees correctly.

8.72 Finally, where evidence of overcharging by an officer emerged either through an investigation or audit of expenses, such evidence should be reported to the appropriate disciplinary authority. We think that deliberate overcharging would normally be treated as very serious misconduct, rendering the officer liable to severe penalties.[1]

8.73 We **recommend:**

(1) Provision should be made by act of sederunt that the report of a poinding should state the fees, mileage charges and outlays incurred in serving the charge and executing the poinding. The auditor of the sheriff court should have power, in the absence of any request by the creditor or debtor or remit by the court, to audit and tax selected expenses. Unless the audit was requested by the debtor or creditor, the audit expenses should be chargeable to the Exchequer.

(2) Any fee chargeable by the auditor of court in connection with audit and taxation of reports of sales of poinded goods should be waived.

(3) Provision should be made by act of sederunt that all diligence forms served on debtors should contain a detailed statement of the fees, mileage charges and outlays incurred in that step of the diligence.

(4) The debtor or creditor should, as at present, have a right to have diligence expenses audited and taxed. It should be provided by act of sederunt that for sheriff court diligence and poindings proceeding on a Court of Session decree, the audit should be carried out by the sheriff court auditor; for other Court of Session diligence the audit should be carried out by the Auditor of the Court of Session.

(5) Provision should be made by act of sederunt that where diligence expenses are found on audit to be stated correctly or understated, the debtor or creditor requesting the audit should be liable for the auditor's fee. Where the diligence expenses are found on audit to be overcharged, the sheriff (or in the case of an arrestment proceeding on a Court of Session decree, the Lord Ordinary) should have power to adjust the diligence expenses, to order repayment of fees or other sums found to have been overcharged, and to order the officer to pay the expenses of audit and subsequent procedure. The officer in question should also be liable to be reported to the appropriate disciplinary authority.

(6) A person appointed in terms of Recommendation 8.10 should have power to check diligence expenses charged by officers of court and to report evidence of overcharging. Deliberate overcharging should render the officer concerned liable to disciplinary proceedings for misconduct.
(Recommendation 8.11; clauses 61(7) and 104(1).)

Disciplinary proceedings

8.74 The functions of disciplining and controlling sheriff officers to ensure the maintenance of appropriate standards of conduct are vested in the sheriffs

[1]See Recommendation 8.12(4) (para. 8.84) for the range of penalties which could be imposed.

principal. In addition, sheriff officers may be liable in damages to a creditor or debtor for negligence or impropriety in the conduct of their business. The sheriffs principal have wide powers to suspend sheriff officers and to deprive them of office which have not been formally changed since at least the early 19th century when those powers were upheld in an unreported Court of Session case.[1] These powers have not previously been examined by any official report. A report in 1818[2] and later textbooks[3] state briefly that sheriff officers hold their office "during the pleasure of the sheriff principal" or "during their good conduct" or use a like formula. Although the sheriff principal's powers of discipline and dismissal are administrative in character and not subject to appeal, it is clear on general common law principles that these powers must be exercised in a judicial manner and, as such, are subject to the Court of Session's inherent jurisdiction to correct abuses of natural justice.[4]

8.75 The functions of disciplining and controlling messengers-at-arms are vested concurrently in the Lord Lyon and the Court of Session.[5] The procedure of the Lyon Court is governed by Rule 56 of the Rules of the Court of Session, but there are doubts as to the appropriate procedure in the Court of Session,[6] and in practice proceedings for suspension or dismissal take place in the Lyon Court. An appeal may be taken to the Court of Session against a sentence of the Lyon Court dismissing or suspending a messenger.[7]

8.76 In our Consultative Memorandum No. 51, we identified a number of defects (which had been brought to our attention by the sheriffs principal) in the powers of the sheriffs principal to deal with complaints of misconduct by sheriff officers.[8] The kinds of complaint are extremely varied and the sheriff principal requires to deal with them in different ways.[9] In most cases, the complaint can be disposed of without formal procedures, but there are exceptional cases in which disputed matters of fact require to be investigated and in which the difficulty of doing so, or the seriousness of the complaint,

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

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

[3]MacLaurin, *supra*; McGlashan, *Sheriff Court Practice* (4th. edn.; 1868) p. 89; Dove Wilson, *Sheriff Court Practice* (4th. edn.; 1891) p. 44; Wallace, *Practice of the Sheriff Court* (1909) p. 24; *Encyclopaedia*, vol. 13, p. 527; Dobie, *Sheriff Court Practice* (1952) p. 10.

[4]See *Malloch* v. *Aberdeen Corporation* 1971 S.C. (H.L.) 85 in which the majority of the House of Lords held that the power to dismiss a person from an office held during the pleasure of the appointing authority must be exercised only after giving the person an opportunity to be heard, and, in the absence of this safeguard, the dismissal was a nullity subject to reduction by the Court of Session.

[5]*Encyclopaedia*, vol. 9, pp. 622–7.

[6]Maclaren, *Court of Session Practice* (1916) p. 1114.

[7]R.C. 61.

[8]Para. 3.16.

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

makes it inappropriate that the sheriff principal should undertake the investigation personally. In such cases, the sheriff principal may experience difficulty in obtaining, and verifying the accuracy of, information in the absence of powers to appoint a suitable person to take precognitions and prepare a case against an officer and in the absence of any adversary procedure; in the absence of powers to cite witnesses or to order the recovery of documents; and in the absence of provisions for the recompense of witnesses in respect of travelling expenses. Moreover, in serious cases involving the possible dismissal of the officer, it seems inappropriate that the sheriff principal should be required to act as investigator, prosecutor and judge. In these respects, the procedures compare unfavourably with disciplinary procedures in the professions. While it is clear that the sheriffs principal can impose penalties of suspension or dismissal, it is not clear what other penalties can be imposed. It would be desirable to clarify and extend the range of penalties, for example by conferring express powers to fine, or to order repayment of collection charges or fees.

8.77 In Consultative Memorandum No. 51 we proposed[1] that the sheriff principal should have power, following a complaint not answered by the sheriff officer to the satisfaction of the sheriff principal, to appoint a solicitor to investigate the complaint, and where the investigation discloses evidence of misconduct, to present the case before the sheriff principal. The procedure should be adversarial in character and the officer should have fair notice of the case and the right to legal representation. Similar proposals were made in relation to complaints against messengers.[2] The same procedure should, we think, also be adopted where as a result of an inspection of the officer's work evidence of misconduct is disclosed. Where the inspection was carried out by a solicitor, the same person could subsequently be appointed as investigator and prosecutor. The procedure should also be used where suspicion of misconduct is reported to the sheriff principal or the Court of Session—for example by a sheriff dealing with litigation concerning taxation of expenses charged by an officer.

8.78 We do not think it would be advisable to attempt a comprehensive definition of misconduct, because the range of possible behaviour is too great. But it is important that misconduct should not be restricted to misconduct in the course of an officer's official duties. An officer of court has to enjoy the respect of the community in which he or she acts; the officer's extra-official business activities should therefore not be such as to render the officer unfit in the eyes of the community to hold office as a messenger-at-arms or a sheriff officer.

8.79 On consultation it was suggested that an officer should have the right to demand that an allegation of misconduct be disposed of by way of a formal investigation and disciplinary proceedings. We would reject this as formal proceedings might then have to be used for the most trivial of cases. The sheriff principal or the Court of Session should be able to deal with a minor infringement informally and give the officer a warning as to future conduct. But the powers of suspension, deprivation, fining and censure should be

[1]Proposition 7 (para. 3.17).
[2]Proposition 12(2) (para. 4.9).

available to the appropriate authority only if the misconduct is admitted by the officer in writing or is established in formal disciplinary proceedings. In this way minor cases of misconduct could be disposed of quickly and informally, yet officers accused of serious misconduct would be safeguarded.

8.80 Upon the view that few solicitors have sufficient knowledge of enforcement matters, it was suggested to us that a senior counsel should be retained as a permanent (but not full-time) investigator and procurator for the whole of Scotland, thus enabling that person to gain experience in such matters. Considerations of convenience and expense, however, suggest that a local solicitor should be appointed as and when needed.

8.81 In addition to the power to suspend an officer from practice or deprive the officer of office, the sheriff principal or the Court of Session should be able to censure the officer, impose a fine of not more than a prescribed amount, and, in the case of overcharging of fees and outlays, to order repayment of the sums overcharged. By analogy with the powers of the Scottish Solicitors' Discipline Tribunal, we suggest that the maximum fine that may be imposed on an officer of court should be £2,500.[1] The Secretary of State should have power to alter this figure by statutory instrument from time to time to reflect changes in the value of money.[2] In the unlikely event of the fine not being paid, we think that the court should have power, after giving an officer an opportunity to make representations, to grant a warrant for recovery of the fine by diligence, or to suspend or dismiss the officer.

8.82 Other aspects of disciplinary proceedings which require to be regulated either by statute or act of sederunt include empowering the sheriffs principal or the Court of Session to deal with the liability for the expenses of disciplinary proceedings, to cite witnesses and order the production of documents, and the publication of any sentence pronounced after a finding or admission of misconduct.

8.83 Diligence executed by an officer of court who has been suspended or deprived of office is null. In the case of messengers, the Lyon Court decree of suspension or deprivation takes effect from a specified date not earlier than the date of its publication,[3] but the position regarding sheriff officers requires clarification. A suspended or dismissed messenger incurs a small (and out-of-date) fixed penalty of £10 for each occasion on which he or she acts as messenger.[4] There is no fixed penalty for sheriff officers. A person who falsely claims to be an officer of court is guilty of the common law crime of fraud[5] if the pretence has some practical result (payment of the debt, for example) and could be charged with attempted fraud where the pretence was discovered before any practical result had been achieved. We prefer to deal with the problem by means of the existing common law rather than by the creation of new statutory offences. Moreover, the powers of the court on conviction for common law offences are sufficient to enable it to deal severely with an

[1]Solicitors (Scotland) Act 1980, s. 53(2).
[2]S. 53(8).
[3]R.C. 57.
[4]R.C. 57.
[5]*Donald MacInnes and Malcolm MacPherson* (1836) 1 Swin. 198.

officer who deliberately carried on practice after dismissal, which it might not be able to do if there was a fixed statutory penalty for each transgression.

8.84 We **recommend:**

(1) Where as a result of an inspection of the officer's work or a complaint or otherwise the sheriff principal has reason to believe that a sheriff officer may have been guilty of misconduct, the sheriff principal should have power to appoint a solicitor to investigate the matter, unless the officer admits the misconduct in writing or gives a satisfactory explanation of the matter. Misconduct should include conduct tending to bring the office of sheriff officer or messenger-at-arms into disrepute.

(2) If, following the investigation, the solicitor is of the opinion that there is a probable case of misconduct and sufficient evidence to support it, disciplinary proceedings should be brought at the instance of the solicitor before the sheriff principal. In such proceedings, the sheriff officer should be given fair notice of the allegations of misconduct and a right to legal representation. If the solicitor is of the opinion that there is no probable case of misconduct, or insufficient evidence, a report to this effect should be made to the sheriff principal.

(3) Similar powers to deal with allegations of misconduct involving messengers-at-arms should be conferred on the Court of Session.

(4) The Court of Session or the sheriff principal should have power following a written admission of misconduct or a finding of misconduct as a result of disciplinary proceedings as mentioned in paragraph (2) above to:

(*a*) deprive the officer of office;

(*b*) suspend the officer from practice;

(*c*) impose a fine of up to £2,500 or such other sum as may be prescribed by the Secretary of State;

(*d*) order repayment of fees, outlays and other sums overcharged; and

(*e*) censure the officer.

(5) It should not be competent to deal with an officer of court in any of the ways set out in paragraph (4) above unless the officer admits misconduct in writing or is found guilty of misconduct in disciplinary proceedings.

(6) The Court of Session after consulting the Advisory Council on Messengers-at-Arms and Sheriff Officers should make rules by act of sederunt regulating disciplinary proceedings against officers of court.

(7) The expenses of an investigation and disciplinary proceedings should be borne in the first instance by the Exchequer, but the Court of Session or the sheriff principal should have power at the termination of disciplinary proceedings to award expenses against either party. The party bringing the proceedings against the officer should be deemed, for this purpose, to be the Secretary of State.

(8) Where the officer is in default in payment of a fine imposed under paragraph (4)(*c*) above the court should have power to suspend or dismiss the officer or grant warrant for recovery of the fine by diligence. (Recommendation 8.12; clauses 101(1)(*h*), 105, and 106(4)–(8).)

Remits of disciplinary proceedings

8.85 Sheriff officers are entitled to execute a warrant, granted by a court within their commission area, outwith that area, and to execute within their commission area a warrant granted by a court outwith that area. Where an allegation of misconduct in the execution of such warrants is made it is necessary to regulate the question which sheriff principal should deal with it. In Consultative Memorandum No. 51 we proposed[1] that, as at present, the sheriff principal from whom the officer holds a commission should deal with the allegation either informally or by way of formal disciplinary proceedings, but may remit any part of the proceedings to the sheriff principal within whose sheriffdom the conduct in question had occurred so that that sheriff principal could conduct that part of the proceedings locally and report the results to the first mentioned sheriff principal. This proposal was generally approved on consultation, although one commentator suggested that allegations of misconduct should always be dealt with by the sheriff principal within whose sheriffdom they took place. We reject this suggestion because the sheriff principal holding disciplinary proceedings would not, in cases where the officer did not hold a commission in that sheriffdom, have power to suspend or dismiss the officer.

8.86 We think that the Court of Session should have similar powers to remit part of the proceedings to one or more sheriffs principal who would then report back to the Court of Session. Also, where the officer's alleged misconduct involved misconduct as a messenger-at-arms and as a sheriff officer (executing poindings before expiry of the days of charge for example) the Court of Session should be able to delegate the entire disciplinary proceedings to a sheriff principal so as to avoid the need for two sets of proceedings.[2] Conversely, a sheriff principal should be able to remit the disciplinary proceedings to the Court of Session where the allegations of the officer's misconduct while acting as a messenger were more serious than the allegations of misconduct as a sheriff officer.

8.87 We **recommend:**

(1) Provision should be made by act of sederunt that where allegations of misconduct arise in relation to the execution of a warrant granted by a court situated within the officer's commission area outwith that area, or a warrant granted by a court situated outwith the officer's commission area within that area, the allegations should (as at present) be dealt with by the sheriff principal from whom the officer holds a commission. But the sheriff principal should have power to remit any part of the proceedings to the sheriff principal within whose sheriffdom the alleged misconduct occurred, and the latter sheriff principal should report back to the former sheriff principal.

(2) Provision should be made by act of sederunt empowering the Court of Session to remit any part of proceedings dealing with allegations against a messenger to the sheriff principal within whose sheriffdom the alleged

[1]Proposition 10(3) (para. 3.41).

[2]In terms of Recommendation 8.15 (para. 8.91 below), suspension from practice or deprivation of office as sheriff officer will automatically result in suspension or deprivation of that officer as messenger.

misconduct arose. In addition, where an officer's alleged misconduct involves misconduct as a messenger-at-arms and as a sheriff officer, the Court of Session should have power to order that disciplinary proceedings be held by the sheriff principal from whom the officer holds a commission as sheriff officer, and the sheriff principal should have power to remit disciplinary proceedings to the Court of Session.
(Recommendation 8.13; clause 101(1)(*h*).)

Effect of criminal convictions

8.88 In line with our recommendation[1] that misconduct rendering an officer liable to suspension from practice or deprivation of office should not be restricted to misconduct in the course of official duties, we suggest that conviction by a court of any crime or offence should also render an officer liable to the same penalties. Convictions which occurred before the granting of a commission to an officer should count just as much as convictions afterwards, unless they had been disclosed in the officer's application for a commission. We think it is better to give the Court of Session and the sheriffs principal a wide discretion rather than attempt to produce a statutory list of the various crimes and offences that might lead to suspension or deprivation. Moreover, even conviction of a minor offence might merit a serious penalty if it was deliberately concealed from the sheriff principal when the officer applied for a commission. However, the Rehabilitation of Offenders Act 1974 should apply so that an officer could not be suspended or deprived on the basis of a conviction which was spent, or be obliged to disclose a spent conviction in an application for a commission as a messenger-at-arms or sheriff officer.

8.89 We **recommend:**

The sheriff principal having disciplinary authority over a sheriff officer should have power to suspend the officer from practice or deprive the officer of office if the sheriff principal becomes aware that the officer has been convicted of any crime or offence unless the conviction was disclosed in the application by the officer for a commission or is spent in terms of the Rehabilitation of Offenders Act 1974. Similar powers should be conferred on the Court of Session in relation to messengers-at-arms.
(Recommendation 8.14; clause 106(1)–(3).)

Effect on other commissions

8.90 Many sheriff officers hold commissions from more than one sheriff principal and all practising messengers-at-arms are at present, and under our recommendations will be required to be, sheriff officers. It is therefore necessary to consider the effect which disciplinary sanctions imposed by one disciplinary authority will have on the officer's commissions granted by other authorities. In the light of consultation,[2] in particular comments made by the Society of Messengers-at-Arms and Sheriff Officers, we recommend that suspension or deprivation of one commission should result in the suspension or deprivation of all commissions held by the officer in question. Suspension

[1]Recommendation 8.12(1) (para. 8.84) above.
[2]In Consultative Memorandum No. 51, Propositions 7(5) (para. 3.17) and 12(3) (para. 4.9).

or deprivation will in terms of Recommendation 8.12(5) be competent only where formal disciplinary proceedings have been held or where the officer has admitted the misconduct in writing. Suspension or deprivation of all other commissions should be automatic on the fact of suspension or deprivation being intimated to the Lord Lyon or other sheriffs principal (as the case may be) who would thereafter make amendments to the roll of messengers or sheriff officers. Any other penalty (such as a fine or a censure) imposed on an officer should also be intimated to the other authorities from whom the officer holds commissions.

8.91 We **recommend:**

(1) Any penalty imposed by one disciplinary authority on an officer for misconduct which has been admitted in writing or established as a result of formal disciplinary proceedings should be intimated to all other authorities from whom the officer holds a commission.

(2) Where a suspension from practice or deprivation of office is intimated to another authority it should be obliged to suspend the officer from practice or deprive the officer of the commission held from that authority. (Recommendation 8.15; clause 107.)

Section D. Standards of conduct

8.92 We now turn to discuss the possible content of rules regulating the standards of conduct including the regulation of debt collection,[1] a subject which in recent years has attracted public concern.[2] We recommended above[3] that the Court of Session after consultation with a new consultative body, to be called the Advisory Council on Messengers-at-Arms and Sheriff Officers, should enact rules regulating the conduct of officers. Most of our recommendations in this Section may be read as submissions for consideration by the Court of Session and the new Advisory Council for enactment by act of sederunt rather than by central government for enactment in primary legislation. However, the provisions dealing with diligence and citation executed by an officer having an interest in the proceedings should, in our opinion, be in statute, since the effect of a prohibited interest is to annul the acts of the officer.

8.93 There are two main reasons why a set of rules on conduct is necessary. First, standards as presently formulated are too vague in certain respects to offer satisfactory guidance to officers of court. Second, there has been recent public questioning of certain practices which met acceptance in the past and it seems desirable that rules relating to these and other aspects of the duties of officers of court should be formulated in the light of comment and criticism

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[1]Debt collection is used to mean the collection of money from debtors, whether or not diligence is done to enforce payment.

[2]See e.g. the Sheriff Officers and Warrant Sales (Scotland) Bill 1980 clauses 4 and 6 (introduced under the ten-minute rule Bill procedure by Mr Dennis Canavan, M.P.). Clause 4 sought to prohibit officers benefiting from their involvement with debt collection agencies and Clause 6 would have required the Secretary of State to prescribe a code of conduct for officers by statutory instrument.

[3]Recommendation 8.5 (para. 8.34).

by interested parties.[1] A set of rules on conduct so promulgated should apply to both messengers-at-arms and sheriff officers.

Enforcement where officer has an interest

8.94 We deal first with rules prohibiting officers from executing citation or diligence in which they, or persons closely connected with them, have an interest. Interest here means an interest in the subject-matter of the proceedings or decree rather than an interest in the fees for executing citation or diligence. In the case of diligence to enforce payment of a debt, interest means an interest as creditor in the debt itself. The question of an interest in the commission for recovering the debt as the creditor's agent is dealt with later.[2]

Personal interest

8.95 It is a long established rule that officers of court are not entitled to execute diligence to enforce debts due to themselves and that any diligence so executed is null.[3] The basis of this rule, which was accepted by those consulted,[4] is that officers hold a public office which they must discharge in an independent and impartial manner. Officers should not enforce their own debts lest debtors and members of the public think that excessive diligence might be done. This rule should in our opinion be extended to citation and diligence unrelated to debt enforcement—such as service of an interdict or enforcement of a delivery order—where the officer has a personal interest. All such diligence and citation should not only be null, but an officer who knowingly acts where a personal interest exists should be liable to disciplinary proceedings for misconduct.

8.96 We **recommend:**

(1) Any citation or diligence executed by an officer of court should be null where the subject matter of the diligence or proceedings is one in which the officer has an interest as an individual.

(2) For the purposes of this recommendation and Recommendations 8.17 and 8.18 an officer who knowingly executes citation and diligence which is null should be liable to disciplinary proceedings for misconduct.
(Recommendation 8.16; clause 109(1)(*a*).)

Interest of officer's associates or relatives

8.97 In Consultative Memorandum No. 51, we suggested[5] that an officer should be disqualified from enforcing a debt due to that officer's wife or husband, business partner, employer or employee. Unless the rules prohibiting an officer from acting were extended in this way, one of the partners of a firm

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

[2]Para. 8.111.

[3]*Dalgliesh* v. *Scott* (1822) 1 S. 506; see also R.C. 50 (messengers-at-arms only).

[4]Consultative Memorandum No. 51, Proposition 15 (para. 5.13).

[5]Proposition 17 (para. 5.19).

of officers could purchase debts for enforcement and instruct the other partners or employee officers of that firm to execute citation and diligence. We also suggested that officers should be disqualified from enforcing debts due to their wives or husbands, since officers will often have as great an interest in a debt due to them as in their own debts. We were not in favour of extending the prohibition against enforcement of spouses' debts to other defined close family relatives because an officer might not derive any benefit from enforcing a close relative's debt, and because an officer determined to evade the spirit of the prohibition could get a relative outwith the defined class to run the debt purchase business. Instead we proposed that an officer should be disqualified from enforcing a debt due to another person only if the officer derived a pecuniary benefit other than by way of diligence fees or a commission for collection.

8.98 Although the above approach was accepted by those consulted, we are now of the opinion that it would be better to define in legislation the class of people whose debts an officer should not be entitled to enforce. As citation and diligence executed by an officer in breach of the statutory rules is to be null, the rules themselves must be clear and it should not be necessary to carry out further investigations as to an officer's precise financial arrangements with associates or family in order to establish the nullity or validity of diligence.

8.99 On consultation one body suggested that, because of the scarcity of officers in remote areas, the sheriff principal should be empowered to authorise a sheriff officer to enforce a particular debt due to a relative or associate which the officer would otherwise be prohibited from enforcing. We doubt whether such an additional provision is necessary; it would in most cases be easier to instruct another officer than apply to the sheriff principal for authorisation.

8.100 We **recommend:**

(1) Any citation or diligence executed by an officer should be null where the debt sought to be enforced is due to a business associate or a relative of the officer.

(2) In this recommendation and in Recommendation 8.18 "business associate" means a co-director, partner, employer, employee, agent or principal (other than the principal instructing the citation or diligence) and "relative" means wife or husband, and parent, grandparent, child, grandchild, brother or sister by blood or affinity.
(Recommendation 8.17; clause 109(1)(*b*), (2), (3) and (4).)

Interest of connected firm or company

8.101 As a result of a recent series of sheriff court cases,[1] it is clear that where an officer of court is a director of a company, diligence effected by that officer to enforce a debt due to the company is invalid. It is not clear, however, whether this rule extends to cases where the officer has a controlling interest

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

or a substantial stake in the company. It would be pointless to prohibit an officer from enforcing personal debts if the prohibition could be avoided by setting up a company or partnership to purchase debts which the officer then enforced by diligence. In our Consultative Memorandum No. 51, therefore, we proposed that an officer who was a director of a company or a partner of a firm should not be entitled to execute diligence to enforce a debt due to that company or firm.[1] This proposition proved uncontroversial but the question whether officers should be prohibited from enforcing a debt due to a company or firm in which they have an interest other than as director or partner is more difficult. We think a distinction should be drawn between companies and firms which purchase bad debts for enforcement and those which do not. The rules on disqualification from enforcement of debts due to debt purchase companies ought to be stricter in order to prevent officers using such companies as a means of evading the prohibition against officers enforcing their own debts. In Consultative Memorandum No. 51, we tentatively suggested[2] that where a company or firm was involved in debt purchase, any interest of the officer, however small, should lead to disqualification. While the majority of those consulted agreed, we believe on reflection that this rule is too restrictive. Since many banks or other financial organisations are involved in debt purchase (although this normally forms only a small proportion of their business) the proposal would prevent an officer investing in many publicly quoted financial organisations or indeed in any unit trust which included such an organisation in its portfolio. We think therefore that the disqualification by reason of an interest however small should refer only to companies or firms whose principal business was the purchase of debts for enforcement.

8.102 As regards companies which do not purchase debts, we expressed no firm opinion but asked for views[3] as to whether an officer should be disqualified from acting by a pecuniary interest and if so, how substantial that interest ought to be. The variety of comments received shows the difficulty of framing practical rules. The mischief to be struck at is that of an officer acting for a company or firm in which he or she has such an interest that its debts are effectively to some extent the officer's debts, as where the officer has a controlling interest.[4] An officer should, we think, also be prohibited from acting where the officer's personal interest in a company or firm, when aggregated with the interests of relatives or business associates, amounts to a controlling interest.

8.103 In Consultative Memorandum No. 51, we suggested[5] that it would be necessary to extend the prohibition against enforcement by an officer for a company or firm in which the officer has an interest to cases where the debt is due to a company or firm in which the officer's spouse, partner, employer or employee has an interest; otherwise the rules could be evaded by an officer placing a debt purchase business in the name of his or her spouse or business associate. No adverse comments were made by those consulted, but we now

[1]Proposition 16(1)(*a*) (para. 5.15).
[2]Proposition 16(1)(*b*) (para. 5.15).
[3]Proposition 16(2) (para. 5.15).
[4]Controlling interest is used to mean control of a majority of the votes in the company: see Finance Act 1975, Sched. 4, para. 13(7).
[5]Proposition 18 (para. 5.20).

think that the prohibition should be extended to cases where certain defined close relatives of the officer have an interest in the business.

8.104 We **recommend:**

(1) Any citation or diligence executed by an officer should be null where the debt sought to be enforced is due to a company or firm and the officer:

(*a*) has a pecuniary interest (however small) in that company or firm and the principal business of that company or firm is the purchase of debts for enforcement; or

(*b*) is a director or partner of that company or firm or holds personally or along with a business associate or a relative a controlling interest.

(2) Any citation or diligence executed by an officer should be null where the debt or obligation sought to be enforced is due to a company or firm and a business associate or a relative of the officer:

(*a*) is a director or partner of that company or firm or holds a controlling interest; or

(*b*) has a pecuniary interest (however small) in that company or firm and the principal business of the company or firm is the purchase of debts for enforcement.

(Recommendation 8.18; clause 109(1)(*b*), (2), (3) and (4).)

Extra-official activities

8.105 Rule 52 of the Rules of the Court of Session prohibits a messenger-at-arms on pain of deprivation from being "the servant of any particular master".[1] There is no equivalent enactment for sheriff officers, and while employment under a contract of service which affects the officer's official functions is prohibited at common law,[2] it is not clear whether such a contract is unlawful if it does not affect those functions. There is no enactment or rule of law prohibiting either a messenger or sheriff officer from engaging in a trade, profession or business as a self-employed person. Most officers of court are engaged more or less full-time in performing their official functions.[3] The main fields outside their official duties in which officers are regularly engaged appear to be debt collection; work as enquiry agents; and the service of statutory notices, such as notices under the Companies Acts, where the officers are not acting in their official capacity but merely as reliable witnesses to establish that the notice has been duly received.

8.106 Leaving aside debt collection to which we revert below,[4] the law is in need of some clarification and reform. First, the same provisions should apply to messengers and sheriff officers. Second, it seems to be merely an historical

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[1]We have recommended above that this rule should be changed to allow employment of an officer of court by another officer of court: Recommendation 8.9 (para. 8.61).

[2]See *Stewart* v. *Reid* 1934 S.C. 69 (referred to at para. 8.58 above); *Mackay* v. *Henderson* 20 Dec. 1832, F.C. (contract of employment held unlawful where officer was to act as messenger and sheriff officer for a small salary in lieu of the fees which he was to pay over to the employer).

[3]The survey conducted at the end of 1979 showed that of 121 officers of court who were actively engaged as sheriff officers, 109 stated that they were engaged full-time, 10 worked part-time and two as consultants.

[4]Paras. 8.111 to 8.125.

accident that there is a limitation on officers seeking employment under certain types of contract of service, but apparently no rule as to contracts of services. We do not think that officers of court should be prevented from carrying on all paid extra-official activities. Given that the officers are independent contractors, a complete prohibition of extra-official activities would be an unwarranted restriction on their business freedom and might affect the viability of some officers' businesses especially in rural areas. The Law Society of Scotland observed that "severe practical difficulties would arise in many parts of Scotland if sheriff officers were not entitled to conduct a debt collection business, subject to safeguards; conduct enquiries; and act as certifiers of service of documents".

8.107 On consultation, there was general agreement with our view that there should be restraints on extra-official activities, where they are incompatible with the nature and functions of the office of messenger-at-arms or sheriff officer, (if, for example, they adversely affect the officer's independence and duty to serve all those who instruct diligence to be done[1] or derogate from the dignity of the office or the standing of the officer) or hinder an officer from acting when instructed.[2] We think it would be impracticable, however, to frame comprehensive statutory rules which set out in precise detail what extra-official activities are prohibited; and it is probably undesirable to seek to do so since circumstances vary and what might be permissible in rural areas might be prohibited in cities.

8.108 In Consultative Memorandum No. 51,[3] we proposed therefore that the sheriff principal should have power to authorise in relation to a particular officer any extra-official employment, trade, profession or business, and that the officer should be permitted to engage only in such of these extra-official activities as had been so authorised. There was general agreement with this proposal though one body thought that certain activities should be expressly prohibited. A modification suggested by one body was that officers should have a general authorisation to conduct enquiries as enquiry agents, and to serve and certify service or intimation of legal documents, without applying for a specific authorisation. We accept both of these helpful comments. The scheme we now recommend would consist of three elements. First, the Court of Session should have power (after consulting the proposed Advisory Council on Messengers-at-Arms and Sheriff Officers) to prohibit by act of sederunt specified extra-official activities. Second, the Court of Session should have a similar power to prescribe a list of activities (such as serving statutory notices) that any officer would be allowed to undertake for remuneration without having to seek authority from the sheriff principal. Third, an officer who wishes to undertake for remuneration any activity not specifically prohibited or authorised should be obliged to apply to the sheriff principal from whom the officer holds a commission for authority to do so. With regard to the last category there should be a presumption of freedom so that the sheriff principal should refuse to grant authority only if of the opinion that

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

[2]R.C. 48 (messengers).

[3]Proposition 14 (para. 5.9).

the activity in question would be incompatible with the functions of the office of an officer of court. Both the Court of Session and the sheriffs principal should be able to impose conditions on the undertaking of authorised extra-official activities; for example an officer might be allowed to run a business as an auctioneer provided the officer remained available at all reasonable times to receive and execute instructions for diligence. Since all practising messengers are, and would under our recommendation[1] require to be, sheriff officers, authorisation given by sheriffs principal would suffice without the need for a separate authorisation system for messengers.

8.109 We also proposed[2] that the penalty for performance of prohibited or unauthorised extra-official activities should be at the discretion of the sheriff principal. Only one body, which was in favour of fixed statutory penalties, dissented on consultation. We remain of the view that performance of prohibited or unauthorised extra-official activities is best treated as misconduct which, if established in disciplinary proceedings or admitted in writing, renders the officer liable to penalties ranging from censure to deprivation of office at the discretion of the sheriff principal.

8.110 We **recommend:**

(1) The Court of Session should have power, after consulting the Advisory Council on Messengers-at-Arms and Sheriff Officers, to specify by act of sederunt in relation to officers of court:

(*a*) extra-official activities which are prohibited; or

(*b*) extra-official activities undertaken for remuneration which are allowed or allowed subject to conditions specified in the act of sederunt.

(2) An officer of court should be prohibited from undertaking for remuneration any extra-official activity (other than those specified in terms of paragraph (1)(*a*) or (*b*) above) unless the sheriff principal on application by the officer grants authority in respect of the activity in question. The sheriff principal should be required to grant such authority unless it appears that the activity would be incompatible with the nature and functions of the office of officer of court, and such authority may be granted subject to such conditions as the sheriff principal thinks fit.

(3) Records should be kept by sheriff clerks of authorised extra-official activities in respect of each officer.

(4) The performance of prohibited or unauthorised extra-official activities should render the officer concerned liable to disciplinary proceedings for misconduct and the penalty should be within the discretion of the sheriff principal.

(5) If, as we propose at Recommendation 8.8(5), all messengers-at-arms are required to be sheriff officers, it would be unnecessary to provide for separate authorisations by the Court of Session of the extra-official activities of messengers-at-arms.

(Recommendation 8.19; clause 101(1)(*e*) and (*f*), (2) and (3).)

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[1]Recommendation 8.8(5) (para. 8.56).
[2]Proposition 14(5) (para. 5.9).

Debt collection by officers

8.111 As a general rule, debt collection is not part of the official functions of an officer of court.[1] The question whether an officer may act as a debt collector and as officer in the same case has been discussed in judicial decisions. In *British Relay Ltd* v. *Keay*[2] the sheriff held the practice incompetent, but in *Lewis, Petitioner*[3] the sheriff principal took the view that an officer's interest in a debt collection agency does not of itself disqualify the officer from executing diligence to enforce the agency's debts, but may do so if, in the circumstances of a particular case, it gives rise to a loss of public confidence in the officer's independence and impartiality. The sheriffs principal do not in practice treat an interest in a debt collection agency as a disqualification.[4] In considering the question of debt collection, a distinction has to be drawn between debts not yet constituted by decree and debts which have been so constituted and, as regards the category of pre-decree collection, between cases where officers use their official designations in debt collection and cases where they collect as individuals without any use of that designation.

8.112 *Pre-decree debt collection as officers.* In the case of pre-decree debt collection, it appears that an officer is not expressly prohibited by law from demanding payment in the capacity of officer of court, but the Office of Fair Trading has refused to issue licences to officers entitling them to engage in debt collection using their official designations.[5] In Consultative Memorandum No. 51 we proposed[6] that officers of court should be expressly prohibited from using their official designations when collecting pre-decree debts. Only one commentator disagreed, arguing that, by long-standing tradition, sheriff officers had engaged in debt collection and this should not be interfered with. It seems clear, however, that whenever officers use their official designations, the public should be entitled to assume that they are acting in their official capacity. An officer's use of the official designation when collecting debts prior to decree is an abuse of public office: it may deceive debtors into thinking that the demand has the authority of the court or that decree has already been granted in favour of the creditor.

8.113 We **recommend:**

> An act of sederunt should be made expressly prohibiting officers of court from purporting to act in that capacity when collecting debts before the debts have been constituted by decree.
> (Recommendation 8.20; clause 101(1)(*e*).)

8.114 *Unofficial pre-decree debt collection.* Many officers of court engage in pre-decree debt collection, either without using their official designations, or

[1]Sheriff officers are however empowered to receive payment after poinding on summary warrants for taxes. Taxes Management Act 1970, s. 63(3); Value Added Tax (General) Regulations 1980, reg. 59(*c*).

[2]1976 S.L.T. (Sh.Ct.) 23.

[3]Unreported, 3 February 1978, Sheriffdom of North Strathclyde at Paisley.

[4]A Practice Note has been made in the Sheriffdom of Lothian and Borders (1 November 1978) requiring an applicant for a commission as sheriff officer to disclose any interest (either personal or of a close relative) in a debt collection agency. The applicant must also undertake to inform the sheriff principal of any intention to acquire such an interest in the future.

[5]Consumer Credit Act 1974, Parts III and X.

[6]Proposition 19 (para. 5.27).

by acting through a debt collection agency which they control, or in which they have a substantial interest.[1] In view of criticisms sometimes made of this practice, it may be helpful if we summarised the arguments on both sides.

8.115 The arguments in favour of allowing officers of court to continue to collect debts before decree, or to operate debt collection agencies, are as follows.

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

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

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

(4) Debt collection by specialist agencies is not by itself illegal and indeed may well be highly desirable because collection by the agency saves creditors and debtors the high cost of debt actions and diligence, and because such agencies provide a valuable service which the creditors themselves are unwilling or unable to undertake.

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

8.116 The disadvantages of allowing officers to be involved in pre-decree debt collection may be summarised as follows:

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

(2) Where officers act as debt collectors before decree it can no longer be said that they are merely carrying out a function which they cannot refuse to perform; rather they are voluntarily taking the side of the creditor against the debtor.

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

[1]See Consultative Memorandum No. 51, para. 5.31.

(4) Where officers collect debts using their own name without their official designations, there is some risk that debtors with local knowledge will think they are acting in their official capacity.

8.117 In Consultative Memorandum No. 51, we invited views as to whether officers should continue to be allowed to collect debts before decree, either as individuals or through debt collection agencies.[1] Almost all of those who commented were of the opinion that officers of court should continue to be allowed to collect pre-decree debts. It seems to us that the disadvantages are more theoretical than real at the present time and are outweighed by the advantages.

8.118 If, as we recommend, an officer's involvement in a debt collection agency is to be subject to scrutiny and authorisation, the question then arises whether authorisation should also be sought where persons closely connected with an officer are involved. In Consultative Memorandum No. 51 we suggested[2] limiting such connected persons to the officer's spouse, near relatives or business associates. Most of those consulted agreed. However, on reconsideration, we have come to the view that authorisation should be sought from the sheriff principal in respect of each and every agency for which the officer proposes to act. Where neither the officer nor any connected persons have an interest in the agency we expect that authorisation would normally be granted, unless for example the volume of work might interfere with the officer's official functions. The officer should be required to disclose in the application for authorisation any personal interest or any interest held by a near relative or business associate in the agency in question.

8.119 Where an officer has been authorised to collect debts on behalf of a particular collection agency, that officer should be entitled to execute citation and diligence on instructions from that agency, provided the agency is interested in the debts only as collector and not as creditor.[3]

8.120 Some debt collection agencies make demands for payment from debtors of collection charges which are not legally enforceable. On consultation,[4] there was no dissent from our view that officers should not be permitted to make such demands.

8.121 We **recommend:**

An act of sederunt should be made to the following effect:

(*a*) Officers of court should be entitled to collect debts not constituted by decree provided they have obtained prior written authorisation from the sheriff principal. An officer should be required to disclose any personal interest or any interest held by a member of his or her family or by a business associate in an organisation when applying for authority

[1]Proposition 20 (para. 5.35) where we suggested that, like any other extra-official activity, debt collection before decree should be permitted if the written authorisation of the sheriff principal were obtained.

[2]Proposition 20 (para. 5.35).

[3]Paras. 8.94 to 8.104 above deal with debt purchase agencies.

[4]Consultative Memorandum No. 51, Proposition 20(5) (para. 5.35).

to collect debts on behalf of that organisation, and any subsequent acquisition of an interest.

(*b*) Sheriff clerks should keep in respect of each officer a register of authorisations granted and the disclosed interests of officers, members of their family and their business associates in organisations whose debts the officers are authorised to collect.

(*c*) An officer who collects debts without authorisation by the sheriff principal, or who demands payment from the debtor of a collection charge which is not legally enforceable, should be liable to disciplinary proceedings for misconduct.
(Recommendation 8.21; clause 101(1)(*f*), (2) and (3).)

8.122 *Post-decree debt collection*. The collection of debts by officers of court after decree has been pronounced against the debtors raises different issues. Since collection makes diligence unnecessary, it is reasonable and practicable to allow officers to collect debts in the course of, or as a preliminary to diligence. It would be absurd to prevent an officer from accepting payment of a debt on the creditor's behalf where the debtor tendered payment in response to, or to prevent, diligence. Moreover, collection by the officer is often convenient for both creditors and debtors. The officer is often in direct contact with the debtor as well as the creditor, and it may be easier for the debtor to make payment to the officer. Post-decree debt collection by officers in their official capacity does not attract the same objections as have been made of pre-decree collection. Thus debtors will not, because of the officer's involvement, be misled into thinking that decree has already been granted since that is in fact the case. Once decree has been granted the officers are merely collecting sums which the court has found to be due, whereas collection of unconstituted debts by officers in their official capacity identifies officers with creditors in a way which is incompatible with the status of officers as holders of a public office. On the other hand, the position is not entirely satisfactory. An officer who receives payment after decree is acting as the creditor's agent and not in an official capacity[1] so that creditors and debtors are not protected by the officer's bond of caution. Probably most debtors and creditors are unaware of this.

8.123 In Consultative Memorandum No. 51, we suggested[2] that post-decree debt collection should become part of the official functions of officers of court, whose bonds of caution would be extended to cover debts collected in pursuance of decrees, and that instructions to an officer to do diligence should be taken to include authority to receive payment, unless the contrary was clearly stated. These proposals were welcomed by all commentators, and we would extend the proposals to cover sums recoverable under a summary warrant for rates or tax arrears. We do not propose, however, that the collection charges payable by the creditor to the officer of court should be recoverable by the creditor from the debtor. Furthermore, our recommendation is not intended to mean that collection charges should be regulated or

[1]In *Ayr County Council* v. *Wyllie* 1935 S.C. 836 Lord Blackburn remarked (at p. 844) that "the determination of whether a sheriff officer is on any particular occasion acting as collector or as sheriff officer may come to depend on distinctions which are almost ludicrous".
[2]Proposition 21 (para. 5.45).

prescribed by act of sederunt. Such regulation seems unnecessary. In these respects collection charges would differ from diligence fees.

8.124 We also invited views on whether it would be sufficient protection for creditors and debtors that in the event of embezzlement by the officer, compensation could be recovered from the officer's cautioner or whether officers should be required, like solicitors and many other professions, to keep separate accounts of clients' money which were subject to regular inspection and audit. Almost all of those consulted were in favour of audited clients' accounts. While debtors and creditors might be adequately protected by officers' bonds of caution, it seems reasonable and desirable that if post-decree debt collection is to be an official function, officers should be required to keep clients' accounts which are regularly audited. The Society of Messengers-at-Arms and Sheriff Officers have for some time advised its members to keep clients' accounts,[1] but cannot enforce this as a requirement since the Society can only make recommendations for good practice by its members. The details of the relevant rules should be settled by act of sederunt made by the Court of Session after consulting the Advisory Council on Messengers-at-Arms and Sheriff Officers. We put forward the suggestion, however, that audits should be carried out annually with reports being made to sheriffs principal, and that generally an inspector appointed to examine the work of specified officers of court[2] should have power to examine their clients' accounts.

8.125 We **recommend:**

An act of sederunt should be made:

(*a*) providing that the collection of debts which have been constituted by decree or are enforceable under a summary warrant for rates or taxes should form part of the official functions of officers of court, and the officer's bond of caution should be extended to cover the collection of such debts as well as diligence. In the absence of contrary instructions, instructions to an officer to execute diligence should be deemed to include a mandate to receive payment of, or on account of, the debt. Charges for collecting such debts should not, however, be recoverable by the creditor from the debtor and should not be regulated by act of sederunt; and

(*b*) requiring officers of court to keep accounts of money collected on behalf of creditors and to have these accounts audited periodically.
(Recommendation 8.22; clause 101(1)(*d*), (*i*), (*j*) and (*k*).)

Duty to act when instructed

8.126 As the counterpart of the exclusive privilege of executing diligence, an officer must act impartially for any instructing creditor who tenders the prescribed fees.[3] An officer's duty to execute diligence when instructed ensures

[1]The "Code of Professional Ethics" of the Society provides that all members of the Society "who are self-employed or in partnership must maintain proper business books and a client's account, in accordance with normal accounting procedures".

[2]Recommendation 8.10 (para. 8.66) above.

[3]R.C. 48 (messengers-at-arms); *Stewart* v. *Reid* 1934 S.C. 69 (sheriff officers).

that court orders, however unpopular locally, are executed and it also serves to protect officers from criticism in that:

> "Reasonable persons, however strong their feelings, recognise that the officer is only engaged in the impersonal discharge of an official duty which he cannot refuse to perform."[1]

8.127 An officer may be liable in damages if undue delay occurs in acting on instructions. What constitutes undue delay depends on the circumstances, but in general the officer's duty is to execute diligence at once.[2] An officer instructed to do immediate diligence must act at once, but where the officer is given a discretion (such as when instructed to allow the debtor time to pay), the officer's liability will depend on the extent to which the creditor's instructions were followed. Rule 49 of the Rules of the Court of Session requires a messenger to acknowledge receipt of instructions within 24 hours on pain of a fine of £2. No equivalent enactment applies to sheriff officers.

8.128 Although an officer has a duty to act when instructed, the officer may ask for the fees to be tendered or secured before accepting instructions. It appears that in practice a solicitor instructing an officer may become personally liable in the first instance for the officer's fees,[3] but we propose no change in the law on this topic.

8.129 In Consultative Memorandum No. 51 we proposed[4] that the existing law and practice should be restated in rules of conduct applying uniformly to both messengers and sheriff officers. No adverse comments emerged on consultation. Breach of the rules—for example by failure to carry out diligence without undue delay—should as at present subject the officer to liability to damages at the instance of the creditor. But a breach should, we think, also render the officer concerned liable to disciplinary proceedings.

8.130 We **recommend:**

(1) New rules of conduct should be made by act of sederunt applying to both messengers-at-arms and sheriff officers, requiring them to execute citation and diligence when instructed, but entitling an officer to refuse to act if:

(*a*) the prescribed expenses, or a reasonable estimate thereof, are not tendered or secured by or on behalf of the instructing creditor; or

(*b*) disqualified from acting in terms of Recommendations 8.16 to 8.18 above; or

(*c*) it is not reasonably practicable for the officer to carry out the instructions because of pressure of other business or for other reasonable cause and the officer intimates this forthwith to the instructing solicitor or creditor.

(2) Without prejudice to the existing civil liability of officers to creditors, breach of the rules in paragraph (1) above should render the officer

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[1] *Stewart* v. *Reid supra* per Lord Sands at p. 75.
[2] Graham Stewart, pp. 821–2.
[3] Maclaren, *Court of Session Practice* (1916) p. 1115.
[4] Propositions 13 (para. 5.5) and 24 (para. 5.56).

liable to disciplinary proceedings for misconduct.
(Recommendation 8.23; clause 101(1)(*c*).)

Relationship between officers and solicitors

8.131 In Consultative Memorandum No. 51[1] we drew attention to the danger that the division of functions between officers and solicitors may become blurred, especially where an officer holds a general mandate from a creditor to act as an agent, collect the debt, instruct a solicitor, and execute citation and diligence as necessary. Thus, for example, writs which should be prepared by solicitors might be prepared by officers and merely signed by solicitors whose fees would be charged against the debtor for work in fact done by officers or their staff.[2] This and other potential abuses are struck at by the Solicitors (Scotland) Act 1980.[3] Contraventions of these provisions are more likely to occur where officers and solicitors share the same business premises.

8.132 We sought views on whether officers of court should be prohibited from sharing business premises with solicitors and on whether the provisions of the Solicitors (Scotland) Act were adequate to ensure that the functions of solicitors and officers were kept separate.[4] Most of those who commented thought that the existing provisions were adequate, and no specific abuses were brought to our attention. The sharing of business premises by a solicitor with any other person (including an officer of court) is already a breach of professional practice rules justifying a report to the Scottish Solicitors' Discipline Tribunal. It therefore seems unnecessary for officers' rules of conduct to prohibit them from sharing premises with solicitors.

Misconduct in connection with sales of poinded goods

8.133 Allegations have occasionally been made that officers of court have entered into agreements with second-hand furniture dealers, whereby officers arrange that goods sold at a warrant sale are undervalued, so enabling dealers who buy them to resell them at a profit. None of these serious charges have, as far as we are aware, been substantiated. Rule 51 of the Rules of the Court of Session prohibits a messenger from purchasing poinded goods either personally or through an agent. This enactment does not apply to sheriff officers, although most poindings are executed by sheriff officers.

8.134 On consultation there was general agreement with our suggestion[5] that a new rule, applying to sheriff officers as well as messengers-at-arms, should replace Rule 51 of the Rules of Court. Breach of the rules should render the officer concerned liable to disciplinary proceedings and, although the penalty

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[1]Paras. 5.46 to 5.48.

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

[3]Section 32 makes it an offence for an unqualified person to prepare any writ relating to any legal proceedings unless it is proved that the person prepared it without receiving, or without expecting to receive, either directly or indirectly, any fee, gain or reward; section 33 provides that the expenses of preparing writs which should be prepared by solicitors may not be recovered where the writs have been prepared by unqualified persons in contravention of section 32 (see *Dow* v. *Mitchell and Cram* (1939) 55 Sh.Ct.Reps. 258 construing similar provisions in the Solicitors (Scotland) Act 1933); and section 26 makes it an offence for solicitors to lend their name to writs prepared by unqualified persons.

[4]Proposition 22 (para. 5.49).

[5]Consultative Memorandum No. 51, Proposition 23 (para. 5.52).

would be at the discretion of the Court of Session or the sheriff principal, we suggest that an officer found guilty should normally be deprived of office.

8.135 **We recommend:**

(1) An act of sederunt should be made prohibiting an officer of court:

(*a*) from purchasing personally, or through an agent, goods sold by virtue of diligence in which the officer has acted; and

(*b*) from sharing with the creditor any goods (or their proceeds of sale) adjudged to the creditor by virtue of diligence in which the officer has acted; and

(*c*) from sharing with the purchaser any profit the purchaser makes in re-selling goods bought at a sale carried out by virtue of the diligence in which the officer has acted.

(2) Any breach of the above rules should render the officer concerned liable to disciplinary proceedings for misconduct.
(Recommendation 8.24; clause 101(1)(*c*).)

Advertising by officers

8.136 There are no formal restrictions prohibiting officers or firms of officers from advertising, canvassing or touting for business in contrast to restrictions imposed on many professions. In Consultative Memorandum No. 51 we proposed[1] that the Court of Session should have power to regulate advertising by officers, though regulation seemed unnecessary at present since current practice was and is unexceptionable. All those who commented agreed with both of these points.

8.137 We **recommend:**

The Court of Session should have power to make regulations controlling advertising and soliciting for business by officers of court.
(Recommendation 8.25; clause 101(1)(*c*).)

Child delivery orders and ejections

8.138 Recognising that execution of child delivery orders arouses strong emotions on the part of those concerned, and that the presence of social workers might minimise the risk of inappropriate action by officers, we sought views in Consultative Memorandum No. 51[2] on whether an officer of court should, except in cases of urgency, intimate an intention to execute a child delivery order to the local social work department and request the attendance of a social worker.[3] We also sought views on whether a similar rule should be adopted for ejections. Our proposals evoked a mixed reaction by those consulted. On reflection, we think that, while the involvement of social workers might in cases of child delivery and ejection orders sometimes be beneficial, it would be inappropriate to regulate their involvement by means

[1]Proposition 24 (para. 5.57).
[2]Proposition 26 (para. 5.60).
[3]The Sheriff Officers and Warrant Sales (Scotland) Bill 1980 (introduced under the ten-minute rule Bill procedure by Mr Dennis Canavan, M.P.) provided in clause 5 for a sheriff officer to obtain prior approval of the social work department before taking possession of a child in pursuance of a child delivery order).

of the rules on standards of conduct to be observed by officers of court. Accordingly, we make no recommendations on this topic in the present context.

Section E. Miscellaneous

8.139 We complete this Chapter by considering a number of miscellaneous issues, namely, the liability of officers of court to creditors; the provision of identity cards for officers of court; measures to improve the collection of statistics on diligence; whether membership of the Society of Messengers-at-Arms and Sheriff Officers should be compulsory; and dues payable by officers.

Liability of officer to creditor

8.140 In reviewing the liability of officers of court for wrongful diligence,[1] we drew attention to the harsh rule operating in the case of poindings and civil imprisonment that neglect or failure to carry out instructions subjects the officer to liability for the whole amount of the debt which it was the object of the diligence to recover.[2] This rule has been criticised[3] on the ground that the officer's failure may in fact have caused little or no loss to the creditor and for that reason the rule has, in one case, not been extended to arrestments.[4] In Consultative Memorandum No. 51 we proposed[5] that the measure of damages for negligent delay in executing diligence against property[6] should be the loss suffered by the creditor, represented by the difference in amount between what would have been attached by timeous diligence and what was actually attached. All those who commented agreed with our proposal. On reconsideration we recommend abolition of the harsh rule referred to above, thus leaving the issue to be determined by reference to the general law on the quantification of damages.

8.141 We **recommend:**

Any rule of law whereby damages recoverable from an officer for failure or delay in the execution of diligence are determined solely by the amount of the debt should be expressly abolished.
(Recommendation 8.26; clause 110.)

Official identity cards

8.142 A messenger-at-arms, on obtaining a commission, receives as badge of office a wand (or baton) and blazon. The wand is a silver tipped ebony rod about six inches long to which is attached the blazon—a silver disc on which the Royal Arms are embossed. Messengers are required to display the blazon while executing citation or diligence so that people are aware that they are messengers.[7] On appointment, sheriff officers receive written commissions but these are not used to provide identification.

[1]Consultative Memorandum No. 51, paras. 6.2 to 6.8.
[2]Graham Stewart, p. 821 and following.
[3]*Couper* v. *Bain* (1868) 7 M. 102, Lord Ormidale at p. 104.
[4]*Monteith* v. *Hutton* (1900) 8 S.L.T. 250.
[5]Proposition 27 (para. 6.8).
[6]Our proposal did not apply to civil imprisonment.
[7]Stair, *Institutions*, IV. 47.14.

8.143 In Consultative Memorandum No. 51 we proposed[1] that sheriff officers should be provided with an official identity card in order to prevent disputes which can sometimes arise between officers and debtors over the officer's legal right to enter the debtor's premises. In terms of our proposal, officers would be required to exhibit an identity card on request when executing citation or diligence. All those who commented agreed with our proposal, to which we adhere. It is now commonplace for all officials seeking entry to houses to be provided with identity cards and the general public expect such cards to be produced.

8.144 We also invited views[2] as to whether the wand and blazon of messengers-at-arms should be replaced or supplemented by an official identity card. Some commentators were in favour of an official card replacing the wand and blazon, but others, including the Lyon King of Arms, the Law Society of Scotland and the Society of Messengers-at-Arms and Sheriff Officers, thought it would be unfortunate to dispense with the traditional wand and blazon. We do not wish to break with tradition unnecessarily and propose that messengers should be issued, on obtaining a commission as messenger, with an official identity card as well as a messenger's wand and blazon. As mentioned above,[3] the wand and blazon would be presented by the Lord Lyon King of Arms when granting a commission to the messenger. However on being asked to establish their identity as messenger, officers should be required to exhibit their identity card rather than their wand and blazon. We leave the question of what form the identity card or cards should take where an officer holds commissions from more than one sheriff principal, or is both a messenger and a sheriff officer, to the competent authorities.

8.145 We **recommend:**

(1) Sheriff officers should be provided with an official identity card which they should be bound to exhibit on request when performing their official functions.

(2) Messengers-at-arms should be provided with an official identity card in addition to a wand and blazon, and they should be bound to exhibit on request the identity card when performing their official functions.
(Recommendation 8.27; clause 111.)

Diligence statistics

8.146 The only statistics on diligence collated on an annual basis are those collected and returned by the sheriff clerks and published in the annual Civil Judicial Statistics for Scotland.[4] This information is fragmentary and incomplete because only those steps in diligence granted by or reported to the court can be included. The only arrestments reported to the court are those arrestments on the dependence of sheriff court actions where the arrestment is served before the summons, a tiny fraction of the total number of arrestments on the dependence and in execution. Actions of furthcoming do not appear separately in the statistics and are aggregated with other actions. As regards

[1]Proposition 28(1) (para. 6.11).
[2]Proposition 28(2) (para. 6.11).
[3]Recommendation 8.4 (para. 8.28).
[4]Judicial Statistics (Scotland) Act 1869, s. 2.

poindings, until recently only reports of sale were covered, though the statistics now cover the three stages of the report of poinding, the grant of warrant of sale and the report of the sale. The number of charges are not shown, however, since these are not reported to the court.

8.147 In Consultative Memorandum No. 51 we proposed[1] that officers of court should be required to make statistical returns as to the steps of diligence performed by them. These returns should be made on a confidential basis at public expense. Only one commentator disagreed on the ground that the benefit would not justify the cost. Though the statistics on poindings have been improved, diligence statistics generally are still inadequate. Only if improved statistics become available will it be possible to obtain a quantitative measure of the way in which the reformed diligences are operating.

8.148 We **recommend:**

(1) The Civil Judicial Statistics for Scotland should include statistical information on all the main steps of diligences. The Judicial Statistics (Scotland) Act 1869 should therefore be amended to enable the competent authorities to require officers of court to make annual returns of the steps of diligence executed by them.

(2) The cost of the work involved in making the returns should be borne by the Exchequer and the administrative machinery for making the returns from officers of court should preserve confidentiality as to the nature and volume of business executed by each officer or firm and as to the parties involved in the diligence process.
(Recommendation 8.28; Schedule 7, para. 7.)

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

8.149 We briefly described above the extremely useful role presently played by the Society of Messengers-at-Arms and Sheriff Officers in representing officers of court and in other ways.[2] In Consultative Memorandum No. 51 we suggested[3] that all officers should be required by law to be members of the Society, whose rules, especially those relating to the expulsion of members, would require to be regulated by the Court of Session.

8.150 Our proposal evoked a mixed response from those consulted. On reconsideration we recommend that membership of the Society should not be compulsory. It is, we think, a fundamental principle that officers of court should be controlled by the courts. If membership of the Society were compulsory there would be inevitable conflicts between the Society and the disciplinary authorities over control of officers; compulsory membership of the Society is only compatible with a self-regulating service of officers of court.

Dues payable by officers

8.151 The Rules of the Court of Session impose liability for certain dues on messengers-at-arms. For example messengers are bound to pay annual dues

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[1]Proposition 27 (para. 6.15).
[2]See para. 8.17.
[3]Proposition 30 (para. 6.18).

to the Lyon Clerk,[1] pay statutory fees when intimating any change of address to the Lyon Clerk,[2] and pay a fee for lodging a new bond of caution on the death or bankruptcy of the previous cautioner.[3] Schedule B to the Lyon King of Arms Act 1867 also prescribes various dues payable by messengers, and since the amounts in Schedule B have been regularly changed[4] while those in the Rules have not,[5] there are many instances of conflicting provisions.[6] Also both the Rules and the Schedule make different provisions in respect of messengers practising or applying to practise in the "county" or "district" of Edinburgh and other messengers, and furthermore the provisions in the Rules are inconsistent with those in the Schedule.[7] This distinction between Edinburgh messengers and others we understand reflects out-of-date practice, since for some considerable time commissions have been granted entitling the messenger to act throughout Scotland. Another criticism of the existing provisions is that no comparable dues are prescribed for sheriff officers, yet it is difficult to see any rational ground for this difference. We think that the opportunity should be taken, when drawing up new regulations for officers of court, to revise the regulations dealing with the payment of dues by them.

8.152 We **recommend:**

The competent authorities should review the provisions relating to payment of dues by messengers-at-arms and should consider making similar provisions in relation to sheriff officers.
(Recommendation 8.29.)

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[1]R.C. 59.
[2]R.C. 47.
[3]R.C. 55.
[4]By the Secretary of State for Scotland under s. 5 of the Public Expenditure and Receipts Act 1968. The last change was made in 1983 by the Lyon Court and Office Fees (Variation) Order 1983 (S.I. 1983/1072).
[5]Apart from decimalisation by the Decimal Currency Act 1969.
[6]For example fee payable for intimation of change of address 13p. (Rule 47), £2.75 (Sched. B).
[7]Dues payable on admission of a messenger to practise in Edinburgh £95, other messengers £82 (Sched. B). Annual dues for an Edinburgh messenger 85p. (Rule 59), £15 (Sched. B); for other messengers 87p. (Rule 59), £15 (Sched. B).

CHAPTER 9

MISCELLANEOUS

9.1 In this, the final Chapter of our report, we discuss a variety of topics. The main groups of topics relate to the simplification of warrants for diligence including abolition of obsolete proceedings, such as letters of horning; the recovery of diligence expenses; assistance for and representation of debtors and creditors in applications made to the court under our recommendations; and rights of appeal. We also deal with harassment of debtors by creditors or their representatives, illegal collection charges, and the provision of debt counselling.

Warrants for diligence

9.2 The manner in which statutory rules prescribe the styles of warrant to arrest, charge and poind in execution[1] and regulate their legal effect is, for purely historical reasons, rather confusing. Long forms of warrant for use in extract decrees were introduced in 1838[2] and made equivalent to letters of horning, poinding or arrestment;[3] subsequently short forms were introduced superseding (but not abolishing) the long forms.[4] In relation to writs registered for execution in the Books of Council and Session or sheriff court books, the Writs Execution (Scotland) Act 1877 provides for diligence similar to that competent on extract decrees, and sets out a short form of warrant for execution to be inserted in the extract of the writ.[5]

9.3 We think that the present multiplicity of slightly different statutory provisions relating to warrants for diligence in execution should be replaced by provisions in identical terms setting out the authorised diligences. The authorised diligences would include not only the existing diligences of arrestment, charge and poinding but also the new diligences of earnings arrestment, and current maintenance arrestment which we recommend in Chapter 6. In addition to uniform provisions as to the diligences authorised by warrants we think there should be a single short form of warrant appended to extract decrees and other documents on which execution can proceed.

9.4 So far we have considered warrants for diligence in execution of civil debts. Section 411 of the Criminal Procedure (Scotland) Act 1975[6] empowers the court on imposing a fine, or at any time before imposing imprisonment for failure to pay the fine, to authorise recovery of the fine by diligence. The warrant for diligence is granted by the court adding to the finding imposing the fine the words:

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[1]We do not deal with warrants for diligence on the dependence or in security in this report.
[2]Debtors (Scotland) Act 1838, ss. 1 (now repealed) and 9, Scheds. 1 and 6.
[3]*Ibid.*, ss. 2, 3, 4, 9 and 35.
[4]R.C. 64, 65 and 170D(6); Sheriff Courts (Scotland) Extracts Act 1892, s. 7(1) and Sched., Form 1; Summary Cause Rules, rule 89(2) and Forms U1–5, U7–14. Diligence under the Exchequer Court (Scotland) Act 1856 is discussed in Chapter 7.
[5]Ss. 1–3 and Sched.
[6]As amended by the Criminal Justice (Scotland) Act 1980, s. 52 and Sched. 7, para. 66.

"and decerns and ordains instant execution by arrestment and also execution to pass hereon by poinding and sale, after a charge of 14 days."

This appears to authorise a sale without a further application to the court. However, section 411 further provides that the diligence may be executed in the same manner as if the proceedings were on an extract decree of the sheriff in a summary cause, and this would appear to mean that the procedure in the Debtors (Scotland) Act 1838 including a separate application for warrant of sale is competent and perhaps necessary. Civil diligence is also available to enforce payment of sums due under a compensation order[1] or upon forfeiture of caution.[2]

9.5 We do not intend to discuss in this report the role of civil diligence in the enforcement of fines as this would involve considerations of sentencing policy. In Consultative Memorandum No. 48 we asked[3] for views as to whether poinding and sale to enforce a criminal fine should continue to be executed in the usual fashion or whether the summary procedure used for rates and taxes[4] should be adopted. The majority of those expressing a view were against summary procedure and we think the diligences and procedures used should be the same as for ordinary civil debts. The new diligence against earnings, the earnings arrestment, that we recommend in Chapter 6, could be a very effective method of collecting fines from offenders who are in steady employment. The short form of warrant for diligence recommended for all civil debts should also be used for fines and other sums ordered to be paid by a criminal court.

9.6 As regards sheriff court civil diligence we note that many of the provisions and forms in the Sheriff Courts (Scotland) Extracts Act 1892 contain obsolete material, some, but not all, of which relate to the diligences considered in this report. Since we understand that the Sheriff Court Rules Council propose to review the 1892 Act in due course with a view to its revision by act of sederunt, we have confined the amendments of the 1892 Act recommended in the draft Bill annexed to this report to the minimum necessary to give effect to our recommendations.

9.7 We **recommend:**

(1) A single form of warrant for diligence in execution of a decree of a civil court, an extract registered writ, or an order of a criminal court should be prescribed by act of sederunt or act of adjournal.

(2) The diligences authorised by the prescribed form of warrant should be laid down in statute.

(Recommendation 9.1; clause 112(1) and Schedule 7, paragraphs 8, 10 and 23.)

Letters of horning and poinding

9.8 Before 1838 a creditor wishing to enforce a decree applied to the Bill Chamber of the Court of Session for authority for letters of horning, letters

[1]Criminal Justice (Scotland) Act 1980, s. 66.

[2]Criminal Procedure (Scotland) Act 1975, s. 303(1)(*c*).

[3]Proposition 63 (para. 7.28).

[4]See Chapter 7, Section A.

of poinding, or letters of horning and poinding to be issued under the Signet. Letters of horning authorised the creditor to charge the debtor to pay on pain of horning. On expiry of the days of charge without payment the debtor or obligant could be denounced rebel—"put to the horn". When the letters of horning, together with the messenger's certificate of execution of the charge and denunciation were registered in a register of hornings, the creditor could apply for letters of caption on which the debtor or obligant could be imprisoned until the debt was paid. Letters of poinding authorised a charge on pain of poinding while letters of horning and poinding were a combination of letters of horning and letters of poinding. The Debtors (Scotland) Act 1838 simplified this procedure: extract decrees became in themselves warrants to charge on pain of poinding or imprisonment;[1] registration of the expired charge in a register of hornings became equivalent to a denunciation;[2] and warrant to imprison was obtainable by a simple minute to a clerk of court rather than by letters of caption.[3] Letters of horning, horning and poinding, and poinding remain competent although the extra expense in obtaining such warrants for diligence can be recovered from the debtor only if no warrant can be obtained under the provisions of the Debtors (Scotland) Act 1838.[4]

9.9 In Consultative Memorandum No. 48 we suggested that such letters were archaic and should be abolished.[5] Resort to these letters is still necessary,[6] first, where there has been a change of creditor after decree has been pronounced but before it has been extracted, or before a deed registrable for execution has been registered, and second, where in addition to the deed registrable for execution which constitutes the obligation, some subsidiary document not by itself registrable for execution is necessary to quantify the obligation or identify the creditor, at least where the deed has already been registered.[7] To deal with these residual cases we proposed that a simpler procedure[8] should be introduced on the lines of the existing statutory procedure, whereby an executor or assignee of the creditor in an extract of a decree or registered writ can obtain a warrant for diligence in his or her own name by endorsing a simple minute on the extract and producing it to a clerk of court, along with the relevant link in title. Such a procedure would also avoid questions arising as to whether the statutory procedure or letters of horning was the appropriate method of obtaining a warrant for diligence.[9]

9.10 Our proposal to abolish these letters was approved on consultation. Diligence forms must disclose at whose instance diligence is done, and it is necessary for the protection of debtors to have some procedure whereby a

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[1]Ss. 2–4 and 9.

[2]Ss. 5 and 10.

[3]Ss. 6 and 11.

[4]S. 8.

[5]Proposition 4 (para. 2.8).

[6]Letters of horning may be used to enforce Lyon Court decrees. *Encyclopaedia*, vol. 9 pp. 343–5.

[7]Graham Stewart, pp. 284–6. Where the deed has not been registered, the practice is to register it and the subsidiary document together.

[8]Debtors (Scotland) Act 1838, ss. 7 and 12 and Scheds. 5 and 9.

[9]See *Mitchell* v. *St Mungo Lodge of Ancient Shepherds* 1916 S.C. 689 in which the judges seem to have held different opinions on the question whether the trustees of a friendly society required to deduce title to an extract bond by letters of horning or by the procedure under ss. 7 and 12 of the Debtors (Scotland) Act 1838.

new creditor's entitlement to do diligence is checked.[1] But it was agreed on consultation that the simple and inexpensive administrative procedure operated by clerks of court under sections 7 and 12 of the Debtors (Scotland) Act 1838 was also suitable for the residual cases where the old forms of letters are still required. We therefore recommend the abolition of letters of horning, poinding and horning and poinding. Many old statutes and acts of sederunt authorise letters of horning, in execution of particular decrees or obligations. We believe, however, that these provisions, so far as relating to letters of horning, can either be repealed outright, or repealed and replaced by provisions authorising the ordinary forms of diligence in execution, with little or no change to existing practice. Letters of caption can only be granted if a debtor has been denounced rebel by virtue of letters of horning and are also obsolete. Our recommendation to abolish letters of horning necessarily leads us to recommend the abolition of letters of caption.

9.11 At present, a Court of Session decree of poinding of the ground[2] is not by itself a direct warrant to officers of court to poind the moveables on the ground; instead the decree enables letters of poinding to be issued which grant authority to officers to poind. Our recommendation to abolish letters of poinding will necessitate a change in this practice. We suggest that a Court of Session extract decree should be a direct warrant to poind, as a sheriff court decree of poinding of the ground already is under the present law.[3]

9.12 We **recommend:**

(1) The granting of letters of horning, letters of poinding, letters of horning and poinding, and letters of caption should cease to be competent.

(2) A simple administrative procedure should be available enabling creditors acquiring from another person a right to a decree (including a writ registered for execution), whether before or after extract, to obtain a warrant for diligence in their own name on production of the extract decree and their title to it to a clerk of court. This procedure should also be available to a creditor in a deed registrable for execution where a subsidiary document is needed to quantify the obligation in the deed or identify the creditor.

(3) An extract decree of poinding of the ground should contain a warrant in prescribed form authorising officers of court to poind the ground.
(Recommendation 9.2; clauses 112(2), 113 and 114; Schedule 7, paragraphs 1 and 6; and Schedule 9.)

Registration of certificates of execution of charges

9.13 The Debtors (Scotland) Act 1838[4] enables a creditor to register in a register of hornings the certificate of execution of a charge which has expired without payment. We indicated in Chapter 7[5] that registration in a register of hornings is an essential part of the procedure for civil imprisonment of a

[1] *Ibid;* per Lord Salvesen at p. 694.
[2] See para. 3.40 for an explanation of this term.
[3] Graham Stewart, p. 500; *Kennedy* v. *Ramsay's Trs.* (1852) 14 D. 513.
[4] Ss. 5 and 10.
[5] Paras. 7.70 to 7.80.

debtor under a warrant of a clerk of court under the 1838 Act;[1] that as a result of a somewhat complicated legislative history, that procedure is now only competent in the case of rates enforceable under a court decree (not a summary warrant) and civil fines or penalties due to the Crown; and that the procedure is no longer used in such cases and should be abolished. The only residual use of registers of hornings is that registration has the effect of accumulating the debt and interest into a principal sum bearing interest,[2] but creditors do not in practice use registration for that purpose.

9.14 In Consultative Memorandum No. 48 we suggested[3] that the provisions for registration of expired charges in registers of hornings were obsolete and ought to be repealed. The last registration in the Register of Hornings occurred in 1936[4] and we understand that registrations in sheriff court registers of hornings are extremely rare. All those who commented agreed and we recommend accordingly.

9.15 We **recommend:**

It should cease to be competent to register a certificate of execution of a charge for payment, that has expired without payment having been made, in any register of hornings.
(Recommendation 9.3; clause 115(6).)

Obligations *ad factum praestandum*

9.16 We are not concerned in this report to review the whole law on the enforcement of decrees *ad factum praestandum*. Some of the statutory provisions on warrants and charges for payment, however, also govern warrants and charges for performance of obligations *ad factum praestandum*. Our recommendations for re-enactment of the former in a revised form have compelled us to consider the latter and in particular, first, whether extract registered writs should authorise enforcement of an obligation *ad factum praestandum* by imprisonment, and, second, whether a charge to perform on pain of imprisonment is still appropriate having regard to the reforms of the procedure for civil imprisonment already on the statute book.

9.17 Prior to 1940 an obligation *ad factum praestandum* (an obligation to perform a specified act, such as handing over goods) contained in a decree or writ registered for execution could be enforced by imprisonment under the Debtors (Scotland) Act 1838.[5] If the debtor in the obligation failed to perform it within the period allowed in the charge, the certificate of execution of the charge could be registered in a register of hornings and thereafter a warrant of imprisonment could be obtained from the Bill Chamber (later the Petition Department) of the Court of Session or a sheriff clerk. Such a warrant was granted as of right provided the application and supporting documents were in order.

[1]Ss. 6 and 11. There is a Register of Hornings kept at Edinburgh for the whole of Scotland and a register of hornings in each sheriff court.
[2]1838 Act, ss. 5 and 10.
[3]Proposition 12 (para. 3.24).
[4]*Civil Judicial Statistics, Scotland 1982* (Cmnd. 9235), para. 4.15.
[5]Ss. 5 and 11.

9.18 Section 1 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 replaced the administrative procedure by an application to the court for warrant of imprisonment and gives the court powers to substitute payment of damages in lieu of the decree *ad factum praestandum*, or to make such other order as appears to be just and equitable in the circumstances. Small debt decrees for delivery of moveable goods were enforceable by civil imprisonment following an expired charge to deliver,[1] but in 1932 a procedure requiring an application to the sheriff was introduced[2] which formed the model for the 1940 Act. This procedure was abolished along with small debt procedure[3] and section 1 of the 1940 Act now applies to all decrees *ad factum praestandum*, including summary cause decrees. By an apparent legislative oversight the 1940 Act was limited to decrees so that a warrant for imprisonment to enforce an obligation *ad factum praestandum* contained in a writ registrable for execution can still be obtained from a clerk of court.

9.19 We do not think it would be sufficient merely to bring obligations contained in writs within the ambit of the 1940 Act. Where the creditor wishes to enforce an obligation *ad factum praestandum* contained in a writ, in our opinion the creditor should have to bring an action for the purpose of obtaining a decree *ad factum praestandum*. The court would then have power, as it does in other actions for decrees *ad factum praestandum*, to refuse to grant such a decree[4] or grant it subject to conditions (such as giving the debtor a reasonable time within which to perform the obligation.[5])

9.20 Under the present law it is not clear whether a charge to perform an obligation *ad factum praestandum* is an essential prerequisite for further enforcement measures. On the one hand, Rule 65 of the Rules of the Court of Session and the provisions of the Writs Execution (Scotland) Act 1877, dealing with the import of warrants of execution appended to Court of Session decrees and extracts of registered writs respectively, can be construed as providing for a charge to be given. On the other hand, the Schedule to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 by repealing, in so far as they relate to obligations *ad factum praestandum*, section 9 of the Debtors (Scotland) Act 1838 and section 7 of the Sheriff Courts (Scotland) Extracts Act 1892 (which deal respectively with the import of long and short warrants for execution on sheriff court decrees), suggests that a charge to perform an obligation *ad factum praestandum* is not competent under those warrants.

9.21 In our view, charges to perform obligations *ad factum praestandum* should cease to be competent, (if or to the extent that they are not already incompetent) whatever the decree or document imposing the obligation may be. In terms of section 1 of the 1940 Act, the court before granting warrant to imprison the debtor must be satisfied that the debtor is wilfully refusing to perform the obligation. The giving of a charge is neither a necessary nor a sufficient factor in establishing wilful refusal. It is for the court to decide

[1]Sheriff Courts (Scotland) Act 1907, s. 46.
[2]Hire Purchase and Small Debt (Scotland) Act 1932, s. 7.
[3]Sheriff Courts (Scotland) Act 1971, s. 46(2), Sched. 2.
[4]Gloag and Henderson, *An Introduction to the Law of Scotland* (8th edn.) pp. 129 and 130.
[5]*McKellar* v. *Dallas's Ltd* 1928 S.C. 503.

in any particular application whether failure to perform arose from wilful refusal to comply, or from some other cause, such as ignorance of the terms of the obligation, or inability to comply with those terms.

9.22 We **recommend:**

(1) An obligation *ad factum praestandum* contained in an extract of a writ registered for execution in the Books of Council and Session or sheriff court books should cease to be enforceable by imprisonment by virtue of registration. A creditor who wishes to enforce an obligation *ad factum praestandum* contained in a registered writ should be required to constitute the obligation by decree.

(2) To clarify the law it should be declared to be incompetent to charge a debtor to perform an obligation *ad factum praestandum*.
(Recommendation 9.4; clause 125.)

Execution outwith sheriffdom

9.23 Section 13 of the Debtors (Scotland) Act 1838 enables diligence to be done outwith the sheriffdom on an extract decree of the sheriff provided a warrant of concurrence is obtained from the Court of Session or the sheriff clerk of the sheriffdom in which the warrant is to be executed. The Ordinary Cause Rules[1] and the Summary Cause Rules[2] dispense with the need for warrants of concurrence for any warrant granted in these causes. However, warrants of concurrence remain necessary in respect of warrants for diligence contained in extracts of writs registered for execution in sheriff court books, and summary warrants for recovery of rates and taxes.

9.24 In Consultative Memorandum No. 48 we proposed[3] that it should be competent to charge and poind anywhere within Scotland without a warrant of concurrence. All those who commented agreed. Consultation also revealed that practical problems can arise in obtaining warrants of concurrence for rates summary warrants where one warrant may cover many hundreds of defaulters.[4] The McKechnie[5] and Grant[6] Reports expressed the view that warrants of concurrence were an unnecessary formality. We would agree; the need to obtain a warrant of concurrence adds to the delay and expense of enforcing sheriff court warrants in those cases where warrants of concurrence are still required.

9.25 The Ordinary Cause Rules[7] and the Summary Cause Rules[8] provide that a warrant may be executed either by an officer of the court granting the warrant or an officer of the sheriff court district within which it is to be executed. We would extend this to other cases where we recommend that

[1]Rule 16, applied to summary applications by Act of Sederunt (Ordinary Cause Rules, Sheriff Court) 1983, para. 5.
[2]Rule 11.
[3]Proposition 5 (para. 2.10).
[4]See paras. 7.62 to 7.65 above for further discussion of summary warrants.
[5]Paras. 143 and 144.
[6]Para. 648.
[7]Rule 16.
[8]Rule 11.

warrants of concurrence should be unnecessary, to avoid uncertainty as to which officers were entitled to execute such warrants.

9.26 We **recommend:**

(1) Diligence on a warrant inserted in an extract of a writ registered for execution in sheriff court books or contained in any decree of a sheriff should be capable of being executed anywhere in Scotland without endorsement of a warrant of concurrence.

(2) Any such diligence in pursuance of a warrant in a decree, summary warrant or extract registered writ may be executed either by an officer of the court which granted the decree or warrant (or from whose books the extract was issued), or by an officer of the sheriff court district in which the warrant is to be executed.
(Recommendation 9.5; clause 116.)

Encouraging debtors to use the courts

9.27 In Chapter 2 we observed[1] that the procedural rules and other matters relating to applications to the court under our recommendations ought to be framed so as to bring the new safeguards within the reach of those debtors whom they are designed to assist; unless debtors actually make use of the courts' new powers to regulate diligence, our recommendations will remain reforms on paper only. Debtors threatened with diligence do not in general turn to solicitors for help, and the issues involved in our recommended applications will rarely be such as to require legal skills for their resolution. For these reasons procedures should be designed with the unrepresented debtor in mind so that he or she, assisted by court staff or others if necessary, could make an application to the court without legal representation.[2] The major factors which we think deter ordinary people from using the courts are lack of knowledge about the procedures and how to apply, and the fear of being found liable in expenses, the amount of which they cannot estimate in advance.

9.28 Our recommendations concerning debtors' lack of knowledge about what procedures are available and how to apply consist of several elements. First, forms served on debtors in connection with diligence, such as a charge to pay or a poinding schedule, should contain information in simple clear language as to what applications could be made to the court at that stage of the diligence and advice as to whom to contact if they want to make such an application. Secondly, while we are confident that the court staff will continue to be as helpful to applicants as they are at present in providing general help and advice, we propose that the sheriff clerk should have an express statutory duty to complete forms of applications for debtors if requested to do so.[3] Even people who are otherwise able to manage their own affairs may experience difficulties when faced with unfamiliar forms. In making this proposal we are

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[1]Paras. 2.134 to 2.139.

[2]Limited legal help should remain available under the Legal Advice and Assistance Scheme, see para. 9.59 below.

[3]The Intestates Widows and Children (Scotland) Act 1875, s. 3 and the Small Testate Estates (Scotland) Act 1876, s. 3 lay a duty on the sheriff clerk to prepare and fill up an inventory and relative oath on request in the case of small estates.

not suggesting that the sheriff clerk should act as the debtor's agent, for that would impair the sheriff clerk's impartiality. The statutory duty would merely extend to completing the form using information provided by the debtor; the choice of remedy sought, or any proposal for payment of the debt, would be that of the debtor alone. To protect sheriff clerks and encourage them to assist debtors they should be immune from actions brought by debtors for failure to comply with the recommended statutory duties. Thirdly, we recommend that applications should be made wherever possible by way of printed forms drafted in simple and clear language. A printed form assists unrepresented people by indicating what information the court needs in order to deal with the application, and if properly completed should allow unopposed applications to be decided without the need for a hearing before the sheriff. Finally, we recommend that if a hearing is necessary, it should normally be possible for the parties to be represented by persons other than a lawyer, such as a friend or a debt counsellor.[1] Provision for lay representation might also benefit corporate creditors in that they could be represented by directors or employees. The possibility of lay representation should be confined to the sheriff court; it would be inappropriate to introduce it into the Court of Session in connection with applications relating to time to pay decrees.

9.29 The second major factor which we think inhibits use of the courts is the cost. We deal later[2] with liability for expenses but an initial monetary barrier to debtors are the court dues which are payable on lodging applications or defences.[3] Although these dues may be modest compared with other expenses, debtors who are subject to diligence could well find difficulty in paying them. We concur with the Law Society of Scotland who expressed the view on consultation that court dues should not be exigible from debtors applying to the courts for orders controlling diligence.

9.30 Documents may have to be served and intimations made to interested parties in connection with an application. For example, where the debtor applies for a time to pay order, a copy of the application and an interim order sisting diligence would be served on the creditor,[4] and a copy of the sheriff's decision on the application would be served on both the debtor and creditor.[5] Throughout our report we have in general recommended that these duties should be carried out by the sheriff clerk, our purpose being to save debtors expense and to encourage them to use the courts.

9.31 We **recommend:**

(1) Sheriff clerks should be under a statutory duty to provide debtors with information as to the procedures available and assist them, if requested, to complete any form required in connection with proceedings under our recommendations. But a sheriff clerk should not be liable to the debtor for any failure in the performance of these duties.

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[1]See Sheriff Courts (Scotland) Act 1971, s. 36(1) and Rule 17 of the Summary Cause Rules permitting lay representation in summary causes undefended on the merits.

[2]Paras. 9.37 to 9.44.

[3]R.C. 346 (for Court of Session); Act of Sederunt (Fees for Sheriff Court) 1982 (for sheriff court).

[4]Para. 3.74.

[5]Para. 3.75.

(2) An act of sederunt should be made permitting a party to proceedings in the sheriff courts under our recommendations to be represented by a person who is neither an advocate nor a solicitor.

(3) Diligence documents served on the debtor, whose form is to be prescribed by an act of sederunt, should contain information as to the applications which the debtor may make to the courts.

(4) The forms prescribed by act of sederunt for use in connection with proceedings under our recommendations should be drafted so as to be capable of being used by unrepresented persons.

(5) No court dues should be payable by debtors in connection with any application under our recommendations.
(Recommendation 9.6; clauses 121 and 122.)

Expenses

9.32 In Chapter 2 we dealt briefly with the issues of the level of diligence expenses generally and in the remote areas of Scotland in particular.[1] Here we consider to what extent the debtor should be liable for the expenses of diligence, including the expenses of any application made to the court in connection with diligence, and by what means such expenses should be recoverable. The diligences we are concerned with are conjoined arrestment orders and diligences directly authorised by warrants for execution appended to extracts of decrees and writs registered in books of court, i.e. charges, poindings, arrestments, earnings arrestments and current maintenance arrestments.

Diligence expenses not involving application to the court

9.33 Under the present law debtors are, with minor exceptions, liable for the expenses of diligence done against them. We think this general rule is sound and should be retained. In the case of an earnings arrestment or a current maintenance arrestment, the expenses are relatively straightforward in that they consist merely of the expense of serving the schedule of arrestment on the debtor, together with, in the case of an earnings arrestment, the expense of serving a prior charge. With poindings several steps are involved in the execution and completion of the diligence, and the steps needed to be taken in a particular poinding may vary according to the situation and nature of the goods and other circumstances. In our view the debtor should generally have to bear the expenses of those steps which the creditor is, in the circumstances of the particular poinding, obliged to take in order to execute or complete the diligence. Thus in the straightforward case the expenses of serving a charge for payment, executing a poinding, reporting it to the court and applying for warrant of sale, making arrangements for the sale and intimating these and the copy warrant to the debtor, attending or conducting the sale and reporting it to the court should be chargeable against the debtor together with any outlays such as advertising and auctioneer's fees. The circumstances of a particular case may, however, justify charging a debtor with more than these basic expenses. Where, for example, the warrant of sale requires the goods to be removed to another place for sale, or the officer has

[1] Para. 2.176.

to notify the debtor of his or her intention to return to poind because the house was unoccupied on the occasion of the officer's first visit, or a report of a payment agreement entered into after warrant of sale has been granted is made to the court, these expenses ought also to be chargeable against the debtor since they will be statutory requirements laid on the officer or creditor which have to be carried out if the diligence is to proceed. In the interests of clarity and to give guidance to those involved in diligence, particularly officers of court and auditors of court taxing diligence expenses, we have set out in Schedule 1 to the draft Bill annexed to this report a list of steps the expenses of which should be chargeable against the debtor. We think it would be useful if this list could be amended in the light of experience by subordinate legislation, and accordingly recommend that the Secretary of State may amend it by statutory instrument subject to affirmative resolution procedure.

9.34 In Chapter 5 we recommended[1] that the creditor should be entitled, without recourse to the court, to cancel arrangements made for sale and make fresh arrangements for sale as long as no amendment of the warrant of sale was necessary and the original arrangements had to be cancelled due to circumstances outwith the control of the creditor or officer. We think that it would be unjust if the debtor had to bear the cost of both arrangements since the circumstances necessitating fresh arrangements for sale might well have arisen through no fault of the debtor either. We therefore recommend that the debtor should have to pay the expenses in making arrangements for and executing the latter sale but not the expenses in making arrangements for the sale which had to be cancelled.

9.35 Where poinded goods are removed, damaged or destroyed in breach of poinding before they can be sold, the creditor can apply to the court for various orders such as an order requiring restoration of poinded items which have been removed, a warrant authorising officers of court to search for and deliver them, or an order for revaluation of damaged items.[2] We recommend that the expenses of executing these orders should be at the discretion of the sheriff, since fixed rules would be unsuitable in view of the wide variety of circumstances in which removal, damage or destruction may occur. This discretionary power should, for the same reasons, also apply to the expenses of executing orders made for the security of poinded goods, or for their immediate disposal.

9.36 We **recommend:**

(1) The expenses chargeable against the debtor in connection with:

- (*a*) an earnings arrestment, should consist of the expenses of serving a charge to pay on the debtor and a schedule of arrestment on the debtor's employer;
- (*b*) a current maintenance arrestment, should consist of the expenses of serving a schedule of arrestment on the debtor's employer.

(2) Provision should be made for the expenses of poinding and sale along the following lines.

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[1]Recommendation 5.40 (para. 5.193).

[2]See paras. 5.121 to 5.125.

The expenses detailed in the list below should be chargeable against the debtor—

(*a*) in serving one charge;

(*b*) in serving a notice and a copy thereof before entering a dwellinghouse for the purpose of executing a poinding;

(*c*) in executing a poinding;

(*d*) in making a report of the redemption by the debtor of any poinded article;

(*e*) in granting a receipt for payment for redemption;

(*f*) in making a report of the execution of a poinding, but not in applying for an extension of time for the making of such a report;

(*g*) in making intimation, serving a copy of the warrant of sale and giving public notice of the sale;

(*h*) in removing any articles for sale in pursuance of a warrant of sale;

(*i*) in making arrangements for, conducting and supervising the sale;

(*j*) in granting a receipt for payment for, or in making a report of, the release or redemption of poinded articles;

(*k*) in making a report of a payment agreement entered into after warrant of sale;

(*l*) in making a report of sale;

(*m*) in granting a receipt for payment for the release from a poinding of any article which is owned in common;

(*n*) in making a report of the release of any such article;

(*o*) in opening shut and lockfast places in the execution of the diligence.

This list should be capable of being altered by the Secretary of State by statutory instrument subject to affirmative resolution procedure.

(3) The debtor's liability for the expenses of executing an order made by the court in connection with the removal, damage or destruction of poinded articles, or their security or immediate disposal, should be at the discretion of the sheriff.

(4) Where new arrangements for sale have to be made but an amendment to the warrant of sale is unnecessary, the debtor should be liable for the expenses of the new arrangements but not for the expenses of the cancelled arrangements.
(Recommendation 9.7; clauses 77(1)(*c*) and 79(3) and Schedule 1, paragraphs 1, 3, 6 and 7(*b*).)

Liability for expenses of applications to the court

9.37 Earlier in this Chapter we have made recommendations[1] designed to ensure that debtors are not discouraged from making applications to the court. One major factor which in our view inhibits their use of the courts is the fear of being found liable for expenses, the amount of which cannot be known in advance. Given that the procedures under our recommendations are designed to be simple and expeditious and that the value of the issues involved are likely to be modest, we would recommend that, subject to certain exceptions noted in the following paragraphs, the debtor and creditor should bear their own expenses in relation to an application. Thus a debtor making an application for say a time to pay order would not be faced with the possibility of having to meet the expenses of a legally represented creditor who successfully opposed it.

9.38 There is a danger that a rule providing for no expenses due to or by either party would encourage debtors to make applications or oppose creditors' applications merely with the object of delaying the progress of diligence. Creditors might also behave in a similar fashion, by opposing as a matter of policy any application by debtors in order to deter such applications. To combat such tendencies we propose that the sheriff should have power to award expenses in connection with an application up to a prescribed limit against a person who acts on grounds that appear to the sheriff to be frivolous. We think that the courts would only exercise this power in clear cases of abuse of process and recommend that, in order not to deter debtors unduly, the prescribed limit should be set at a modest sum, such as £25. The prescribed figure should be capable of being altered as necessary by the Secretary of State by statutory instrument in order to reflect changes in the value of money.

9.39 We have identified four areas where the above general rule should not apply: first, where an appeal is taken from the decision of a sheriff[2] on the application. An appeal is to be competent on a point of law only. The parties would almost invariably be legally represented and legal aid would be available, so that the normal rules about expenses should apply. Secondly, the normal rules about expenses should also apply to third parties, such as employers or owners of goods which have been inadvertently poinded, as it would be unjust if they were to be penalised financially through involvement in litigation about other people's debts. Thirdly, the expenses of the creditor and debtor in connection with a debtor's application for a time to pay direction to be attached to a decree should form part of the expenses of the proceedings in which the decree was granted. The fourth and final category concerns the expenses of applications in connection with the diligence of poinding and sale, and the creditor's expenses in applying for, or applying to join, a conjoined arrestment order. Here different rules should apply to take account of the general principle that the debtor should be liable for the creditor's necessary expenses in doing diligence.

9.40 Although an application to the court for warrant of sale is an essential step in every poinding, in a particular poinding the creditor may find it

[1]Recommendation 9.6 (para. 9.31).

[2]Or a Lord Ordinary in the unusual case of an application relating to a time to pay decree in the Court of Session.

necessary in the circumstances to make other applications in order to proceed with the diligence. To apply the general principle that debtors should be liable for the necessary expenses of the creditor in prosecuting diligence would result in too great an imposition on debtors, and could penalise them for circumstances which had arisen through no fault of their own. It would, however, be equally inequitable to require the creditor and debtor to bear their own expenses in every case. In view of the variety of circumstances in which an application may be made we would recommend that, subject to one exception mentioned below,[1] the award of expenses in connection with an application by a creditor relating to a poinding should be left to the discretion of the sheriff hearing the application. But, so as not to inhibit opposition by the debtor where reasonable grounds exist for opposing the creditor's application, any expenses awarded against the debtor should be limited to those which the creditor would have been entitled to had the application been unopposed. If the debtor opposes the application on frivolous grounds, however, the sheriff should have power to award expenses of up to £25 (or such other figure as may be prescribed) against the debtor, in addition to the "unopposed basis" expenses.

9.41 The exception mentioned in the preceding paragraph concerns a creditor's application for warrant to sell the poinded goods. Because this application is an essential step in every poinding, the debtor should always be liable for the expenses on an unopposed basis, with additional expenses being awarded for frivolous opposition. In Chapter 5 we recommended that the sheriff should have power, on application by the creditor, to amend a warrant of sale provided the need for the amendment was due to circumstances for which neither the creditor nor the officer were responsible.[2] We think it would be unjust if the debtor had to bear the cost of this extra procedure as well as the expenses incurred under the original warrant, since the circumstances might well have arisen through no fault of the debtor either. We therefore recommend that the debtor should have to pay the expenses of the application for the amended warrant and proceedings in execution of that warrant, but should be released from any liability to pay for the expenses of the application for the original warrant[3] and any proceedings which had taken place in pursuance of that warrant. On the other hand, where a pending application for warrant of sale falls on the making of an interim order in connection with a time to pay order[4] or a debt arrangement scheme[5] and the creditor's right to continue with the poinding subsequently revives[6] a second application for warrant of sale will be needed. In these circumstances the debtor should have to bear the expense of both applications since the right to continue with the poinding will have arisen due to some fault on the debtor's part.

9.42 The recommendations we advance in Chapter 5 in relation to poindings will afford debtors increased opportunities to apply to the court for regulation

[1]Para. 9.41.

[2]Recommendation 5.40 (para 5.193).

[3]Unless an award of expenses had been made against the debtor for frivolous opposition (see para. 9.38) to the creditor's application for that warrant. These expenses should be added to the expenses of executing the amended warrant.

[4]Bill, clause 7(1)(*a*).

[5]Bill, clause 20(3)(*a*).

[6]On default in making payments under the time to pay order, for example (Bill, clause 9).

of the diligence. We think that as a general rule each party should bear their own expenses in connection with an application made by the debtor (for example an application for release of an article from the poinding on the ground that it is exempt from poinding) so as not to deter debtors from making use of the courts. Expenses of up to £25 (or such other sum as may be prescribed), however, should be capable of being awarded against a debtor who makes a frivolous application. A similar sanction should be available against a creditor who opposes a debtor's application on frivolous grounds.

9.43 In the field of arrestments of earnings the general rule should be that the creditor and the debtor would be liable for their own expenses in connection with any application made by them to the court. An exception should be made for the creditor's expenses in applying for a conjoined arrestment order or for inclusion in an existing conjoined arrestment order. Section 2 of the Wages Arrestment Limitation (Scotland) Act 1870 provides that the debtor is not liable for the expenses of any arrestment of wages which fails to recover more than the expenses of executing that arrestment, and we recommend the extension of this rule to earnings arrestments and current maintenance arrestments.[1] Where the creditor serves an arrestment which is abortive because another arrestment or a conjoined arrestment order is being operated against the debtor's earnings, the expenses of that creditor's application for a conjoined arrestment order, or inclusion in the subsisting conjoined arrestment order should be borne by the debtor but the debtor should cease to be liable for the expenses of the abortive arrestment. This produces what in our opinion is an equitable result whereby the creditor is entitled to, and the debtor is liable for, only one set of expenses, so that neither is unduly prejudiced by an application for, or for inclusion in, a conjoined arrestment order being necessary.

9.44 We **recommend:**

(1) No expenses should be awarded against a debtor in favour of a creditor, or against a creditor in favour of a debtor, by a court in connection with any applications to the court under our recommendations. But where a party acts on grounds which appear to the sheriff to be frivolous, the sheriff should have power to award expenses of up to £25 (or such other sum as may be prescribed) against the party so acting. The prescribed sum should be capable of being altered by the Secretary of State by statutory instrument in order to reflect changes in the value of money. This rule should be subject to the exceptions in the following paragraphs.

(2) The rule in paragraph (1) should not apply to appeals from decisions made on applications under our recommendations, to applications involving third parties, or to an application for a time to pay decree. In these cases expenses should be awarded according to the normal rules.

(3) The expenses of an application made by a creditor in connection with the diligence of poinding and sale should be at the discretion of the sheriff, except where the application is for warrant of sale or amendment of the warrant of sale. Where the sheriff awards expenses against the

[1]Recommendation 9.9 (para. 9.58) below.

neighbours, employers and others of the debt; or the use of abusive and threatening language when communicating with the debtor. So far as we can ascertain these practices are relatively uncommon in Scotland at present, although instances do occur from time to time.

9.81 Simulation of legal process and harassment of debtors are specific statutory criminal offences in England and Wales[1] and the Younger Report on *Privacy*[2] recommended that the same provisions should apply to Scotland. Although our proposal in support of this recommendation met with approval on consultation, we have come to the view that legislation is unnecessary. Firstly, behaviour which causes embarrassment, alarm or distress could be charged as a breach of the peace.[3] Secondly, threatening a debtor with publicity with the object of making the debtor pay amounts to the crime of extortion.[4] Thirdly, making offensive or threatening telephone calls is an offence under section 49 of the British Telecommunications Act 1981. Fourthly, fraud would be committed if creditors or their agents falsely represented to the debtor that criminal proceedings would ensue on failure to pay, or that they were authorised in some official capacity to collect the debt, or if they sent simulated court documents with the intention of inducing the debtor to pay,[5] if these actions caused the debtor to pay. Attempted fraud would be committed if such a result was intended but did not occur. Civil remedies also exist in the shape of damages for threats of assault or defamation, while behaviour putting a person in a state of distress or alarm can be interdicted. Other possible remedies include making a complaint to the Office of Fair Trading who have power to revoke a debt collection licence issued under the Consumer Credit Act 1974, and where the debt collector is a messenger-at-arms or a sheriff officer making a complaint to the Court of Session or the sheriff principal who could take disciplinary action.[6] The existing law seems adequate to curb the mischief and new legislation would merely duplicate the present common law and statutory remedies.

Collection charges

9.82 A debtor is not liable to pay the creditor or debt collection agency a collection charge, except in the rare case where the contract between the debtor and creditor so provides. Nevertheless, demands are made from time to time by debt collection agencies for collection charges which are not legally enforceable. Making such demands may amount to the crime of fraud if the agency falsely pretends that the collection charges are due knowing that they are not, and, where threats of legal proceedings are used to enforce payment, they may also amount to extortion. Furthermore, demanding unenforceable collection charges might lead to the Office of Fair Trading, on receipt of a complaint, revoking the debt collection licence of the agency in question. If a sheriff officer was involved, the appropriate sheriff principal might discipline the officer. In Consultative Memorandum No. 47 we suggested[7] that specific

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[1]Administration of Justice Act 1970, s. 40.
[2]Cmnd. 5012, (1972) para. 278.
[3]*Sinclair* v. *Annan* 1980 S.L.T. (Notes) 55.
[4]*Alexander F. Crawford* (1850) Shaw 309.
[5]Gordon, *Criminal Law* (2nd edn), Chapter 18.
[6]See Chapter 8, paras. 8.74 to 8.84.
[7]Para. 2.29.

legislation should be introduced to prohibit the practice. While this met with approval on consultation, we now consider that any statutory provision would amount to a mere reformulation of the existing common law relating to fraud and extortion. However we do recommend in Chapter 8 that, in order to clarify the law, a demand for unenforceable collection charges by an officer of court should be treated as misconduct rendering that officer liable to suspension or dismissal.[1]

Debt counselling services

9.83 A number of reports by official advisory bodies have pointed to the need to develop the provision of debt counselling and related services in order to give information, advice and assistance free of charge to debtors, particularly to those with low incomes.[2] The provision of such services is related to diligence in at least two ways. First, by acting as a channel of communication between debtor and creditor and by becoming a "broker" for payment arrangements, debt counselling agencies prevent many cases from proceeding to diligence. Second, debt counselling agencies will have an important role to play in advising and assisting debtors to apply for the various types of court orders which sist or preclude diligence which we recommend earlier in this report.[3] The C.R.U. Debt Counselling Survey assessed the nature and extent of such facilities for consumer debtors in Scotland. It suggested that the organisations appearing to offer most potential for expansion were local authority social work departments (for long-term financial problems or debtors enmeshed in a multiplicity of social and financial problems) and voluntary grant-aided "generalist" advice agencies such as Citizens Advice Bureaux and welfare rights organisations (for debtors in an immediate debt crisis). We support the general aims of the Hughes Report in seeking to improve the provision of debt counselling within the framework of "generalist" advisory services.

Central register of court decrees

9.84 In Consultative Memorandum No. 47 we expressed the view[4] that the establishment of a central register of court decrees, in which debt decrees and their satisfaction were recorded, would not be practicable unless civil debts were collected through the courts. Although one body thought that a register of court decrees and satisfaction should be set up, the prevailing view on consultation, with which we concur, is that setting up a register would be expensive and unnecessary. Debts should in general be collected by creditors or their agents rather than the courts or a public agency; we have recommended the intervention of the court in this sphere only in those cases (conjoined arrestment orders[5] and debt arrangement schemes[6]) which involve the sharing of the proceeds of diligence or debtor's payments amongst two or more creditors.

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[1]Recommendation 8.21 (para. 8.121).

[2]Payne Report, paras. 1213–23; Crowther Report, chapter 9.3; Hughes Report, paras. 12.6 to 12.12.

[3]Time to pay decrees and orders (Chapter 3); debt arrangement schemes (Chapter 4); recall of a poinding and opposing an application for warrant of sale (Chapter 5), for example.

[4]Para. 2.22.

[5]Chapter 6.

[6]Chapter 4.

Diligence-related instalment settlements

9.85 In Consultative Memorandum No. 47 we raised the question of diligence done while an agreement between creditor and debtor for payment of the debt by instalments was in operation.[1] Some debtors interviewed in the Edinburgh University Debtors Survey claimed that diligence had been done while instalments were being paid and the Scottish Council for Civil Liberties drew attention on consultation to this practice.[2]

9.86 Whether the use of diligence is justified where the debtor is complying with an instalment agreement depends on the terms of the agreement. Where the creditor expressly or by implication agrees not to execute diligence for as long as the agreement is complied with, damages can be claimed for diligence done and further proceedings in the diligence can be interdicted.[3] We would agree with those commentators who thought that creditors should remain entitled to reserve the right to do diligence, notwithstanding the debtor's compliance with an instalment agreement, because where a debtor is on the verge of insolvency the creditor may need to execute diligence promptly in order to obtain a preference over other creditors. In terms of our earlier recommendations, diligence will be recalled or frozen on the granting of a time to pay order[4] or on the confirmation of a debt arrangement scheme.[5] In our view these provisions will enable debtors who are unable to negotiate satisfactory agreements with their creditors to obtain protection from diligence while paying off their debts by instalments, and no further recommendations seem necessary.

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[1]Paras. 3.53 to 3.57.

[2]See also *McTaggart* v. *Dalry Co-operative Society Ltd* 1980 S.L.T. (Sh.Ct.) 142.

[3]*Cameron* v. *Mortimer* (1872) 10 M. 461; *Mackersy* v. *Davis & Sons Ltd* (1895) 22 R. 368; *McTaggart* v. *Dalry Co-operative Society Ltd, supra.*

[4]Recommendation 3.19 (para. 3. 93).

[5]Recommendation 4.14 (para. 4.118).

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