Scottish Law Commission

promoting law reform

(SCOT LAW COM No 233)

Report on Judicial Factors

report

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promoting law reform

Report on Judicial Factors

Laid before the Scottish Parliament by the Scottish Ministers

August 2013

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

SCOTTISH LAW COMMISSION

Item No 3 of our Eighth Programme of Law Reform

Report on Judicial Factors

To: Kenny MacAskill MSP, Cabinet Secretary for Justice

We have the honour to submit to the Scottish Ministers our Report on Judicial Factors.

(Signed) LYNDA CLARK, *Chairman*
LAURA J DUNLOP
PATRICK LAYDEN
HECTOR L MACQUEEN
ANDREW J M STEVEN

Malcolm McMillan, *Chief Executive*
24 June 2013

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Abbreviations and glossary

"The 1849 Act" - the Judicial Factors Act 1849 (c. 51).

"The 1880 Act" - the Judicial Factors (Scotland) Act 1880 (c. 4).

"The 1889 Act" - the Judicial Factors (Scotland) Act 1889 (c. 39).

"The 1980 Act" - the Solicitors (Scotland) Act 1980 (c. 46).

"The 1998 Act" - the Scotland Act 1998 (c. 46).

"The Accountant" – The Accountant of Court.

"Addison" – D Addison, *Judicial Factors* (1995).

"Bankton" – *Institute* (1754).

"Bell" – *Commentaries* (7th Edition, 1870)

"Campbell Irons" – J Campbell Irons, *Law and Practice in Scotland Relative to Judicial Factors* (1908).

"Caution" (pronounced "kay-shun") is a guarantee by a third party, normally a financial institution, that it will make good any loss to the factory estate arising through the intromissions of the judicial factor.

"The Discussion Paper" – Discussion Paper on *Judicial Factors* (Scot Law Com Discussion Paper No 146, 2010), available at
http://www.scotlawcom.gov.uk/index.php/download_file/view/600/130/

"Erskine" – *Institute* (1773).

"RCS" – Act of Sederunt (Rules of the Court of Session 1994) 1994 (SI 1994/1443) (as amended).

"Stair" – *Institute* (1693).

"SME" - *The Laws of Scotland (Stair Memorial Encyclopaedia*) (1989).

"Thoms" – H J E Fraser, *Thoms on Judicial Factors*, 2nd Edition (1881).

"D M Walker" – D M Walker, *A Legal History of Scotland Vol III: The Sixteenth Century* (1995).

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

Chapter 1 Introduction

Our remit

1.1 A judicial factor is a person appointed by the court to hold, manage, administer and protect property in cases where it is not possible, practicable or sensible for those responsible for the property to do so. The office of judicial factor is therefore an important institution and one which is of considerable potential value across a wide range of circumstances. It is not, however, working as well as it might. The features of the institution are based partly on the common law and partly on legislation dating from the nineteenth century, or earlier. The result is that many aspects of the institution are not clear, while others seem old-fashioned, not to say archaic, to those who come into contact with judicial factories today. Our remit is to modernise this important part of Scots law, making it once more fit for purpose.

1.2 This is not the first occasion on which this institution has been examined by this Commission. In the 1970s some work was done on the powers of judicial factors. This resulted in a Report in 1980.[1] An examination of the institution as a whole was first put on the Commission's agenda in our Fourth Programme of Law Reform in 1990.[2] Other work of the Commission, however, both as part of our formal Programmes of Law Reform and in response to references from the Government, has had to be accorded priority, and some parts of the project have been overtaken by developments elsewhere. Originally, it was envisaged that the project would include what was called "Guardianship of the Incapable" as well as powers of attorney. Those aspects of the matter have been comprehensively dealt with in the Adults with Incapacity (Scotland) Act of 2000.[3]

1.3 Nevertheless, there is no doubt that the rationale for the project remains. The law needs an efficient system under which a capable, independent person, supervised by the Accountant, may take over the administration of property with which the owner cannot or will not deal properly. We are pleased to have completed this work, and to have produced a Report.

Background to this Report

1.4 We published a Discussion Paper[4] in December 2010, in which we analysed the existing law, including some of the ambiguities thrown up by some of the decided cases, and suggested that there was a continuing need for the office of judicial factor. In that regard, we proposed that there were, broadly, two options which should be considered. The first was essentially to reform and update the current structure of the office. The second was to replace the current system with a new, public office which would assume responsibility for

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[1] Report on *Powers of Judicial Factors* (Scot Law Com No 59, 1980), available at http://www.scotlawcom.gov.uk/index.php/download_file/view/449/139/.
[2] See also the consolidating Fifth Programme, paras 2.30-2.31.
[3] 2000 asp 4.
[4] Discussion Paper on *Judicial Factors* (Scot Law Com DP No 146, 2010), available at http://www.scotlawcom.gov.uk/index.php/download_file/view/600/130/.

all, or almost all, judicial factors who might be appointed in the future. This latter option was not favoured by any of our consultees, and we pursue it no further.

1.5 The aim of this Report accordingly is to set out proposals for modernising the office of judicial factor broadly on the same basis as it functions at present. There are, however, one or two general questions which we should address in this Introduction.

What's in a name?

1.6 The first relates to the name of the office. In the Discussion Paper we suggested[5] that the name "judicial factor" was not readily understood, and that it should be changed. A number of our consultees agreed, and a variety of suggestions were made, including "court appointed administrator", which was favoured by the Senators of the College of Justice (hereinafter "the Judges"), the Faculty of Advocates ("the Faculty") and the Law Society of Scotland ("the Law Society"). On the other hand, other consultees pointed out that "administrator" was used in so many legal contexts that confusion might arise if that term were used. From that perspective, the term "judicial factor" is, in advertising terms, the "unique selling point" of the office. On reflection, we consider that the term "factor" in the general sense of "manager" is itself frequently used, if not, indeed, in common parlance. In that connection we note that, as recently as 2011, the Scottish Parliament passed the Property Factors (Scotland) Act.[6] It is also the case that if this Report, and its attached draft Bill, are taken forward, and legislation results, the existing name will not only continue to be unique, but it will be given a new lease of life by the passing of the legislation. On balance, therefore, we recommend no change in the name.

Ward/beneficiary

1.7 The next matter also relates to a name. In the Discussion Paper[7] we explained that much of the litigation on the subject referred to the person for whose benefit the judicial factor was appointed as the "ward". Because that term was and is used in a variety of other contexts, we thought that it might be confusing to continue using it in relation to judicial factors. In consequence we referred to the person concerned as the "beneficiary" for the purposes of the Paper.

1.8 We appreciate that the use of the word "beneficiary", too, tells only part of the story. Certainly, from its earliest use, the office of judicial factor enabled someone to be appointed to manage and preserve property. That task might well have been carried out on behalf of the person who was, or would be, beneficially entitled to it. There were and are, however, other reasons for the use of the facility. An appointment can also be made where there is a dispute, or at least an uncertainty, as to who is, or may be, beneficially entitled to the property. We mention in Chapter 2 appointments made on estates confiscated as a result of the 1715 rebellion: in such cases it would have been far from clear who might be entitled to the property at the end of the day. (In modern times the nearest equivalent might be the Proceeds of Crime legislation, where officers carrying out functions analogous to those of judicial factors are appointed.)

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[5] At paras 1.20-1.21.
[6] 2011 asp 8.
[7] At para 1.22.

1.9 Further, at present the plurality of applications for the appointment of a judicial factor are made by the Law Society. In those cases the judicial factor is certainly tasked with the management and preservation of the property, but is carrying out that function primarily in order to protect the clients of the firm (and the Solicitors' Guarantee Fund) from the consequences of faulty administration, actual or anticipated, on the part of the solicitor.

1.10 Naturally, if the practice of the solicitor, or the firm, is found to be in a sound position, the assets remaining will be returned to the solicitors concerned, who will, at that stage, be the "beneficiaries". But the primary focus of the judicial factor's activities is not the interests of those solicitors, but the interests of their clients.

1.11 Essentially, the purpose of the appointment of a judicial factor is to administer property where, for whatever reason, the persons responsible for its administration cannot do so, are not doing so, or should not be doing so. In this Report we accordingly focus on the factor's relationship to the estate which is being administered; and we refer to the persons who are, or may be, beneficially entitled to it as persons having an interest in it.[8]

Structure of the legislation

1.12 The origins of the office of judicial factor are set out in some detail in Chapter 2. The modernising of an office which owes something to the common law, something to statute law (including (perhaps) some venerable Acts of Sederunt), and something to the court's consideration of any or all of the above, is a complex matter. There are some aspects of the institution, such as the vesting of property in the judicial factor, and the arrangements for holding the judicial factor to account, which we consider should be changed, and in relation to which we make specific provision in the accompanying draft Bill. There are others where we consider that the prescriptive approach of the existing legislation is too constraining, and we accordingly recommend the introduction of more flexible arrangements. And where we consider that a sound approach has evolved over a succession of court decisions, we recommend no change, so that the position will remain as it presently is or, if that seems appropriate, can be developed further.

1.13 It is not our intention to prescribe, in the attached draft Bill, precisely how this institution should work in practice. We have sought rather to provide a statutory framework which will set out clearly what we regard as the essential features of the office of judicial factor, and the broad parameters within which it should operate. This is for two reasons.

1.14 The first is that the broad framework we recommend will leave scope for the further development of the office in the light of changing circumstances, and under the guidance of the courts. To that end, we have, for example, deliberately expressed the grounds for appointment in general terms. If it becomes politic to seek the appointment of a judicial factor in circumstances not obviously covered by the existing practice, that will, we hope, clearly be competent within the terms of the new legislation.

1.15 The second is that a substantial amount of the detailed regulation of the institution should ideally be in rules of court, that is to say, in a form which can be adjusted without excessive formality in the light of experience.

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[8] For further detail on what is meant by 'interest in the estate' in this context, see para 4.5 below.

Transitional arrangements

1.16 We are conscious that those currently involved with judicial factories may be anxious as to how those judicial factories will be affected by the new regime which we are recommending. One concern may be, for example, whether the status and powers of a judicial factor appointed under the existing law will survive the repeal of the existing legislation. Further, if an existing appointment was made subject to particular restrictions as to the powers of the judicial factor, will those restrictions continue to apply if and when our draft Bill becomes an Act of the Scottish Parliament?

1.17 As will appear from the remainder of this Report, the exercise we are carrying out here is largely one of repealing existing legislation and re-enacting it, with modifications. The structure and organisation of the institutions of the judicial factor and the Accountant will remain broadly as they are now. Technically, a relatively common approach to the modernisation of statutory institutions is to bring them up to date, with some adjustments to reflect modern practice in terms both of policy and of drafting style. The Interpretation Act 1978[9] ("the 1978 Act") makes specific provision for this, and it may be helpful to set out how it would apply to the two examples mentioned at paragraph 1.16 above. Section 17(2) of the 1978 Act provides:

> "(2) Where an Act repeals and re-enacts, with or without modification, a previous enactment then, unless the contrary intention appears —
>
> > (a) any reference in any other enactment to the enactment so repealed shall be construed as a reference to the provision re-enacted;
> >
> > (b) **in so far as any** subordinate legislation made or other **thing done under the enactment so repealed**, or having effect as if so made or done, **could have been** made or **done under the provision re-enacted, it shall have effect as if** made or **done under that provision.**" (emphasis added)

Section 17 of the 1978 Act was applied to Acts of the Scottish Parliament by the new section 23A, which was inserted into the 1978 Act by the 1998 Act. The effect of section 23A is that where an Act of the Scottish Parliament repeals and re-enacts an Act of Parliament, anything done under that Act of Parliament which could be done under the ASP will have effect as if done under the ASP.

1.18 In practical terms, the effect of this is that a judicial factor who has been appointed under the existing legislation will be treated as having been appointed under the new legislation – in effect, the factor's "status and powers" will have been saved. Similarly, a judicial factor appointed with limited powers – perhaps, for example, with no power to sell heritable property – will still be in that position once the new legislation comes into force, because such limitations could competently be imposed under the provisions of the draft Bill attached to this Report.

1.19 It may be sensible to consider one further example. In relation to accounts, the present legislation provides for an account of charge and discharge, to be prepared each year. That is one of the things which we suggest should be changed. We are

[9] 1978 c. 30.

recommending that more flexible, modern arrangements should be put in place. But it would be competent, under the draft Bill, for the Accountant and a judicial factor to agree that the factor should continue to account for the intromissions on the estate by means of an account of charge and discharge. Accordingly, any judicial factor who currently accounts for intromissions in that way will continue to be required to do so. But the Accountant and the factor could, by virtue of the new legislation, agree different arrangements.

1.20 That said, there is no doubt that some transitional provisions will be required. Leaving aside altogether the effect of the major reform of the civil courts following the Gill Review, we are recommending considerable alterations to the existing rules of court. That, too, is contemplated in the draft Bill. Section 60 provides that the substantive provisions of the measure will come into force on such day as Scottish Ministers may by order appoint; and section 59 gives Ministers a comprehensive power to make such ancillary provision as seems to them to be appropriate. In practical terms, we would envisage that after the draft Bill has received Royal Assent and the necessary alterations to rules of court etc have been put in hand, then the Act will be commenced.

Legislative competence

Devolved and reserved powers

1.21 The legislative competence of the Scottish Parliament is limited by section 29 of, and Schedules 4 and 5 to, the Scotland Act 1998 ("the 1998 Act"). Among other things, section 29 provides, at subsection (2)(a), that no legislation of the Scottish Parliament may form part of the law of a country or territory other than Scotland. Further, Schedule 5 sets out a list of matters in relation to which legislative competence is reserved to the United Kingdom Parliament. Generally, the law in relation to judicial factors is not reserved to the United Kingdom Parliament and so the majority of our recommendations fall within devolved legislative competence.

Order under section 104 of the 1998 Act

1.22 That said, there are a number of aspects of the law relating to judicial factors and the Accountant which, in terms of the draft Bill, are intended to apply in the remainder of the United Kingdom as well as in Scotland. The provisions as to the ingathering of property by the judicial factor, the provisions as to the vesting of property in the factor, and the ability of the factor, and of the Accountant, to require bodies of various sorts to provide information, are all examples of this. It may be for that reason that the 1849 Act,[10] the 1880 Act[11] and the 1889 Act[12] contain no provision as to extent.

1.23 So far as the existing law is concerned, we are aware that at least one transaction relating to land in England has been held up following the publication of our Discussion Paper, and on account of the questions we raised in that Paper concerning the operation of section 13 of the 1889 Act. We hope that the problem identified in that transaction will be resolved by our recommendations as to the vesting of property in the judicial factor.

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[10] 1849 c. 51.
[11] 1880 c. 4.
[12] 1889 c. 39.

1.24 As regards the draft Bill, most of its provisions need apply only in Scotland, but it will be necessary to ensure that provisions such as those mentioned above, which require to have a wider effect, will do so.

1.25 On the whole issue, therefore, we have come to the view that it would be appropriate if these provisions which may require to apply throughout the whole of the United Kingdom should be so applied by an Order under section 104 of the 1998 Act.

1.26 There remains a further matter requiring a section 104 Order. That is in relation to proceeds of crime. Section 6 of the 1889 Act essentially provides that anyone who is appointed to carry out a function similar to or the same as that of a judicial factor comes under the supervision of the Accountant, and that all the judicial factors legislation applies to these parties.

1.27 Section 6 has been expressly disapplied in relation to administrators appointed under the Proceeds of Crime (Scotland) Act 1995[13] ("the 1995 Act") and also under the Proceeds of Crime Act 2002[14] and the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005.[15] The effect of disapplying section 6 is that the category of appointment in question is not caught by the judicial factors legislation. It is our intention, in terms of policy, that the current draft Bill should apply only to judicial factors so called, and should not apply to any other type of administrator appointed under any other legislation. Accordingly, we intend to recommend the repeal of section 6 of the 1889 Act. The references to that section in the proceeds of crime legislation should therefore be removed.

1.28 Proceeds of crime generally is not a reserved matter, but, under Schedule 5 to the 1998 Act, the 1995 Act is reserved insofar as it relates to drug trafficking. It appears, therefore, that to make the required amendments outlined above would be outwith the competence of the Scottish Parliament. The 2002 Act and 2005 Order clearly cannot be amended by the Scottish Parliament or Scottish Ministers.

1.29 All these matters are dealt with in the draft section 104 Order which is attached to this Report as Appendix B.

European Union Law and the European Convention on Human Rights

1.30 In addition to the provisions of Schedule 5, section 29(2) of the 1998 Act provides that an Act of the Scottish Parliament is not law if "it is incompatible with any of the Convention rights or with Community law". (By "Community law" the Act means the law of the European Union.)

1.31 In terms of the European Convention on Human Rights, the necessary consequence of the appointment of a judicial factor is that the responsibility for administering the property concerned is removed from the person legally entitled to it. *Ex facie* that process would raise issues under Article 1 of Protocol 1 to the Convention. But any such removal has to be justified in court proceedings in which the person concerned has a right to be represented, and the process is regulated throughout by a public official under the general supervision of

[13] 1995 c. 43.
[14] 2002 c. 29.
[15] SI 2005/3181.

the court. It may be technically possible for the legislation to operate in a way which would, in an individual case, raise issues under Article 1 of Protocol 1. But we are of the view that the legislation itself is fully compatible with the Convention.

1.32 We are also of the view that the proposed legislation raises no issues under European Union law.

Relationship with Scottish Law Commission project on trusts

1.33 This Commission is currently undertaking a project on the law of trusts in Scotland, and we anticipate that the ensuing Report will recommend the repeal and re-enactment of much of the current legislation on trusts. The statutes on trusts contain a variety of references to judicial factors; indeed, in the Trusts (Scotland) Act 1921,[16] "judicial factor" is included in the definition of "trustee". One of the recommendations we make in this Report is that the link between trustees and judicial factors should be cut, and we suggest amendments to the current trusts legislation to give effect to that recommendation. Self-evidently this Report is being published before the Report on trusts; but if that Report, which we hope to publish this year, is implemented first, then some of the amendments in the draft Bill attached to this Report will be incorrect.

1.34 We cannot predict which Report will be implemented first. For the time being, and for the purposes of this project, we are content to recommend amendments to the law of trusts as it is presently stated. No doubt, when either or both Reports are placed before the Scottish Parliament, Scottish Parliamentary Counsel will be able to make the appropriate adjustments.

Structure of the Report

1.35 Generally, this Report analyses the nature of the office, and distinguishes it from other offices with which it has been compared and, indeed, equiparated in the past. It describes the existing law. It deals with the appointment process, and its implications, and in that regard recommends a new, and, we hope, clearer position in relation to the vesting of property in the judicial factor. It considers what should be the duties and powers of judicial factors. It makes new proposals as to the process by which a judicial factory should be brought to an end. There is a Chapter on a variety of miscellaneous matters, and a separate Chapter on the important matter of the Accountant.

1.36 These substantive Chapters are followed by a summary of the recommendations. A draft Bill is attached, as Appendix A, giving legislative shape to the recommendations in the Report. And, as we have noted at paragraph 1.29, a draft Order under section 104 of the 1998 Act is also attached, as Appendix B.

Business and Regulatory Impact Assessment ("BRIA")

1.37 The Scottish Government introduced new requirements in 2010 aimed at achieving enhanced regulatory impact assessments of primary legislation, secondary legislation, codes of practice and guidance. In line with these, we have prepared a BRIA in relation to our

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[16] 1921 c. 58.

recommendations and have published it on our website. The main conclusions of the BRIA are:

- There is unanimous support from those with experience of this area of the law for our recommendations which will update, simplify and clarify the law making it fit for purpose, flexible and of benefit to all those involved, in any capacity, in judicial factories; and

- The recommendations will bring substantial savings in professional time and costs.

Acknowledgements

1.38 We did not seek to constitute a formal advisory group in relation to this project, but we were conscious from the outset that if the office of judicial factor is to be of continuing use, then any new arrangements would have to take account of and, indeed, reflect, the views of those with experience of operating the current law. We have been extremely fortunate in having the continuing assistance of Ms Sandra McDonald, the Accountant and her Deputy, Ms Rosemary Wawrzyniak. We have also been greatly assisted by Ms Morna Grandison, the Director of the Interventions Department of the Law Society. In addition we have had the benefit of comments, written and verbal, from those who responded to the Discussion Paper (see Appendix C) and, in particular, from Ewen Alexander (Johnston Carmichael), Bill Cleghorn (AVER), Tom Hughes (Gerber, Landa & Gee), Derek Francis (Advocate) and John McArthur (Gillespie Macandrew).

1.39 We are most grateful to all those who have freely given their time and shared their experience with us. Their contributions have had a major influence on the production of this Report. We hope that the structure we are recommending will be clearer, cheaper and more user-friendly than the existing arrangements, and that the appointment of a judicial factor will be seen as a viable option across a wider range of circumstances.

Chapter 2 The current law

Introduction

2.1 In this Chapter we set out and analyse the existing law on the office of judicial factor. While much of the material in this Chapter derives from the discussion in Part 2 of the Discussion Paper, it seems sensible to set out here the legal framework within which this Report operates.

2.2 The office of judicial factor is uniquely Scottish and has been little affected by comparisons with models from other jurisdictions;[1] although, as one might expect, similar offices are to be found elsewhere. In England, for example, a receiver – whose powers appear to be regulated largely by the common law – can be appointed in cases where a judicial factor would be appointed in Scotland. In this Chapter we give an account of the history and nature of the office, and of the legislative developments that have influenced it.

2.3 The term "factor" has of course an ordinary meaning as a private solicitor or mandatory, such as a factor appointed to manage a landed estate or to look after property when the principal is in a different country and hence unable to manage it. Another example appears in the Factors (Scotland) Act 1890[2] which is about "mercantile agents". The term is often used nowadays in relation to managers of tenements or housing developments, and in that connection we have already mentioned the Property Factors (Scotland) Act 2011.[3]

Origin of the office

2.4 The office of judicial factor has developed from what could be seen as a merging of different roles. Originally the Crown was vested with the guardianship of all unprotected persons,[4] that is to say, minors or incapable adults. Before the Union in 1707 the Scots Privy Council could provide such extraordinary remedies as the appointment of someone to manage the affairs of another.5 The Court of Session too had power to appoint a factor or steward over sequestrated[6] estates and it is from this that the name "'judicial' factor" originated.[7] The term "factor"[8] can be seen in Acts of the Parliaments of Scotland from as early as 1581 and it is apparent that Parliament could also exercise the power to appoint a factor.[9] After 1707, following the abolition of the pre-Union Scottish Privy Council, the Court of Session assumed full responsibility over judicial factors, exercising the *nobile officium* to

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[1] D M Walker, p 1115.
[2] 1890 c. 40.
[3] 2011 asp 8.
[4] *Bryce v Graham* (1828) 6 S 425 at 433.
[5] *Ibid* at 430. See also N M L Walker, p 3.
[6] For more on the term 'sequestration' in this context, see paras 2.6-2.7 *et seq* below.
[7] Thoms pp 1-2; Campbell Irons, p 1.
[8] Although not necessarily in the sense of a judicial factor.
[9] According to the General Index of The Acts of the Parliaments of Scotland: *APS* iii 229, c. 40; RPS 1581/10/59 provided for the discharge of factories of the livings of certain persons accused of treason; *APS* vii 257, c. 277; RPS 1661/1/341 provided that aliens were not to be employed by merchants as their factors abroad; *APS* viii 495, c. 61; RPS 1685/4/85 appointed factors on the estate of Sir William Primrose of Caringtoun whose "memory and judgment" were affected by palsy; and *APS* x 215, c. 3; RPS 1700/10/73 provided that papists were incapable of acting as factors.

appoint them.[10] Latterly, the Court of Session, and later the sheriff court, also had the power to appoint factors under statute.[11]

2.5 It must be noted that in some writings, including some of the early Acts mentioned above, the term "factor" was used in the ordinary commercial context mentioned above, where a principal employed a factor to look after property, often when the principal was in a different country and hence unable to manage it personally. These factors were appointed by an individual, whereas a *judicial* factor was always appointed by the court. But the appointment was for essentially the same reason – that the person or persons on whose estate the factor was (judicially) appointed was or were unable (or unwilling) to manage that estate.

2.6 The major focus in early comment on judicial factors was on those appointed in sequestration, particularly in the context of bankruptcy, but the focus has shifted as bankruptcy has become a largely distinct area of law. Sequestration involved the removal of property from the control of a person by the court and, according to some definitions, also included the placing of it in the hands of another.[12] According to Bankton, sequestration was:

> "… the depositation of a thing in controversy, between two or more, in the hands of a third person, during the suit, to be restored to him, who is found in the event to have the best right…"[13]

2.7 This would have included the sequestration of bankrupt estates, where a factor was appointed for the interim preservation of the estate, but it would also have covered other situations, such as where there was a dispute in court over property. Although there seems to have been some disagreement on the issue, it appears that sequestration was not a necessary prerequisite to the appointment of a judicial factor.[14] Stair concentrated on factors in the context of arrestments and described judicial factors as "factors constitute by the lords". He described the appointment as follows:

> "Under Arrestment is comprehended *Sequestration*, whereby not only the Subject is Arrested, to remain *in statu quo*, without the Access of either Party contending till there Titles be discuss, but likewise the custody of the thing contraverted is intrusted, by an Act and Commission of the *Lords*, to persons nominat by them, either for the Custody, or for the Management thereof and Profits of the samen, to be made furthcoming to the Parties that shall be found to have best Right. These are ordinarily called *Factors* constitute by the *Lords*..."[15]

He goes on to give five examples of when such a factor might be appointed which cover situations where there is a dispute over property in court or where heirs are in doubt or out of the country.[16]

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[10] N M L Walker, p 4.
[11] See the 1849 Act and 1880 Act.
[12] Bankton, iv.7.24; Erskine, ii 12.58.
[13] Bankton, i.15.15.
[14] Campbell Irons, pp 1 and 516–518.
[15] Stair, IV, 50, 27.
[16] *Ibid*, IV, 50, 28.

2.8 The institutional writers also discussed factors in the context of managing the estates of minors where there was no one else to do this[17] and of managing the estates of persons abroad.[18] It should be noted that this did not detract from the fact that judicial factors could be appointed where it was seen to be necessary by the court and that the range of situations in which they were appointed was broad.

Legislative developments

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

Acts of Sederunt

2.10 Early Acts of Sederunt applied to factors appointed to ingather sequestrated rents. Those dated 31 July 1690 and 25 December 1708 imposed liability for interest on rents recovered or which ought to have been recovered; the Act of 22 November 1711 required the lodging of an inventory; and that of 31 July 1717 prohibited a factor from buying in debts or receiving gratuities from a creditor.[19]

2.11 These were followed by the more comprehensive Act of Sederunt of 13 February 1730 which was seen to be necessary, in light of the large number of applications, to regulate the duties of factors. This Act of Sederunt named only three categories of officer to which it applied, namely factors *loco tutoris*, factors *loco absentis* and *curators bonis*, but it regulated the powers and duties of almost all judicial factors.[20] The 1730 Act of Sederunt did not expressly revoke the previous Acts, nor was it itself expressly revoked by later, primary legislation. Some sections of the 1730 Act would appear to have been impliedly revoked by subsequent legislation which addresses the same issues.[21] Nevertheless, even after the passing of the 1849 Act, the Court of Session was still discussing the terms of the 1730 Act of Sederunt.[22]

Judicial Factors Act 1849[23]

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

> "superintend generally the conduct of all judicial factors…and see that they duly observe all rules and regulations affecting them for the time."[24]

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[17] Erskine, ii 12.58.
[18] Bankton, iv.7.24; Erskine, ii 12.58.
[19] The Act of Sederunt of 1717 seems to have been specifically directed at the judicial factors appointed on the estates sequestrated from those involved in the rebellion of 1715.
[20] Campbell Irons, p xxxix.
[21] N M L Walker, p 7.
[22] See *Lord Gray and Others, Petitioners* (1856) 19 D 1.
[23] 1849 c. 51.
[24] At s 10.

It also expressly provided for a factor's duty to find caution and to lodge an inventory and accounts with the Accountant. Like the 1730 Act of Sederunt, this enactment applied to three classes of factor, although unlike the 1730 Act of Sederunt it was explicitly restricted to those classes.[25] This resulted in some types of judicial factor being regulated by the Act of Sederunt and others by the 1849 Act.[26] (This would change with the Judicial Factors (Scotland) Act 1889, discussed below.)

2.13 One of the consequences of the limited application of the 1849 Act, as noted above, is that it did not revoke, either expressly or impliedly, the whole of the 1730 Act of Sederunt. Nor did the 1889 Act. While we suspect that there will be few questions turning on an application of any of the Acts of Sederunt mentioned above, it would be as well, for the sake of legislative tidiness, to remove them.

2.14 We accordingly recommend:

1. **That the Acts of Sederunt of 31 July 1690, 25 December 1708, 22 November 1711, 31 July 1717 and 13 February 1730 be expressly revoked.**

(Draft Bill, schedule 3, Part 2)

Bankruptcy (Scotland) Act 1856[27]

2.15 The 1856 Act introduced a further officer known as the Accountant in Bankruptcy[28] whose duties included keeping a Register of Sequestrations and overseeing the conduct of trustees. Under section 16 of this Act the court could appoint a judicial factor for the interim preservation of the estate but otherwise a trustee in sequestration would be appointed.

Court of Session (Scotland) Act 1857[29]

2.16 The 1857 Act was also known as the Distribution of Business Act 1857. Section 4 provided that applications for judicial factor appointments were to be brought before a junior Lord Ordinary.

Titles to Land Consolidation (Scotland) Act 1868[30]

2.17 Section 24 of the 1868 Act detailed the method and form by which title to heritable estate was to be completed by the judicial factor.

Judicial Factors (Scotland) Act 1880[31]

2.18 Section 4 of the 1880 Act empowered the sheriffs to appoint judicial factors over small estates.

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[25] *Accountant of Court v Morrison* (1857) 19 D 504.
[26] N M L Walker, p 7.
[27] 1856 19 & 20 Vict. c. 79.
[28] Bankruptcy (Scotland) Act 1856, s 156.
[29] 1857 20 & 21 Vict. c. 56.
[30] 1868 c. 101.
[31] 1880 c. 4.

Trusts (Scotland) Amendment Act 1884[32]

2.19 Section 2 of the 1884 Act provided that in it and previous Trusts Acts the term "trustee" was to include a judicial factor. It also set out, at section 3, the investment powers of trustees.

Judicial Factors (Scotland) Act 1889[33]

2.20 The 1889 Act brought all classes of judicial factor under the 1849 Act.[34] It also united the offices of the Accountant of the Court of Session and the Accountant in Bankruptcy into one office known as the Accountant of Court.[35]

Trusts (Scotland) Act 1921[36]

2.21 The 1921 Act provided a list of extended powers for trustees in section 4, and section 2 defined the term "trustee" to include judicial factors. Section 25 provided a method for judicial factors to complete title to heritable and moveable trust estate.

Conveyancing Amendment (Scotland) Act 1938[37]

2.22 Section 1 of the 1938 Act provided for judicial factors, on a trust estate, to complete title to heritable property.

Trustee Investments Act 1961[38]

2.23 The Trustee Investments Act 1961 made provision for investment by trustees, including judicial factors. The provisions relevant to judicial factors have since been repealed by the Charities and Trustee Investment (Scotland) Act 2005 and replaced with a new regime.[39]

Trusts (Scotland) Act 1961[40]

2.24 The Trusts (Scotland) Act 1961 provided further powers and duties for trustees, including judicial factors. In particular, and as amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, section 2 enables judicial factors appointed on a trust estate to seek the approval of the Accountant to do things which are at variance with the purposes of the trust.

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[32] 1884 47 & 48 Vict. c. 63.
[33] 1889 c. 39.
[34] 1889 Act, s 6.
[35] *Ibid*, s 1.
[36] 1921 c. 58.
[37] 1938 c. 24.
[38] 1961 c. 62.
[39] For discussion of the 1961 Act, from which reform in the shape of the 2005 Act followed, see Part II of the Law Commission and Scottish Law Commission Report on *Trustees' Powers and Duties* (Law Com No 260, Scot Law Com No 172, 1999), available at http://www.scotlawcom.gov.uk/download_file/view/340/.
[40] 1961 c. 57.

Law Reform (Miscellaneous Provisions) (Scotland) Act 1980[41]

2.25 As stated in the previous paragraph, section 8 of the 1980 Act amended section 2 of the Trusts (Scotland) Act 1961. Section 14 further extended the powers of the sheriff to appoint judicial factors.

Bankruptcy (Scotland) Act 1993[42]

2.26 The 1993 Act resulted in a further separation of the offices of the Accountant of Court and the Accountant in Bankruptcy.

Charities and Trustee Investment (Scotland) Act 2005[43]

2.27 The 2005 Act repealed most of the Trustee Investments Act 1961, amending the law in relation to charity fundraising and investment powers of trustees (including judicial factors).[44]

Nature of the office

2.28 As we noted in the Discussion Paper,[45] the office has been perceived as that of a preserver of the estate and the duty of conservation is apparent in some of the definitions of the office of judicial factor.[46] Bell stated that the object of sequestration and purpose of the appointment of a factor was to preserve the estate rather than to improve it for the benefit of the creditors[47] and the duties and powers of a factor were described as those of a "mere manager".[48] Bankton, again in the context of sequestration, stated:

> "The office of a sequestree is safely to keep the thing, and to manage it to the best advantage in the mean time, and, at the end of the suit, to deliver it, with the profits, to the person that is preferred…"[49]

2.29 The appointment has been seen as one of necessity rather than convenience (and as such its temporary nature has been stressed).[50] This is consistent with the power of the Court of Session to appoint, which arises from the *nobile officium,* and the open list of situations in which a factor can be appointed. It has been stated that:

> "Now, there is no limit to the circumstances under which the Court, in the exercise of its *nobile officium*, may appoint a judicial factor, provided the appointment is necessary to protect against loss or injustice which cannot in the circumstances be prevented by allowing the ordinary legal remedies to take their course."[51]

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41 1980 c.55.
42 1993 c. 6.
43 2005 asp 10.
44 Para 4 of sch 3 to the 2005 Act.
45 At para 2.25.
46 24 SME, para 247.
47 Bell, II.244.
48 *Ibid,* II.300.
49 Bankton, i.15.16.
50 *Bryce v Graham* (1828) 6 S 425.
51 *Leslie's Judicial Factor* 1925 SC 464 per Lord President Clyde at p 469.

2.30 This is also linked with the current limit on the powers of a judicial factor to those which are necessary for achieving the purpose of the appointment.[52]

2.31 While, ideally, any such appointment would be temporary, as, for example, where the factor is required to realise and distribute an estate, there are cases, such as that of a judicial factor appointed on the estate of a child, where it will be contemplated that the appointment will run for some time. And we are aware of a number of appointments on trust estates, where the appointment will be in place more or less indefinitely. Further, and apart from trust estates, there are examples of appointments over particular estates which, because of specific difficulties, have subsisted for a considerable period.[53] In the light of such cases, it appears to us that the arrangements for the appointment of judicial factors, and the powers and duties conferred and imposed upon them, should reflect the possibility that the appointment may be required to go on for some time.

Supervision

2.32 One aspect of the nature of judicial factory is that it was seen as important that the court did not generally interfere with the administration of estates where a judicial factor had been appointed.[54] This was emphasised in the case of *John Mathieson, Petitioner*[55] where the court was careful to use the word "authorised" rather than to talk of a "direction" in its interlocutor, so as not to interfere with the discretion of the *curator bonis*.

2.33 But while the appointing court will not exercise a close control over the actings of a judicial factor, the office of the Accountant of Court was set up by the 1849 Act for that very purpose.[56] The Accountant is tasked with supervising the way in which the judicial factor carries out the responsibilities of the office.

Fiduciary character

2.34 The office is fiduciary in nature. The judicial factor must avoid any conflict of interest, real or apparent, with those with an interest in the estate. The position was very clearly set out in the case of *Lord Gray and Others, Petitioners,*[57] in which the court considered two situations. The first was whether a trustee could use a firm in which he was a partner to carry out work on behalf of the trust. No question was raised as to the propriety of the charges incurred. The second was whether a judicial factor who was a solicitor could employ his own law firm to carry out certain business on behalf of the estate. It appeared from the evidence that the charge for the work was less than it would have been had another firm been employed. In both cases the court held, almost unanimously, that as a matter of principle the trustee/factor was not entitled to his business charges, except to the extent of "costs out of pocket".

[52] 24 SME, para 253.
[53] One such case was drawn to our attention by one of our consultees, Ms M. V. Armstrong.
[54] Bell, II.301.
[55] (1857) 19 D 917.
[56] 24 SME, para 243.
[57] (1856) 19 D 1.

2.35 In reaching that decision the court founded to a large extent on a decision of the Court of Equity Exchequer in the case of *New v Jones,*[58] in which Lord Lyndhurst, the Lord Chief Baron, had observed:

> "The principle is this: it is the duty of an executor and a trustee to be the guardian of an estate, and to watch over the interests of the estate committed to his charge. If he be allowed to perform the duties connected with the estate, and to claim compensation for his services, his interest would then be opposed to his duty, and, as a matter of prudence, the Court does not allow the executor or trustee to place himself in that situation."[59]

2.36 That part of the decision reflected the statutory rule that a judicial factor cannot receive any remuneration other than the commission authorised by the Accountant;[60] but the decision is also cited here for the court's approach to the nature of the office. The Lord Justice Clerk said, in the course of an analysis of the Act of Sederunt of 1730:

> "After describing the importance and objects of judicial factors…[the Act of Sederunt] proceeds to set forth certain regulations "for the faithful and punctual fulfilling of their trust". The factory is thus declared to be a trust. And in principle, it is eminently a trust, and that of the highest order – of great confidence on the one hand and, being derived from the appointment of Court, of a very distinct kind, having, moreover, official responsibility attached to it. Factors are officers of Court with specific duties, in regard to what is declared to be a trust. Agency is no part of such duties – it does not belong to the office."[61]

In a similar vein, Lord Ardmillan, who specifically did not base his opinion on the 1730 measure, said:

> "[I]t appears to me that the office of judicial factor is eminently of a fiduciary character. The duties, the responsibilities, the relations, which are inherent in the office, are in all respects those of a trustee. The protection of the estate, its safe and economical management, and the independent and disinterested exercise of his own judgment in its administration, are intrusted to the factor by the Court; and the appointment of an officer of the Court for the discharge of such duties implies the constitution of a trust."[62]

Should judicial factors be "trustees" (within the meaning of the law of trusts)?

2.37 Since, as both the Lord Justice Clerk and Lord Ardmillan indicated in *Lord Gray and Others,* the appointment of a judicial factor constitutes a trust, the question arises whether that is – or should be – a trust in the statutory sense of the word. It is the case that, at present, the definition of "trustee" in the Trusts (Scotland) Act 1921[63] includes "judicial factor". The discussion of the factor's duties in the SME shows the ambivalence of the law on the subject:

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[58] [1833] 1 H & TW 632.
[59] At p 634.
[60] See 1849 Act, s 32.
[61] At p 13.
[62] At p 21.
[63] 1921 c. 58.

> "Most judicial factors are not in the proper sense trustees. However, they are deemed to be trustees for the purposes of the powers conferred by the Trusts Acts. A factor cannot strictly be classified as a trustee as he is not vested in the estate."[64]

2.38 As that passage makes clear, the purpose of including judicial factors in the definition of "trustees" was to clarify questions as to the powers of judicial factors. Since this Report recommends that the judicial factor should be vested in the judicial factory estate, there may be a question as to whether the office should formally be equiparated with that of a trustee. We have considered that matter, and are firmly of the view that they should be treated separately.

2.39 The restatement of the attributes or incidents of the office of judicial factor, in this Report and in the draft Bill, makes it clear that there are substantive differences between the general notion of what is meant by a "trustee", on the one hand, and a "judicial factor", on the other. One obvious example is the supervision exercised over judicial factors by the Accountant.

2.40 While the recommendation, in this Report, that the judicial factor should be vested in the estate, may at first glance tend to remove an obstacle to treating the judicial factor as a trustee,[65] our recommendation is intended only to clarify the judicial factor's rights in relation to the judicial factory estate. The nature of the factor's relationship to the estate, and therefore to those with an interest in it, is not clear at present. But resolving that question so as to produce clarity does not make the office into that of a trustee.

Office sui generis

2.41 It is in any event neither necessary nor desirable to define the office of judicial factor by reference to other, analogous, offices. It is not necessary because we are persuaded that the combination of the statutory structure which we are recommending in this Report and the attached draft Bill, together with the case law on the nature of the office, will together provide a satisfactory basis for the institution. It is not an agency (see the Lord Justice Clerk's remarks in *Lord Gray).*[66] It is not a trust, although it shares many attributes of that institution. It is an office *sui generis*.

2.42 Neither is it desirable to link the office of judicial factor with other offices. Elsewhere in this Report we envisage the further development of the use of the office.[67] Such developments would take place in the light of experience and practice, and subject to the supervision of the courts. We would not wish what would in our view be an artificial classification of the office by reference to that of trustee to hinder that process.

Relationship with bankruptcy legislation

2.43 There is one minor consequential provision to be made. Section 33 of the Bankruptcy (Scotland) Act 1985[68] provides, *inter alia*, that property held on trust by a debtor for any other person does not vest in the trustee in sequestration. At present, it is also clear

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[64] 24 SME, para 246.
[65] See paras 2.37-2.38 above.
[66] See para 2.36 above.
[67] See paras 3.43-3.44 below.
[68] 1985 c. 66.

that property held by a person as a judicial factor will not vest in the trustee in sequestration, by virtue of the inclusion of "judicial factor" in the definition of "trustee" in the trusts legislation. As a matter of principle, this is clearly the correct position. But, since it is included in the statute for the purposes of trustees, it would be sensible to provide that this will continue to be the position in relation to judicial factors. We recommend:

> **2. That section 33 (limitations on vesting) of the Bankruptcy (Scotland) Act 1985 be amended to ensure that property held by a person as a judicial factor will not vest in the trustee in sequestration.**

(Draft Bill, schedule 2, para 3(2))

Conclusion

2.44 Before leaving this aspect of the matter, we recollect that, when this Commission examined the powers of judicial factors some forty years ago,[69] we observed:

> "It has been stated "that the process whereby tutors of certain types are spatchcocked into a Trusts Act is highly artificial", and the observation applies with equal force to judicial factors. These considerations suggest that there can be no permanent solution which does not recognise and make provision for the different functions respectively of judicial factors and trustees properly so called. Such a solution might require that judicial factors be extricated from the Trusts Acts and provided with a new statutory code which would so set out their powers and duties that much of the existing doubt about the need or otherwise for a judicial authorisation would be dispelled. But the task is formidable: no limit can be put upon the purposes for which judicial factors may be appointed, and the range of activities for which judicial factors have sought special powers is astonishingly wide."[70]

2.45 On reflection, we see no reason to disagree with the view expressed by our predecessors in that Memorandum. We hope that the provisions of the draft Bill attached to this Report will prove adequate to the challenge identified in 1974.[71]

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[69] *Powers of Judicial Factors* (Scot Law Com Memorandum No 19, 1974), available at http://www.scotlawcom.gov.uk/index.php/download_file/view/801/130/ .

[70] At p 18.

[71] On a more pragmatic level, this Commission is currently in the course of a project on the law of trusts. If we were to attempt to define judicial factors by reference to trusts, the necessary cross-referencing would potentially delay both projects.

Chapter 3 Appointment of judicial factor

Introduction

3.1 In this Chapter we discuss the general considerations which inform the appointment process, and suggest certain alterations to the current position.

Process

3.2 At present, whether the matter arises in the Court of Session or a sheriff court, most appointments of judicial factors are made in a petition process. (We deal below[1] with the competence of making an appointment in the course of other proceedings.) Given the history of the Court of Session's involvement with the office, normally through the exercise of the *nobile officium*, that is hardly surprising. We asked no question directed towards the form of the process, but equally we received no general comment that some other form of process should be substituted. The current method of bringing the matter before the court seems to operate satisfactorily in practice, and we see no requirement to change something which works well. We recommend no change in the form of process.

3.3 We are of course aware of the continuing process of giving effect to the recommendations of Lord Gill's review of civil procedure.[2] It may well be that one of the outcomes of that review will be to end the petition procedure in the Court of Session. But it would be premature of us to attempt to second-guess what effect the review might have on the legislation relating to judicial factors. For the time being, we consider that it is safer for us to proceed with this Report on the basis of the law as it currently stands. We recommend:

> **3. That applications for the appointment of a judicial factor should continue to be made by way of petition.**

(Draft Bill, section 1(1))

Jurisdiction

3.4 It is competent for petitions for the appointment of a judicial factor to be presented in either the sheriff court[3] or the (Outer House of the) Court of Session although, at present, most petitions are in fact made in the Court of Session. There is an exception in the case of petitions made for the appointment of a judicial factor under the 1980 Act, which are made to the Inner House.[4] In addition, it is competent, under the *nobile officium,* for the Court of Session, whether in the Outer or Inner House, to appoint a judicial factor in the course of other proceedings should that seem necessary or desirable.

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[1] At paras 3.12-3.14.
[2] Report of the Scottish Civil Courts Review (2009).
[3] S 4(1) of the 1880 Act, as amended by s 14 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980.
[4] RCS, rr 14 (3)(b) and 68.2.

3.5 In the Discussion Paper we asked whether the current rules as to jurisdiction were satisfactory.[5] There was a variety of responses. The Law Society suggested that the required degree of specialism pointed towards the Court of Session having sole jurisdiction. Others (Ewen Alexander and Thomas Hughes) thought that, ordinarily, applications should be to the sheriff court, reserving the Court of Session for more difficult cases. The Judges and Lord Penrose (who responded separately) considered that the present concurrent jurisdiction rules operated satisfactorily. The Scottish Court Service pointed out, in relation to the Scottish Civil Courts Review, that among those of Lord Gill's recommendations which had been accepted by the Scottish Government was that relating to the establishment of a proper hierarchy in the civil justice system. They drew our attention to Lord Gill's introductory comments, where his Lordship observed:

> "The root of the civil justice problem is that Scotland, uniquely among the major jurisdictions of the British Isles, has no proper hierarchy of civil courts at first instance or at appellate level. It has a flat, two-level structure of first instance courts whose jurisdictions for the most part overlap. It has only one appellate court, to which most litigants can appeal without leave.
>
> "In a proper hierarchy, the litigant should not have a choice of two courts of equal jurisdiction. There should be a classification by which a litigation should be conducted only in the court that is appropriate for it by reason of its nature, value or importance. Without such a basic principle, the system is bound to deploy its resources wastefully, to inflict needless expense on the litigants and to fail to deliver justice promptly. Decision-making in our courts is of a good standard; but in many cases the decisions are being made at a needlessly high level. ….
>
> "The self-evident need is to ensure that cases are directed to the lowest level at which they can be competently dealt with."[6]

3.6 In the light of those remarks, the Scottish Court Service suggested that the sheriff court should have sole jurisdiction. We see the force of this suggestion, particularly in the broader context of Lord Gill's report. Nevertheless, we are struck by the fact that the Judges have suggested that we maintain the *status quo*. We could see difficulties in attempting to differentiate between ordinary and particularly difficult cases, not least because it will not often be easy to say, on an *a priori* basis, into which category a particular case may fall; and we do not know how petitions for the appointment of a judicial factor will fit into whatever division of jurisdiction between the Court of Session and the sheriff court may be put in place when Lord Gill's proposals are implemented. On the whole matter, we recommend:

> **4. That petitions for the appointment of a judicial factor should continue to be competent in both the Court of Session and the sheriff court.**

(Draft Bill, section 1(3))

3.7 On the assumption that something broadly along the lines of the current system is to remain, there are three additional points to which we should draw particular attention.

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[5] At para 3.11.
[6] Report of the Scottish Civil Courts Review (2009) Vol 1, Introduction by the Lord Justice Clerk, pp iv-v.

Appointments under other legislation

3.8 The first relates to the fact that applications for the appointment of a judicial factor can be made under a number of other statutes, notably, perhaps, under section 41 of the 1980 Act.[7] References in that section to "the Court" are to the Court of Session.[8] We have adopted a policy, in this project, of dealing with the attributes of the office of judicial factor generally. We have not attempted to go into all the other Acts under which appointments can be made, and transfer those provisions to the draft Bill attached to this Report.

3.9 Some of those Acts envisage appointments in circumstances far removed from the traditional view of a judicial factor – the 1980 Act, referred to above, is a good example. Further, it is more appropriate, and certainly more helpful for the user of the statute book, if, for example, provisions about the appointment of judicial factors under or by virtue of the legislation relating to solicitors are to be found in that legislation, rather than anywhere else. The corollary to this approach is that where other legislation makes specific provision as to the court in which applications under it are to be made, we have not sought to change those. Thus, for example, petitions for the appointment of a judicial factor under the 1980 Act should, in our view, continue to be made in the Court of Session.

3.10 There is one further point to be made here. The 1889 Act provided[9] that it was to apply to all persons carrying out the functions of holding, administering or protecting property, whether or not they were formally called "judicial factors". Our ambitions are more limited. We seek only to ensure that where an officer is formally known as a judicial factor, the provisions of the draft Bill attached to this Report should apply to that officer. We recommend:

5. **That the provisions of the draft Bill attached to this Report should be without prejudice to the appointment of a judicial factor under any other enactment or rule of law.**

(Draft Bill, section 5(1))

6. **That the provisions of the draft Bill should apply to any judicial factor, so called, appointed under that Bill or any other enactment or rule of law.**

(Draft Bill, section 5(2))

Appointments under the 1980 Act

3.11 The second is that, as we have noted above,[10] petitions for the appointment of judicial factors under the 1980 Act are currently made to the Inner House of the Court of Session. There is no provision in the statute requiring this to be done, but the rules of court so provide.[11] We can see no reason why this should continue – nor was any suggested to

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[7] See also the Charities and Trustee Investment (Scotland) Act 2005, s 34 and the Local Government (Scotland) Act 1975, Sch 3, para 20.
[8] 1980 Act, s 65(1).
[9] At s 6.
[10] At para 3.4.
[11] RCS, rr 14.3(b) and 68.2.

us. If an application made to the Outer House were thought to raise issues which should be referred to three judges, the procedures of the court are sufficiently flexible to allow that to happen without delay. We recommend:

> **7. That petitions for the appointment of a judicial factor made under section 41 of the Solicitors (Scotland) Act 1980 should no longer be made in the Inner House of the Court of Session.**

If this recommendation is accepted, effect can be given to it by way of amendment to the rules of court.

Appointments "in the course of other proceedings"

3.12 The third matter which strikes us as anomalous under the current law is the fact that in the Court of Session, but not in the sheriff court, a judicial factor may be appointed in the course of other proceedings. This is, as we have observed, a feature of the Court of Session's present common law jurisdiction. It may be – indeed, it is, almost certainly – an instance of the use of the *nobile officium* of the Court of Session. Whatever may be its jurisprudential basis, however, it seems to us to be wrong in principle that the ability to exercise this useful discretion should depend upon the court in which the "other proceedings" are being heard.

3.13 We are of the view that, so far as the new statutory regime is concerned, the jurisdiction of the Court of Session and the sheriff court should be generally concurrent. Accordingly, in relation to the appointment of a judicial factor in the course of other proceedings, the discretion should be available also in the sheriff court.

3.14 Whether the setting out of the discretion in statute effectively removes it from the ambit of the *nobile officium* of the Court of Session is not a matter which we need to address in this Report. The *nobile officium* lies outwith the scope of this project. It is certainly not our intention that there should be any circumstance calling for the appointment of a judicial factor which is not covered by the draft legislation which accompanies this Report. Nevertheless, against the possibility that it may be thought that the statutory grounds for appointment do not meet some future case, we have preserved, in the draft Bill, a reference to appointments made under the *nobile officium*. We recommend:

> **8. That it should be competent, in either the Court of Session or the sheriff court, for the appointment of a judicial factor to be made in the course of other proceedings.**

(Draft Bill, section 3)

Interim judicial factors

3.15 It is at present competent for the court to appoint an interim judicial factor, normally on an *ex parte* basis, and frequently before intimation of the petition is made to those with an interest in the estate. It seems to us to be a sensible option: there are circumstances, such as where an appointment is sought by the Law Society, or where the estate is liable to be adversely affected by disagreement amongst those entitled to it, where speed of action will be important. In such a case an interim appointment will be highly desirable.

3.16 We understand, from practising judicial factors, that where interim appointments are made in relation to partnerships it occasionally occurs that the fact of the appointment's having been made, and the efforts of the interim factor, encourage the parties to resolve their differences before it becomes necessary to move to a permanent appointment. In such cases appointing an interim factor is entirely beneficial.

3.17 But we are in no doubt that in the ordinary case interim appointments should not go on longer than is necessary and, in point of fact, we consider that such an appointment should be made permanent after the parties affected have had the opportunity of making representations in court. While an interim factor may well have all the powers – and duties – of a permanent judicial factor, it is highly desirable that, if matters cannot be brought to a conclusion quickly, the appointment should be made permanent.

3.18 In the Discussion Paper[12] we noted that it would not be appropriate for an interim appointment to subsist for a long time. We drew attention to the case of *McCulloch v McCulloch,*[13] in which the Court of Session indicated that an interim judicial factor should report to the Accountant monthly, to avoid the undue continuation of the interim appointment.

3.19 We have discussed that matter with the Accountant, who took the view that the requirement to report monthly was unnecessarily prescriptive. In point of fact, the Accountant keeps interim appointments under continuous review, and will ensure that the parties move quickly to a permanent appointment where that is necessary.

3.20 The final issue, in relation to interim factors, is whether such a factor should have all the powers of a permanent factor. In the light of the considerations, dealt with below, of how to set out the powers and duties of a judicial factor, we are of the view that the correct solution is that an interim factor should have all the powers of a permanent appointment; but that it should be open to the appointing court to specify powers which it considers should not be available to that interim factor.

3.21 There might, for example, be situations where the estate in question consisted largely of a house with sentimental value for one, but not the other, of a married couple. In such a case it might be appropriate to provide that the interim factor should not have the power to dispose of heritage. No doubt other examples could be worked up, but on the general issue we consider that it is sufficient to allow the appointing court to have a discretion in the matter.

3.22 Accordingly, we recommend:

9. That it should continue to be competent to appoint interim judicial factors.

(Draft Bill, section 2(1))

10. That an interim appointment should be kept under review by the Accountant.

(Draft Bill, section 2(4))

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[12] At paras 5.33-5.41.
[13] 1953 SC 189.

11. That, subject to any modifications which the appointing court may make, the provisions of the draft Bill should apply to an interim judicial factor as they apply to a permanent judicial factor.

(Draft Bill, sections 2(2) and 2(3))

Intimation

3.23 Initially, intimation of the petition should be made to those who appear to the petitioner to have an interest in the estate. Further intimation can, in the usual way, be ordered by the court. We recommend:

12. That intimation of the petition should be made to those appearing to the petitioner to have an interest in the estate.

(Draft Bill, section 1(2))

Interest

3.24 There is always a question, in relation to any proceedings in court, as to whether the person seeking a remedy has a sufficient interest in the matter to justify the application. So far as judicial factors are concerned, the usual rule is that the petitioner must have an interest in the property over which the appointment is sought.[14] In the Discussion Paper[15] we speculated as to cases where a party might have an interest not so much in a property as in its maintenance. For example, where the dilapidation of one half of a semi-detached property might transmit itself to the other half, and might well tend to diminish the value of the other half, the owner of that other half might well be alarmed at the prospective damage to the property, but without any direct interest in the property which was liable to cause that damage. We asked whether such a case had occurred and, whether or not it had occurred, if the concept of interest in this context should be expanded so as to enable a petition to be competently made. The question provoked a range of responses, from practical examples (the Law Society) to a learned discussion of the law of common interest (STEP Scotland), but no-one was against the idea of widening the definition of interest in this context. We accordingly recommend:

13. That the definition of "interest" should be expressed widely enough to enable the court to make an appointment whenever it considers it appropriate to do so.

(Draft Bill, section 1(1))

Qualifications for appointment as a judicial factor

3.25 One of the issues we mentioned in the Discussion Paper[16] was whether the existing law that any natural person of full legal capacity should be eligible to be appointed was satisfactory. Linked with this is the question as to whether it should be possible to appoint persons domiciled outside Scotland. As a matter of practice, and apart from the

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[14] Addison, para 22.1.
[15] At para 3.16.
[16] At paras 3.3-3.5.

appointments made under the 1980 Act, the great majority of factors appointed are either legal or financial professionals. And, also as a matter of practice, it is very rare for someone domiciled outside Scotland to be appointed. We noted that where that had happened, as in the case of *Sim v Robertson,*[17] the factor had been required to prorogate the jurisdiction of the Scottish courts. That seemed, and seems, to us to be a sensible rule. We would suggest that it should be made slightly more routine, by deeming such a person to have accepted the jurisdiction of the Scottish courts upon accepting appointment as judicial factor.

3.26 Naturally, the fact of eligibility does not and should not guarantee suitability for appointment. It is also necessary that the person concerned should be acceptable to the court.

3.27 None of our consultees made any objection to our conclusion that the current position was satisfactory. We accordingly recommend:

14. That any natural person of full legal capacity, and who is in the view of the court a suitable person, should be eligible to be appointed as a judicial factor.

(Draft Bill, section 6(1))

15. That it should be competent to appoint as a factor a person who is not domiciled in Scotland.

(Draft Bill, section 6(2))

16. That a person domiciled outside Scotland who accepts appointment as a judicial factor is deemed thereby to prorogate the jurisdiction of the Scottish courts.

(Draft Bill, section 6(2))

Caution

3.28 At present, by virtue of section 2 of the 1849 Act, a factor has to find caution before a certified copy of the interlocutor of appointment can be issued, and cannot in any event enter upon the duties of the office until that has been done.

Previous discussion in relation to succession

3.29 This is a subject which the Commission has examined before, in other contexts. As we noted in our Report on *Succession*:[18]

> "The principal argument in favour of retaining caution is that it can provide an effective remedy where an executor dative has acted negligently or fraudulently in administering the estate."

[17] (1901) 3 F 1027.

[18] (Scot Law Com No 215, 2009) at para 7.7, available at http://www.scotlawcom.gov.uk/index.php/download_file/view/390/139/ .

In that Report, we recommended the abolition of the requirement that an executor dative should have to obtain caution. We also recommended that the court should no longer have a discretionary power to order caution. That was in the light of the consideration that to leave the matter on a discretionary basis would collapse the market in the provision of caution, with the result that caution, in the occasional case where it was ordered, would be difficult and expensive to obtain.

Caution in relation to judicial factories

3.30 Accordingly, in our Discussion Paper on Judicial Factors,[19] we mentioned the considerations which we had discussed in relation to the project on succession: we noted that there had been criticisms of the present system as causing delay in the appointment procedure, and as giving rise to considerable expense. We also asked whether the requirement to find caution should be abolished.[20]

3.31 Caution is normally fixed by reference to the whole value of the estate. Even without special arrangements with providers, it appears that, in practice, it is reasonably straightforward for a judicial factor to obtain caution. In particular, when there is an element of urgency in the matter (as is frequently the case when the Law Society is seeking the appointment of a factor), caution can be arranged quickly. And, as the Judges pointed out, unexpected situations can arise at any time.

3.32 Of the six consultees who answered our question as to whether the requirement should be retained, none was unequivocally in favour of outright abolition. The Judges were unequivocally in favour of retaining the requirement. Some speculated as to the replacement of caution with some sort of extended professional indemnity cover, given that most factors nowadays are professional people. The Law Society pointed out that there were few situations where the cautioner had been called upon, but did not recommend abolition. They wondered instead whether some equivalent of the liquidator's bond might be put in place.

3.33 In relation to the practical issues which we had raised, the Accountant commented that it might be possible to introduce for judicial factors a system similar to that which operates in relation to adult guardianship cautionary bonds. In that case, we understand that the Public Guardian has negotiated a service which enables guardians to obtain cautionary cover within 24 hours, by means of an easy application process, and at a cost proportionate to the value of the estate.

3.34 Since the end of the consultation period we have had the great advantage of discussing a draft of the Bill with professionals engaged in judicial factories. The view of all those who attended was that if a discretion were conferred upon the court in individual cases, it was likely that in most cases the requirement would be waived. It was envisaged that that would happen almost inevitably where the appointment was sought by the Law Society, or where a professional lawyer or accountant was appointed.

3.35 Unsurprisingly, none of our professional consultees could sensibly predict what would happen where the judicial factor was not professionally qualified (as, for example, in

[19] At para 7.9.
[20] At para 7.10.

cases under the Children (Scotland) Act 1995,[21] where the possibility of appointing a parent is specifically mentioned).[22] Nor are we in any better position to speculate either as to how often a non-professional will be appointed as a judicial factor or as to how likely it is that caution will be required in such a case, or, if caution is required, what it might cost. It seems to us that there are two elements of this discussion which should inform a decision. The first is that the cost of finding caution, on an annual basis, is a substantial outlay for the estate. The second is that it is impossible to say that there will never be circumstances where it will be appropriate to require even a professional judicial factor to find caution; but, in that connection, it could be made clear in the statute that caution should be required only in exceptional circumstances.

3.36 It is more straightforward to deal with the detailed consequences of a decision by a court to require a judicial factor to find caution. At present caution is fixed, and can be altered from time to time, by the Accountant. That seems to us to be satisfactory. We accordingly recommend:

> **17. That the court should have a discretion as to whether or not to require a judicial factor to find caution; but that that discretion should be exercised sparingly.**

(Draft Bill, section 7(1))

> **18. That where caution is required, the amount of caution should be fixed by the Accountant, who should also be able to vary the amount from time to time.**

(Draft Bill, section 7(2))

Grounds for appointment of judicial factor

3.37 The reasons for the appointment of a judicial factor have been reduced by the establishment of different regimes in relation, for example, to adults with incapacity. And, even within the areas where judicial factors may continue to be appointed, some of the statutes fix upon different aspects of situations which may require or justify such an appointment. In the case of appointments under the 1980 Act, one of the criteria is that the solicitor concerned has failed to comply with the accounts rules and that there is reason to suppose that the firm's liabilities exceed its assets.[23] In the Children (Scotland) Act 1995, it is the value of the property owned by or due to the child involved which prompts consideration of whether an appointment should be sought.[24]

3.38 These are specific examples. But in general, the essential rationale for the appointment of a judicial factor is that there is property which requires to be managed, and which, by reason of some inability or failure of the person or persons who would otherwise be responsible for that management, is not being managed properly.

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[21] 1995 c. 36.
[22] At s 9.
[23] 1980 Act, s 41.
[24] At s 9.

3.39 The aim of the appointment of a judicial factor, therefore, is to secure the proper and sound administration of the property until the situation which has given rise to the requirement for the appointment comes to an end. Such administration will take different forms, depending upon the nature of the property. The range of circumstances which may give rise to the requirement for the appointment of a judicial factor is wide, and, as we have already indicated, we would not seek to limit it in any way. But, without prejudice to that generality, it may be helpful to identify a number of common examples. Section 4 of the attached draft Bill, which gives statutory expression to the recommendations in this Report, mentions three circumstances in which it may be appropriate to appoint a judicial factor. The circumstances are where it would not be possible, or practicable, or sensible, for the management of the property in question to be carried out by those who would otherwise be responsible for doing so.

Possible

3.40 The first of these would arise, for example, where there is property belonging to a child, where the child is not legally competent to take legally binding decisions as to the management of the property, and where, accordingly, someone has to be able to take those decisions until the child reaches the age of capacity. Equally, if the administration of a trust estate is failing by reason of the demise or retirement of the trustees, without a successor having been assumed, then the judicial factor may be charged with the continuing administration of the trust. We understand from the Accountant that there are in fact a number of such judicial factories, which have been running for some considerable time.

Practicable

3.41 The second circumstance might arise where the person responsible for the management of the property is out of the country, and unable, for whatever reason, to administer it from abroad.

Sensible

3.42 Where the appointment is necessitated, for example, because a business owned by a partnership is not being run properly by reason of a fundamental disagreement amongst the partners, the requirement will be two-fold: first, to continue the business as a going concern and, second, to seek a resolution of the dispute between the partners with a view to ending the judicial factory. In such a case it would be possible for the property to be managed by those responsible, and it would, in theory, be practicable. But it would not be sensible, particularly if relations between the partners had reached the stage where they were simply unable to agree about anything.

Future developments?

3.43 It has been authoritatively stated that, statutory barriers apart, there is no limit to the circumstances in which a judicial factor may be appointed,[25] and while we have recommended the provision of a very wide statutory power to appoint judicial factors, we have deliberately left open the possibility of a common law appointment, in case some

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[25] See *Leslie's Judicial Factor* 1925 SC 464 per Lord President Clyde at p 469.

contingency should arise which even that wide statutory power might be thought not to encompass.

3.44 We would go further. One of our consultees said that he might have considered seeking the appointment of a judicial factor as one method of, for instance, securing the re-organisation of a charitable institution required to adapt to some major reduction in funding, had the existing, nineteenth century structures not made that an impracticable proposition.[26] We discuss that contingency no further, because clearly much would depend on the circumstances of the particular institution. But it is certainly our intention to leave open the possibility that the office may be available for use where an appointment is not necessary, in the nineteenth century approach to the matter, but only, perhaps, highly desirable.

3.45 We accordingly recommend:

19. That the grounds for the appointment of a judicial factor should be that there is property which requires to be managed properly and:

(a) that it appears to the court that it is not possible, or not practicable, or not sensible, for those responsible to manage it; or

(b) that there would otherwise be benefit in having it managed by a judicial factor.

(Draft Bill, section 4)

Property

3.46 A judicial factor may be appointed over any property, heritable or moveable. The only requirement is that it should be property which is not being properly managed. We need not expand greatly on this proposition, subject to what we say in the following paragraphs. It is, for example, the case that judicial factors are routinely appointed on trust estates.

Companies

3.47 The only specific concern raised with us as to the kinds of property over which a judicial factor might be appointed relates to companies. A number of consultees queried whether it was competent to appoint a judicial factor to the estate of a company. Although the Companies Act 2006[27] does not make specific provision for the appointment of judicial factors to the estates of companies, the general provisions, found at Part 30 under the heading "Protection of Members against Unfair Prejudice" at sections 994 – 999, enable the court to appoint a judicial factor to the estate of a company if certain requirements are met. Specifically, section 994(1) of that Act provides:

> "(1) A member of a company may apply to the court by petition for an order under this Part on the ground—

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[26] See also para 4.7 below.
[27] 2006 c. 46.

> (a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or
>
> (b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial."

Section 996 of the Act provides, *inter alia*:

> "(1) If the court is satisfied that a petition under this Part is well-founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of."

We are in no doubt that that power is sufficiently wide to enable a court, if so advised, to appoint a judicial factor upon the estate of a company.[28] Our view of the matter is reinforced by section 1154 of the Act, which specifically provides that notice must be given to the Registrar (of Companies) of any appointment of a judicial factor in relation to a company.

3.48 In addition, there is ample authority for the proposition that a judicial factor can be appointed to a company at common law, under the *nobile officium* of the Court of Session. The matter was discussed in the cases of *Paterson v Best*,[29] and more recently in the cases of *Fraser*[30] and *McGuinness v Black*.[31] As it happens, these cases involved petitions for the appointment of a factor on an interim basis, rather than a permanent basis,[32] which may be the reason for the uncertainty among our consultees. But there is no suggestion, in any of them, that there is any inherent limitation of the court's power, to the effect that while an interim appointment would be competent, a permanent appointment would not. Indeed, in *Paterson v Best*,[33] one of the reasons for refusing the appointment of an interim judicial factor was that there was already in place a judicial factor, who had, at the time of the litigation, held the office for some 12 years.

3.49 It is our view that it is competent to appoint a judicial factor over the estate of a company. The position is simply that, for practical reasons, frequently the appointment of an interim factor is more appropriate in the circumstances. Generally, the type of situation in which such an appointment may be necessary either involves an element of urgency, or requires a relatively short term solution as, for example, where a third party is required to look after the company's affairs while a particular issue is resolved.

3.50 The reference to "estate" in section 4 of the attached draft Bill is in our view apt to include companies, so that the general power to appoint judicial factors will be in addition to the power under the Companies Act 2006, discussed above.[34]

Effect of appointment in relation to control over property

3.51 One of the most fundamental questions, where a judicial factor is appointed to deal with another person's property, is as to what the factor is entitled to do with that property by

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[28] See 24 SME, para 276.
[29] (1900) 2 F 1088.
[30] *Fraser* 1971 SLT 146.
[31] *McGuinness v Black (No.2)* 1990 SC 21.
[32] See also *Weir v Rees* 1991 SLT 345, OH.
[33] (1900) 2 F 1088 at p 1093 per Lord Trayner.
[34] "To make assurance doubly sure", we have left open the possibility of an application to the *nobile officium* of the Court of Session, in s 5.

virtue of the appointment. The nature of the control exercised by the judicial factor will be relevant for a range of purposes. An examination of the current law leads to the conclusion that the effects of the appointment are not clear in any particular case, and are not consistent in every case.

3.52 Section 13 of the 1889 Act provides that a certified copy interlocutor of the appointment shall have "the full force and effect of an assignment or transfer, executed in legal and appropriate form, of all funds, property, and effects situated or invested in any part of the British dominions".[35] It is perhaps unfortunate that assignment and transfer are given as alternatives, and that it is not made clear whether "property" includes heritable property.

3.53 It may be for that reason that, when a question arose as to the competence of a charge against a debtor proceeding in the name of the ward rather than that of his *curator bonis,* the court simply overlooked the 1889 Act. In *Yule v Alexander*[36] a debtor under a heritable security was charged, at the instance of an *incapax*, to pay the principal sum then due to the *curator bonis* of the *incapax*. The debtor sought a suspension on the ground that the charge should have proceeded at the instance of the *curator*. The observations of the Division are useful because they reveal the number of different possible approaches there may be to the question of what it is that is transferred to the factor. The Lord President said:

> "The position of a curator bonis is not that he has transferred to him the estate of the ward, nor is the ward divested of that estate. The more accurate statement is that made by Mr Bell (Bell's Prin. sec. 2121), viz., that the ward's management of his estate is superseded in favour of the curator."[37]

Lord Adam observed:

> "I agree with your Lordship that this point turns on the question whether or not the ward is divested of his estate by the appointment of the curator bonis. In this case the ward's estate has not been sequestrated. If that had been done I do not know, and it is not necessary to consider, what effect it would have had on the present question, but the estate is still vested in the ward."[38]

Accordingly, notwithstanding the passage of the 1889 Act, the property remained vested in the ward. Lord McLaren said:

> "I agree with your Lordship that the authority and right of a curator bonis is correctly defined by Mr Bell, when he says that a curator is appointed to supersede the ward in the management of his affairs. The appointment of a curator does not imply that the ward is divested of his estate, or deprived of his civil rights, except in so far as is inconsistent with the institorial power given to the curator."[39]

In the event, in that case, the charge proceeding at the instance of the *incapax* was held to be competent. What difference sequestration might have made to the position was not considered. In that regard it may be instructive to note the opinion of Lord Young in the case of *Smith v Smith,*[40] which concerned an application for the appointment of a judicial factor

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[35] For more detail on section 13 of the 1889 Act, see paras 3.54-3.56 and 3.68-3.72. below.
[36] (1891) 19 R 167.
[37] At p 168.
[38] *Ibid.*
[39] At p 169.
[40] (1892) 20 R 27.

over a partnership estate. The actual point at issue was whether the matter could competently be dealt with in the Inner House, but Lord Young remarked:

> "The petition is primarily one for the appointment of a judicial factor, and unless there be an existing trust there can be no appointment of a judicial factor without sequestration. The meaning of sequestration is the placing of the estate under the management of an officer appointed by the Court, and the manager is the sequester. If, then, the Court appointed a judicial factor without sequestrating the estate, you would have a manager with nothing to manage."[41]

3.54 *Yule v Alexander* was expressly approved in *Inland Revenue v McMillan's Curator Bonis*.[42] The question in the latter case was whether the expenses of the *curator bonis* were to be deducted from the income of the estate before it was assessed for income tax. The Lord President drew a distinction between a judicial factor appointed upon a trust estate, on the one hand, and a factor *loco tutoris* or a *curator bonis*, on the other. In the former case the estate would vest in the factor. In the latter it would not, and the *curator* would have only the right to administer the property, ownership of and title to which would therefore remain with the ward. Since section 13 of the 1889 Act had been raised in argument (as appears not to have been the case in *Yule v Alexander*) the Lord President considered the effect of that provision.

3.55 Section 13 provides:

> "13. An official certified copy interlocutor of the appointment of any judicial factor, trustee, or other person judicially appointed and subject to the provisions of the recited Acts or of this Act, shall have throughout the British Dominions, as well out of Scotland as in Scotland, the full force and effect of an assignment or transfer, executed in legal and appropriate form, of all funds, property, and effects situated or invested in any part of the British dominions, and belonging to or forming part of the estate under his charge; and all debtors and others holding any such funds, property, or effects, shall be bound, on production of such official certified copy interlocutor to pay over, assign or transfer the same to such judicial factor, trustee, or other person."

3.56 The Lord President commented:

> "It was also maintained that under section 13 of the Judicial Factors (Scotland) Act 1889, the decree appointing the *curator bonis* operated as an assignation of the assets of the *incapax* to the *curator*. But I do not so read the section. In the first place, it only applies to funds, property and effects situated or invested in any part of the British Dominions, and I am by no means satisfied that any of the investments in question would fall within this description. But, apart from this aspect of the matter, the section is merely designed to reinforce the title of the *curator bonis* to uplift and ingather the estate of the *incapax*. The section, so far from providing that the appointment of the *curator* is to operate as an assignation to him of the funds of the *incapax*, merely provides that the extract of the appointment is to have the effect of a duly executed transfer of the funds in question in order to give the *curator* authority to recover these funds from debtors and others holding these funds. But the section

[41] At pp 28-29.
[42] 1956 SC 142.

> recognises that these funds still remain part of the ward's estate under the charge of the *curator*."[43]

Lord Sorn observed, with regard to the section:

> "This provision does not seem to me to touch the point we are concerned with. It is simply a piece of adjective legislation to facilitate the ingathering of the estate and means that, in a question with those persons from whom the *curator* has to ingather, his appointment is equivalent to a vesting of the estate in him. The provision does not in any way affect the position as between the *curator* and his ward."[44]

3.57 The result of the finding that the estate did not vest in the *curator* was that the *curator*'s commission was not to be deducted from the beneficiary's income prior to assessment for tax. Had the estate been vested in the *curator,* the beneficiary would have been entitled only to an accounting at the end of the curatory, and the latter's commission would have been a legitimate deduction prior to the assessment.

3.58 The question of what property is transferred to the factor, and upon what terms, was considered more recently in the case of *Council of the Law Society of Scotland v McKinnie (No.2).*[45] In that case a judicial factor was appointed to the estate of a solicitor by virtue of the 1980 Act. Before the factor was discharged the solicitor was sequestrated under the Bankruptcy (Scotland) Act 1985.[46] A dispute arose as to whether the factor was entitled to deduct his expenses and remuneration for work done after the sequestration from the solicitor's clients' account, and whether his charges were an ordinary debt ranking in the sequestration along with other unsecured creditors (insofar as his charges were not met by the right to set off those claims against realised estate within the factor's possession). The leading opinion (by Lord Penrose) in the Inner House discusses a number of issues relevant to this part of this Report. The first was the nature of the control exercised by the factor. Lord Penrose discussed the cases of *Yule v Alexander* and *Inland Revenue v McMillan's Curator Bonis,* mentioned above, and concluded:

> "As these observations make clear, not all judicial factories are *in pari casu*. This must be borne in mind in considering *dicta* in some of the other cases referred to. The nature and extent of a judicial factor's duties, and the scope of his powers in relation to the funds committed to his management, depend on the circumstances giving rise to his appointment. This necessarily follows from the unqualified scope of the court's powers to make such appointments."[47]

3.59 In the event, in relation to judicial factors appointed by virtue of the 1980 Act, his Lordship set the matter out as follows:

> "In my opinion the proper view of the effect of the appointment of a judicial factor on a solicitor's estate in terms of sec 41 of the 1980 Act, derived from a consideration of the purposes of the appointment, is that possession of the solicitor's estate, including client funds, is transferred to the judicial factor with title to intromit therewith and to realise the estates and to apply the proceeds in accordance with the requirements of the situation after full investigation. *In such circumstances what remains with the solicitor is a right to an accounting by the factor for his intromissions with the property*

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[43] At p 148.
[44] At p 149.
[45] 1995 SC 94.
[46] 1985 c. 66.
[47] At p 108.

> *in question from time to time and at the close of the factory to ascertain what balance of funds, if any, is due to the solicitor, coupled with a reversionary right to the assets comprised in that balance.* It may be that in accounting for the balance of funds there will be included assets which remain in the specific form in which they existed at the date of appointment of the factor and that the factor will account to the solicitor for these, by transfer in whatever form is required. But it makes little sense to refer to continuing rights of property in the solicitor in assets which are totally at the disposal of the judicial factor during his period of administration. The judicial factor's position is not comparable to that of the *curator bonis*."[48] (emphasis added).

3.60 The picture which emerges from these various cases is one of some confusion. It is of course possible to approach the matter, as the courts currently do, from the perspective that the attributes of the appointment of a judicial factor will depend upon the reason for the appointment. It will also depend, apparently, upon whether the estate is sequestrated. That too may be a necessary feature of the appointment in some circumstances. But the result of that approach is to leave the relationship of the judicial factor with the judicial factory estate in some considerable doubt. It also, as is demonstrated by the cases, raises questions as to the particular relationships which differently appointed factors have with other parties, such as (now) HM Revenue and Customs, and with trustees in sequestration.

3.61 We have considered this matter carefully. The current position, that the attributes of the appointment are clear in some cases, but not in others, and will in any case depend upon the purposes of the appointment, no doubt reflects the essentially common law nature of the development of the practice of the courts. But that begs the question as to whether this feature of the office is one which should be preserved, or whether the opportunity should be taken to clarify the position.

3.62 We cannot see that it is in anyone's interest that the position of the factor in relation to the property should be in doubt. It seems to us that it would be better to have a clear position, which will apply in all cases. This of course leaves open (at least) two options as to what that position should be. One possibility would be to replicate the position as set out in *Yule v Alexander,*[49] that the factor has a mere power of administration. But that seems to raise many questions as to the factor's relationship with other parties, let alone as to what may properly be done in relation to the estate. And, as will be noted below, in the Chapter on the powers of a judicial factor, it seems, in the past, to have necessitated frequent requests from factors for further powers, or at least for clarification of what powers the factor has. It is, in short, a concept the definition of which does not appear clearly from the decided cases. Accordingly, it does not seem to provide a sound basis for a general rule.

3.63 Alternatively, it would be possible to provide that the effect of appointment would be to vest the estate in the judicial factor *qua* judicial factor. This would give the factor the most complete powers. There would be no requirement to go back to the court to ascertain whether it was competent, in relation to any particular piece of property, to act. Having regard to the fact that any judicial factor is in a fiduciary capacity in relation to those for whose benefit the appointment is made, and to the fact that every judicial factor is supervised by the Accountant, it seems to us that this would be a sound position. The corollary to vesting the property in the factor would be that the court making the appointment

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[48] At pp 110-111.
[49] *Cit. sup.*

should be able, in appropriate cases, to limit what the factor is able to do with the property. We deal with that matter, below, in Chapter 5.

3.64 The end result of that solution, in terms of the cases mentioned above, is that a judicial factor appointed under the draft Bill attached to this Report would be in the position of the judicial factor in the case of *Council of the Law Society of Scotland v McKinnie (No. 2).*[50] What would remain with those ultimately found to be entitled to the estate would be a right to an accounting by the judicial factor, at the end of the judicial factory, for the intromissions with the property, together with a right to the assets which comprise the estate at that time. (Later in this Report we recommend that that right to an accounting should in fact be satisfied by the factor's production of accounts approved by the Accountant.)[51] It would follow that, in circumstances such as those which arose in *Inland Revenue v McMillan's Curator Bonis,*[52] the estate would be assessed for tax on the balance after deduction of the judicial factor's outlays and remuneration.

Warrant to intromit with the estate

3.65 The factor's warrant to intromit with the estate will be a certified copy of the interlocutor of appointment, which should be issued promptly by the clerk of court, unless a requirement for caution is imposed. Where that is the case, the bond of caution should be sent to the Accountant, who should check that the requirement has been complied with, and report accordingly to the clerk of court. On receipt of the Accountant's report, the clerk of court should issue the certified copy interlocutor.

Completion of title

3.66 There is at present a question as to whether the factor should complete title to any heritable property in the estate. Those of our consultees who responded to our question on this matter expressed mixed views; but no-one was against the factor having at least a discretion to complete title. The Law Society were firmly of the view that there should be certainty as to the position, and that it would be better for the factor to have a clear, recorded title, not least because, where no security is in place, there is a risk of an unlawful transfer. The Keeper of the Registers saw no objection to the factor's having the power to complete title, suggesting that the judicial factor would register a notice of title in the Land Register using the certified copy interlocutor of the appointment as a link in title.

3.67 It seems to us that it would be consistent with our view on vesting generally that the judicial factor should have a discretion to complete title to property, both heritable and moveable, as a matter of routine. In relation to property, such as heritable property, where an entry in the appropriate Register is required in order to complete title, the factor should be able to do that as mentioned in the previous paragraph. But, (subject, of course, to any special provision made by the court) that should not be obligatory.

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[50] *Cit. sup.*
[51] See para 7.26 below.
[52] 1956 SC 142.

Repeal of existing provisions relating to completion of title

3.68 This would obviate the detailed provisions as to completion of title currently set out in section 24 of the Titles to Land Consolidation (Scotland) Act 1868[53] and section 25 of the Trusts (Scotland) Act 1921.[54] In the Discussion Paper[55] we also drew attention to the provisions of section 13 of the 1889 Act, which we have quoted above, at paragraph 3.55. In the Discussion Paper[56] we indicated that because section 13 applied to trustees as well as to judicial factors it would not be appropriate, within the remit of this project, to repeal it other than in relation to judicial factors. But, on further thought, we do not think that this is a valid consideration. There are several difficulties in relation to section 13. We have quoted Lord President Clyde's observations on that section above, at paragraph 3.56.

3.69 It is not altogether easy to say precisely what weight Lord Clyde was giving to the provisions of section 13 in that somewhat elliptical pronouncement. Section 13 begins with the words:

> "13. An official certified copy interlocutor of the appointment of any judicial factor, trustee…or other person judicially appointed…".

The expressions "judicial factor" and "trustee" are equally qualified by the words "or other person judicially appointed". In the context of the 1889 Act those words make sense. The Act was intended to apply a uniform structure and system of governance to all who were carrying out the functions of looking after the property of other persons. It is not clear to us to how many trustees section 13 would apply, because it could only apply to a trustee who had been judicially appointed. It is of course the case that trustees are on occasion appointed by the court. Section 22 of the Trusts (Scotland) Act 1921 makes specific provision for such appointments. It also provides for the court to:

> "grant a warrant to complete a title to any heritable property…which warrant…shall also specify the moveable or personal property…and shall also be effectual as an assignation of such moveable or personal property in favour of the trustee or trustees so appointed."

That provision would appear to replace, or supersede, the provision in section 13 of the 1889 Act in relation to trustees appointed by the court and may well, on a proper consideration, amount to an implied repeal of that section, so far as relating to such trustees.

3.70 In any event, as we have observed already, we are not recommending that the model adopted in the nineteenth century legislation should be followed here. Our proposal is that only judicial factors so called should be subject to the provisions of the draft Bill attached to this Report and subject to the supervision of the Accountant.

3.71 It would of course be theoretically possible to leave in place the regime set out in the 1849, 1880 and 1889 Acts only for the purpose of regulating whatever trustees might be judicially appointed, and to whom it was thought desirable to apply that regime. We think that that is no more than a theoretical possibility, which deserves no serious consideration.

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[53] 1868 c. 101.
[54] 1921 c. 58.
[55] At paras 4.6-4.19.
[56] At para 4.19.

3.72 It follows that, on more mature consideration, we see no difficulty in recommending that section 13 of the 1889 Act should be repealed.

3.73 With regard to the fourth provision mentioned in that part of the Discussion Paper, section 1 of the Conveyancing Amendment (Scotland) Act 1938,[57] the position is different. That provision, apart from providing for the "act and warrant" appointing a judicial factor on a trust estate to be a "valid midcouple or link of title", also does other things. That being the case, the provision should be repealed in so far as relating to judicial factors, or at least amended so as to leave the provisions in the draft Bill attached to this Report as the route by which judicial factors complete title to heritable property.

3.74 Accordingly, we recommend:

20. That all property in relation to which the factor is appointed should vest in the factor, in that capacity.

(Draft Bill, section 9(1))

21. That a certified copy of the interlocutor of appointment should be sufficient warrant for the factor to intromit with the factory estate. Where, however, a requirement for caution has been imposed, the certified copy interlocutor should not be issued before the Accountant has informed the court that the requirement has been complied with.

(Draft Bill, section 10)

22. That where the property is of a nature such that the completion of title to it requires some further formal step, such as the registration of a notice of title in the Land Register, the factor should have a discretion to take that step.

(Draft Bill, section 15(2))

23. That section 24 of the Titles to Land Consolidation (Scotland) Act 1868, section 13 of the 1889 Act and section 25 of the Trusts (Scotland) Act 1921 should be repealed.

(Draft Bill, schedule 2, paragraph 1(6); schedule 3, Part 1)

24. That section 1 of the Conveyancing Amendment (Scotland) Act 1938 should be repealed, in so far as relating to judicial factors.

(Draft Bill, schedule 3, Part 1)

Property held in fiduciary capacity

3.75 It should be emphasised, however, that the factor cannot be given a better right to any property than that enjoyed by the beneficiary. Where the appointment extends to property held by the beneficiary in trust, or on some other fiduciary basis, then the factor

[57] 1938 c. 24.

takes the property subject to the same constraints. Specifically, where a factor is appointed on the estate of a solicitor, under the 1980 Act, the solicitor's clients' account is held by the factor in trust for the clients, not as part of the solicitor's business or personal estate.

3.76 This raises a further question in relation to the appointment of judicial factors upon the estates of solicitors by virtue of the 1980 Act. The question was raised in the case of *Council of the Law Society of Scotland v McKinnie (No. 2),*[58] to which we have already referred. At page 105 Lord Penrose discussed whether different rules should or might apply in relation to funds held by the solicitor in different fiduciary capacities. His Lordship observed:

> "I do not accept the argument that it would be incongruous for client funds to be comprised in the solicitor's estate for present purposes when other funds held by him in trust were ***or might not be***. Client funds are held by the solicitor in his professional capacity. A solicitor appointed under a private trust may have been selected by the truster because he was a solicitor, and even because of a professional relationship. There may be a professional charging clause entitling him to remuneration if he performs professional work for the trust. He may hold funds for the trust as for any other client in the event of undertaking such professional work. But his participation in the administration of the trust generally, in the investment and application of its funds, and in the carrying out of its purposes derives nevertheless from the private appointment and not from the public practice of his profession as solicitor. If circumstances warranted the sequestration of the trust estate, and the appointment of a judicial factor, that would be for the purposes of the specific trust, and subject to powers and duties relating to that trust." (emphasis added).

3.77 As his Lordship pointed out, it may be that, while funds held in a solicitor's clients' account are transferred to the factor, funds held under private trusts might not be. He observed that if there were perceived to be a difficulty with the solicitor's administration of such a private trust, then a separate petition might have to be presented, related to the purposes of that trust. That would be because, even though his appointment as trustee might have been as a result of his being a solicitor, nevertheless the administration of the trust would derive not from the public practice of his profession as a solicitor, but from the private appointment. In that connection we simply remark that while an appointment of a solicitor as a trustee may not formally be linked with his professional status, it is, to put it no higher, extremely unlikely that such an appointment will be unconnected with that status. It is of course competent to appoint a judicial factor on a trust estate, and there is no reason in principle why the estate upon which a factor is appointed should not include estate held in a fiduciary capacity – that is what happens to funds held in a solicitor's client account.

3.78 This is a matter which we discussed with the Law Society. They informed us that matters are not always clear-cut. In some cases it is not easy to determine whether a particular trust related to the public practice of a solicitor or to a private appointment as a trustee. In any event the existence of such trusts would not be apparent until after the appointment had been made, and the judicial factor had had an opportunity to see what was involved.

3.79 At this point it is appropriate to consider the purposes for which appointments are made by virtue of the 1980 Act. It is because the Council of the Law Society is satisfied that,

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[58] 1995 SC 94.

to put the matter at its lowest, the solicitor's administration of the clients' affairs has gone gravely wrong. The solicitor has failed to comply with the accounting rules which are designed to secure that a proper professional service is provided to the clients and is thereby acting in such a way as to expose clients to a risk of financial loss, and the profession to a loss of public confidence in it (not to mention any potential call on its Guarantee Fund which such conduct may cause).

3.80 It would appear from Lord Penrose's comment, highlighted in the passage above, that there may be some doubt as to whether a judicial factor appointed over the estate of a solicitor would *ipso facto* be able to administer any accounts held by the solicitor as trustee. There would presumably be the same doubt in relation to accounts held by the solicitor as executor. Section 42 of the 1980 Act already makes provision for accounts held in the name of a particular client. While subsection (1) of that section provides that funds held in a general clients' account, if insufficient to repay all the money owed to each client, should be divided proportionately among all of them, subsection (3) makes it clear that that should not apply to accounts held by the solicitor in the name of, or for, a particular client. That provision would not necessarily cover accounts held by the solicitor as trustee or as executor.

3.81 It seems to us that this is an area where it would be sensible to resolve any doubt there may be in favour of extending the factor's appointment so that it covered all the assets owned or controlled, in whatever capacity, by the solicitor. That would have the effect of preserving the assets of all those on whose behalf the solicitor was acting. If the person on whose behalf a particular account was held wished, in spite of the fact that a factor had been appointed, to retain the services of the solicitor, then it would be a relatively simple matter for the factor to transfer the relevant assets back to the solicitor and to obtain a discharge in respect of that part of the estate.

3.82 Accordingly, we recommend:

> **25. That, without prejudice to sections 41 and 42 of the Solicitors (Scotland) Act 1980, a judicial factor appointed on the estate of a solicitor by virtue of that Act should be vested in all the property held by the solicitor in question, including, unless the court determines otherwise, all such property held by that solicitor in a fiduciary capacity.**

(Draft Bill, section 9(2))

3.83 We should add here, for the sake of completeness, that we see no corollary between what we propose above, in relation to judicial factors appointed upon the estates of firms of solicitors, and judicial factors appointed upon trust estates. In the latter case there is a defined estate belonging to the trust which is the subject of the appointment. In the former the personal property of the solicitor is inevitably included in what is vested in the judicial factor. All we are seeking to do, by the recommendation above, is to make it clear that other property held by the solicitor in a fiduciary capacity, and not falling within the property already covered by section 42 of the 1980 Act, is also transferred to the judicial factor.

Registration of appointment

3.84 Under the present law, only the appointment of a judicial factor upon the estate of a deceased person requires to be advertised, and that has to be done in the Edinburgh Gazette and other appropriate newspapers within 14 days of the appointment.[59] Most of our consultees were of the view that some publication of appointments was highly desirable, if not essential, and we are ourselves of the view that appointments should be drawn properly to public attention. We do not, however, consider that the Edinburgh Gazette is any longer so well scrutinised by financial institutions and other potentially interested parties as to justify a continuation of the requirement to publish in it. On that matter, it seems to us, after consultation with the Keeper, that registration in the Register of Inhibitions would be appropriate.

3.85 There remains the question of who should be responsible for registration. Since the appointment is a public act by the court, it seems to us that it would be appropriate for the clerk of court to register the appointment. It would also be appropriate to require the clerk of court to intimate the appointment to the Accountant. Finally, where an appointment continues for as long as five years then a fresh registration, by the judicial factor, should be undertaken at that interval.

3.86 We accordingly recommend:

26. That the appointment of a judicial factor should be:

(a) registered in the Register of Inhibitions; and

(b) intimated to the Accountant

by the clerk of court.

(Draft Bill, sections 8(1) and (2))

27. That, where an appointment of a judicial factor subsists for 5 years, a fresh registration should be made in the Register by the judicial factor.

(Draft Bill, section 8(3))

[59] RCS, r 61.20. It seems that the purpose of the requirement is to ascertain the claims on the estate.

Chapter 4 Duties of judicial factor

Introduction

4.1 This matter was covered in Part 5 of the Discussion Paper. While this Report treats duties and powers in separate Chapters, we are of course conscious that any consideration of the factor's powers must sensibly be informed by a consideration of his or her duties; there will be many areas of activity in which a duty is simply the reflection of a power, and *vice versa*.

Duties

4.2 Some duties affect the factor from the beginning of the appointment. For example, we have already discussed, in Chapter 3 above, the question of whether the factor should be under a duty to obtain caution. Other duties stem from the fiduciary nature of the appointment, and others from what may be required to be done in relation to the particular judicial factory. While most of these duties are in relation to the estate, the essence of the regime applying to judicial factors is that they are under the supervision of the court, and, in particular, of the Accountant. Many of the duties specifically imposed upon judicial factors will accordingly be duties to account for their acts (and any omissions) to the Accountant and, through the Accountant, to the court.

4.3 Further, in addition to any duties imposed in terms of the legislation, the judicial factor will be under an obligation to comply with any additional and specific duties imposed by the court which makes the appointment.

General duty

4.4 The constant feature, as we observed in Chapter 3, is that the property requires to be managed, but that is clearly insufficient in itself. It is not being managed in a vacuum. The estate is being, or ought to be, managed on behalf of those who have an interest in it.

4.5 It may be sensible to expand a little on the terms used in that statement. In this context "the estate" is to be understood as the net estate, after payment of any liabilities. Certainly, the judicial factor has to meet those liabilities, in the ordinary course of business. But that is not the primary purpose for the appointment. The use of the word "managed" is intended to leave some flexibility for the judicial factor to exercise a sensible discretion. It is, and is intended to be, different from the word "preserve" which might have been used in a nineteenth century formulation of a general duty, although clearly preservation of the estate is a large part of the judicial factor's responsibilities. What is required by such a duty will depend upon the circumstances of the individual judicial factory. Further, while it will usually be clear who "those who have an interest in it" are, there may well be cases in which an interest in an estate is contingent upon the occurrence, or non-occurrence, of some event, or

where there is a dispute as to who is entitled to the estate, or to part of it. We have therefore generalised the term.[1]

4.6 It would of course be possible to leave that general duty to be inferred; but in a comprehensive statute on the subject it seems to us to be more sensible to include it on the face of the draft Bill.

4.7 An important consideration is that any such general duty would be without prejudice to any specific duty imposed by the interlocutor appointing a factor. As we have noted elsewhere, it may be that some bodies would wish to consider seeking the appointment of a judicial factor in order to bring about some alteration in their organisation or functions.[2] In such a case we would anticipate that the petition seeking appointment would set out in some detail what it was that the judicial factor was to do. We would also envisage that, if the court considered that such an appointment would be appropriate, it would incorporate in its interlocutor appropriate requirements upon the judicial factor.

4.8 It may be, in considering the particular circumstances of a particular appointment, that the court will come to the view that some of the duties, whether in the draft Bill or in any other enactment, should not be imposed upon the judicial factor, or that additional duties should be imposed. It should be open to a petitioner to make representations as to these matters, and for the court to make decisions on them either in the light of those representations, or *ex proprio motu.* Finally on this matter, it should be open to a judicial factor to apply to the court to be released from any of the duties imposed by the interlocutor of appointment.

4.9 The general duty would also be without prejudice to any statutory regime for the appointment of a judicial factor. The most obvious example is an appointment made by virtue of section 41 of the 1980 Act. The purpose of such an appointment is to protect and preserve the position of the clients of the firm and, so far as possible, to protect the position of the Solicitors' Guarantee Fund. The interests of those who own whatever may be left of the estate upon which the judicial factor is appointed are clearly to be subordinated to the interests of the clients and creditors.

Nature of general duty

4.10 In the Discussion Paper we asked whether the factor should be under a general duty to manage the estate proactively.[3] That was because it seemed to us that a duty of conservation, strictly interpreted, might possibly work against the interests of the immediate beneficiary and in favour, perhaps, of those who would eventually succeed to the estate. The responses to that question were, on balance, against a duty of "proactive management". Only the Scottish Court Service were of the view that there should be a specific, statutory duty to manage proactively. The prevailing view among other consultees was that it would depend on the circumstances of the particular judicial factory, but that a judicial factor should not be taking risks with the estate.

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[1] It is of course possible that matters may be so confused that the judicial factor will feel obliged to raise an action of multiplepoinding.
[2] At para 3.44 above.
[3] At para 5.7.

4.11 We have considered these differing views with some care. We appreciate, and agree with, the view that a judicial factor should not be taking risks with the estate. On the other hand, a statutory re-statement that a factor's duty is simply to "preserve" an estate might lead to a supine attitude to financial management. While there would be difficulties in a literal application of the principles underlying the parable of the talents to the position of a judicial factor in modern circumstances, perhaps something more might be expected than that the factor should, figuratively speaking, bury the assets of the estate in a hole in the ground.

4.12 While we have come to the view that it would be appropriate to impose a duty on a factor to manage the estate for the benefit of those with an interest in it, we have concluded that that duty should not be qualified by any admonition to administer "proactively". That will enable a conscientious judicial factor to steer a sensible middle course between, on the one hand, an over-enthusiastic programme of investment and, on the other, a tendency to descend into a state of financial inertia.

Duty to manage diligently?

4.13 Finally, on this matter, there is the question of whether anything should be said as to the way in which the judicial factor acts. We consider that it would be appropriate to require a judicial factor to exercise care, diligence and prudence, without specifying further precisely how those qualities would be demonstrated. The circumstances of each appointment, and of the particular judicial factor, will differ, and we are content that there should be a duty, expressed in general terms, against which the performance of the individual judicial factor can be measured.

4.14 We recommend:

28. That a general duty should be imposed upon a judicial factor to manage the estate for the benefit of those who have an interest in it.

(Draft Bill, sections 14(1) and 56)

29. That that general duty should be subject to:

(a) any special statutory regime under which a judicial factor may be appointed; and

(b) the terms of the interlocutor appointing the judicial factor.

(Draft Bill, section 14(2))

30. That a court appointing a judicial factor should have a discretion to add to, or subtract from, the duties which would otherwise be imposed upon a judicial factor under or by virtue of any enactment.

(Draft Bill, section 23(1))

31. That a judicial factor should be able at any time to apply to the court to be relieved of any duty imposed by or by virtue of the interlocutor of appointment.

(Draft Bill, section 23(2))

32. That a judicial factor should be required to exercise care, diligence and prudence in carrying out the functions of the office.

(Draft Bill, section 14(3))

Obligations to be met out of judicial factory estate

4.15 It is clearly essential, where there are persons entitled, either prospectively or immediately, to the estate, that any legal obligations which the estate might be required to meet in relation to those persons should be met from the estate and, therefore, by the factor. Thus, a factor would be entitled and obliged to pay for the alimentary requirements of such persons, and would also be able and obliged to meet the legal obligations, alimentary and otherwise, owed by those persons to others. A factor appointed to run a business because the marriage of the husband and wife partnership which owned it had irretrievably broken down would be required to aliment both parties from the income of the estate. And such a factor would, equally, be obliged to aliment the children of the marriage.

4.16 This statement of the obvious is made simply to point out the distinction between such obligations and other requests for payment, which might properly be accepted by an owner of the property who was managing it personally. We have in mind here donations to charitable institutions, or payments of a voluntary nature to family members towards whom the owner of the estate has no legal, as opposed to moral, obligations. A judicial factor would not in our view be entitled to spend the income or capital of the estate on such moral obligations. A judicial factor who considers that the particular circumstances of the case merit such payments should apply to the court. The matter was discussed in the case of *Hamilton's Tutors, Petitioners*,[4] where Lord Anderson explained the position in this way:

> "The general rule, in a question of this nature, is well settled. It is that the Court will not sanction the expenditure of the funds of a ward for the purpose of the maintenance of a person whom the ward is under no legal obligation to support — *Court*, 10 D. 822; *Primerose*, 15 D. 37; *Dunbar*, 3 R. 554; *Balfour*, 26 S. L. R. 268. If there is legal obligation to maintain, aliment may be exacted by means of an ordinary action. While this is the general rule, expenditure of this nature may be sanctioned when made in special circumstances."[5]

That is the position which obtains under the current law, and we do not recommend any change to it.

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[4] 1924 SC 364.
[5] At p 370.

Specific duties on appointment

4.17 The factor's first duty has always been to secure control over the whole of the judicial factory estate,[6] and this duty will remain. The factor will have to take control of all assets such as leases, share certificates etc. While in most cases this will cause no particular difficulty, it is entirely possible that a professional person may be appointed as judicial factor on more than one estate. It is highly desirable that the affairs of the different judicial factories should be easily distinguished from one another and from any other business in which the judicial factor may be engaged, as well as from the factor's personal assets. We have already dealt with the question of completion of title, at paragraphs 3.66-3.67 above. We recommend:

33. That a judicial factor should be under a duty to ingather the whole of the judicial factory estate.

(Draft Bill, section 15(1))

34. That the judicial factor should ensure that all cash accounts, share certificates and other assets of a like nature, appertaining to the judicial factory, should be readily identifiable as such.

(Draft Bill, section 15(4))

4.18 Having ingathered the estate, the factor is currently under a duty to prepare an inventory of it and send that inventory to the Accountant.[7] That duty should remain. The original inventory is the physical or factual baseline from which the factor's actings in relation to the estate are to be measured. Where further property subsequently comes to light, an appropriate addition can be made to the inventory.

4.19 Further, as part of the function of ascertaining precisely the extent of the judicial factory estate, the factor should intimate the appointment to persons appearing to be debtors or creditors of the estate, using the certified copy interlocutor of appointment for that purpose. This duty is important generally, but particularly so in the case of appointments under the 1980 Act, where large numbers of persons may have money deposited in the clients' account of a firm of solicitors.

35. That the judicial factor should be under a duty to prepare an inventory of the estate, and send it to the Accountant within six months of being appointed.

(Draft Bill, section 16)

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[6] 1849 Act, section 3: "…[H]e shall…recover all writs and documents of importance belonging to the estate, and collect all monies due to the same not securely invested, and use all reasonable diligence in ascertaining the exact nature and amount of the estate placed under his charge…".
[7] 1849 Act, s 3.

36. That the judicial factor should be under a duty to inform persons appearing to be creditors or debtors of the judicial factory estate of the fact of the appointment.

(Draft Bill, section 15(3))

Management plan

4.20 In our Discussion Paper, we asked whether, in addition to preparing an inventory, the factor should be required to prepare some scheme or plan, to be agreed with the Accountant, as to how the estate would be managed.[8]

4.21 This suggestion provoked a variety of responses, ranging from a decisive "yes" (Ewen Alexander) to an equally decisive "no" (Thomas Hughes).[9] The Law Society thought that a management plan was desirable, but that it should not become a "tick-box" exercise, nor too formal. The Scottish Court Service were against the idea, because it would require to be continually updated in the light of changing circumstances. They were rather of the view that the original application should include a summary of what the factor would require to do to administer the particular estate. This would also enable the factor to focus on what powers would be desirable in the context of the particular judicial factory. The Accountant could then seek updates as part of the annual review.

4.22 We have noted Mr Hughes' views, but also that the others who responded to this question seem agreed on the general desirability of a management plan, provided that it is flexible, and not too elaborate.

4.23 We ourselves remain firmly of the view that it is highly desirable, not to say essential, for the factor to have, and to set out, some plan as to how the judicial factory estate is to be managed. It may be, as the Scottish Court Service pointed out, that the management requirements of the particular estate, in the particular circumstances in which it finds itself at the time of the appointment, will inform the choice of judicial factor. (We leave aside, for the moment, the question of powers, which are dealt with in Chapter 5.).

4.24 It is also sensible to ensure that that plan, however broadly expressed, should be agreed with the Accountant, whose task is, ultimately, to provide that element of supervision on behalf of the court which is inherent in the whole system of judicial factories. At the end of the day (although we have difficulty in envisaging how such a situation could arise in practice), if the factor and the Accountant cannot agree as to how the estate should be administered, it is the latter's views which should govern the matter. Finally, it is sensible for any such plan to be reviewed and altered as appropriate, from time to time. Such a process need not be over-burdensome or excessively bureaucratic.

4.25 That said, it seems to us that it is essential that the Accountant, upon whom falls the duty of administering any system of management plans, should be content with what is proposed. We have accordingly discussed the matter in some detail with the Accountant,

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[8] At para 5.27.

[9] "In most cases that I have been involved in the situation changes from day to day and hour to hour. A management plan would be impossible."

and the provisions in the draft Bill reflect the discussions we have had. We accordingly recommend:

> **37. That the factor should be under a duty to prepare a management plan, to be agreed with the Accountant, in such detail as the Accountant may stipulate.**

(Draft Bill, section 16)

Other specific duties

4.26 There are a number of other areas in which it may be sensible for the legislation to impose specific duties.

Accounts

4.27 After the initial preparation of an inventory, the factor should be under a duty to prepare reports, including accounts, at appropriate intervals, for consideration by the Accountant. Such reports and accounts should be in such form as the Accountant may determine in accordance with any rules of court made in that regard. We regard this as a particularly important duty. We propose, later in this Report,[10] that the accounts prepared by the judicial factor, and audited by the Accountant, should be the year on year demonstration that the judicial factor has carried out the duties of the office satisfactorily. At the conclusion of the judicial factory, we propose that the final audited accounts should form the basis for the factor's seeking a formal discharge. While we suggest, and the draft Bill provides, that there should be room for flexibility as to the form of the accounts, it is essential that they should be sufficient to enable the Accountant to be satisfied as to the factor's performance of the duties of the office.

Delegation

4.28 A judicial factor is appointed by the court to administer an estate in person. In principle, it would be wrong for a factor to delegate this major function to someone else. Accordingly, a factor should generally be under a duty *not* to delegate. Since every rule must admit of (sensible) exceptions, however, delegation should be permissible where the draft Bill so provides, or the appointing court expressly allows it, or the Accountant accepts that it is appropriate.

Taking professional advice

4.29 It is reasonable to expect the judicial factor to carry out the duties of the office personally. But it would not be sensible to expect a factor to be a master of all the varied kinds of knowledge which might be necessary or desirable for the proper and efficient management of the estate. The duty not to delegate should not inhibit the factor from taking professional advice in areas where his or her expertise may not extend, such as, perhaps, in relation to decisions as to investment of funds.

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[10] Paras 8.24-8.26 below.

Investment of funds

4.30 The matter of investment of funds raises a particular issue. If the estate has funds which could be invested, then there is a question as to whether the factor should be obliged to invest, or at least to consider whether to invest, those funds. On one view, the duty to manage the estate could be met, at least in a narrow sense, by simply keeping the funds in an appropriate bank account. But that would, certainly in current financial circumstances, be unlikely even to maintain their value in cash terms. And we are mindful of the parable of the talents. It would certainly be better for those ultimately entitled to the estate if any surplus funds were increased by sound investments.

4.31 We consider that this is a sufficiently important matter to justify a specific provision in the draft Bill. We think that where it is appropriate to do so, a factor should be under a duty to invest the funds of the estate. But the factor's position should be protected by requiring the taking of appropriate professional advice as to whether and, if so, how, the factor should carry out that duty.

Litigation

4.32 Decisions to litigate are always difficult, and individuals, looking to their own affairs, will approach such decisions with caution. As the person looking after someone else's estate, a judicial factor would equally be well-advised to be cautious. But that does not preclude a decision to litigate, either as a pursuer or defender, where it is a sensible course of action. We would expect any factor faced with such a decision to consult the Accountant, and take appropriate professional advice.

4.33 Accordingly, we recommend:

38. That a judicial factor should be under a duty:

- **to prepare regular reports, including accounts, for the consideration of the Accountant, at such intervals and in such form as the Accountant may specify.**

(Draft Bill, section 17)

- **not to delegate any functions, unless authorised by the draft Bill, or permitted to do so by the appointing court or the Accountant.**

(Draft Bill, section 18)

- **to take professional advice where it is appropriate to do so.**

(Draft Bill, section 19)

- **to consider whether and, if so, how, to invest the funds of the estate.**

(Draft Bill, section 20)

- **where it is sensible to do so, to enforce or defend any claim in relation to the estate.**

(Draft Bill, section 21)

Duty to promote resolution of disputes

4.34 There is one further matter which should in our view form part of the specific duties of a judicial factor. In a case where the appointment is necessary because of a breakdown in relations between the members of a partnership formed to carry on a business, the factor's initial concern is to keep the business going. It is to be supposed that the court will have in mind, when appointing the factor, the desirability of appointing a person with the necessary skills to carry on the business. It may, exceptionally, authorise the factor to appoint a manager to carry on the business.

4.35 In either event, however, the appointment should not be regarded as anything more than a temporary solution, designed to prevent the collapse of the parties' commercial assets pending a resolution of their differences. It is of course to be hoped that such parties will themselves seek resolution of the differences between them, so as to obviate the requirement for the factor's continued involvement. But that cannot be assumed. In the meantime, there is in place an officer of the court, well able to take an objective view of what might be in the best interests of the parties. Even where the differences between the parties are such as effectively to prevent them from agreeing to resume management of the estate, it should be possible to work out some sensible distribution of the assets which will recognise the irretrievable breakdown of the relationship. It may be that in some cases the best, if not the only, course will be for the judicial factor to recommend a division and sale of the property.[11]

4.36 We consider that we should formally provide for what no doubt already occurs in practice, that is, that the factor should seek to secure the agreement of the differing parties to a proposed solution. This is one of the occasions where it may be appropriate for the judicial factor to employ the services of professional mediators. It may be, of course, that such a course will have no effect. Nevertheless, it would be right, in our view, to impose such a duty on the judicial factor.

4.37 But we recognise that there will be cases where no mediation will enable a solution to be reached, and where the parties remain intransigent. In such a case it would not be desirable for the judicial factory to continue indefinitely, with the associated costs being met by the estate. It may be that a division and sale of the property might be the way forward, as suggested above, or the particular circumstances of the individual case might suggest some other solution. Whatever the solution might be, however, it would in our view be better if a judicial factor faced with an insoluble disagreement between the parties should be under a duty to prepare a scheme for the ending of the situation. We deal below[12] with how such a scheme might be implemented. For the present, we recommend:

[11] See *Price v Watson* 1951 SC 359.
[12] See Chapter 6.

39. **That, where the parties with an interest in the estate are in disagreement, the judicial factor should be under a duty, either personally or through others, to mediate, or otherwise to attempt to persuade them to come to an agreement.**

(Draft Bill, section 22(1) and (2))

40. **That where it proves impossible to persuade the parties to resolve their differences, the judicial factor should be required to prepare a scheme for the solution of the difficulty, either by a suggested distribution of the estate or otherwise.**

(Draft Bill, section 22(3) and (4))

Chapter 5 Powers of judicial factor

General

5.1 In the Discussion Paper[1] we noted that the question of a judicial factor's powers had given rise to a certain amount of litigation, frequently in the form of requests to the court to grant additional powers. In many interlocutors a person is appointed as a judicial factor "with the usual powers". This of course begs the question as to what the usual powers are. The question is answered, or at least approached, on an examination of the purpose for which the factor has been appointed. For example, a factor appointed to preserve an estate might not be thought to require power to dispose of heritage. Such a disposal might nevertheless be desirable, if circumstances changed after the appointment.

5.2 The linking – not necessarily specific – of the powers included with the appointment to the purpose for which the appointment was made had the result that in many cases a factor was reluctant to carry out certain actions, even if the Accountant agreed that the action in question was desirable, without first seeking additional powers from the court. On occasion such requests were refused as unnecessary, on the basis that the factor already had the requisite powers. The whole question of what powers a factor has by virtue of the appointment was and remains an area of considerable uncertainty.

5.3 We asked whether it would be useful to those involved in the business of judicial factories if there were a comprehensive list of powers which any judicial factor could exercise, and whether it would be advantageous if that list were set out in the legislation. We conjectured that it would be possible for the court, in making the appointment, to exclude certain powers from a particular judicial factor if the circumstances warranted that. The strong feeling among consultees was that that would be useful.

5.4 In particular, we produced, as an appendix to the Discussion Paper, a list of powers which included those normally available to judicial factors, those normally available to trustees, and those normally available to trustees in sequestration. Again, the reaction of consultees was that this would be useful.

5.5 It is of course possible to approach the matter of conferring powers in a number of ways. It would be possible to provide that the powers conferred upon a particular factor were to be set out in the interlocutor of appointment. But this would throw – effectively upon the clerk of court – the responsibility of listing all the powers appropriate to each particular case. It did not seem to us that this would be an improvement on the present system; and we feared that there would be a tendency for those making the appointment to revert to the old practice of referring to "the usual powers".

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[1] In Part 6.

5.6 It would also be possible to deal with the matter by providing that a factor should have "all the powers of a natural person beneficially entitled to the property".[2] Such an approach would be readily understood by lawyers as empowering the factor to do everything which an owner of an estate could, if of full capacity, do personally, and that is certainly the result we wish to achieve.

5.7 We suspect, however, that that model would not commend itself to non-lawyers, particularly perhaps in institutions holding funds on behalf of the estate. Frequently such institutions are happier with a clear provision which confers the power in question unequivocally upon the factor. At the end of the day we have concluded that a combination of approaches would produce the best result. We have accordingly provided, in the attached draft Bill, that a factor will have all the powers of a natural person beneficially entitled to the property, and that those powers include, but are not limited to, the specific powers listed in the schedule. For example, other legislation confers powers upon judicial factors, such as the Local Government (Scotland) Act 1975,[3] Schedule 3, paragraph 20, which confers on a judicial factor certain of the powers of a local authority. We recommend:

41. That a judicial factor should have all the powers of a natural person beneficially entitled to the estate.

42. That those powers should include the specific powers:

(a) mentioned in the schedule to the draft Bill; and

(b) conferred on the judicial factor by any other enactment.

(Draft Bill, section 11 and schedule 1)

Power of judicial factor on a trust estate to act at variance with trust purposes

5.8 The placing of provisions which could sensibly be located in one of two or more statutes will always be a matter of judgment, at the end of the day. In our consideration of the relationship between the legislation relating to judicial factors and the trusts legislation, we looked in particular at the provisions of section 2 of the Trusts (Scotland) Act 1961.[4] As originally enacted, subsection (1) of that section provided that where trustees purported to enter into a transaction relating to property, the transaction would not be challengeable by the second party to the transaction, or by any other person, on the ground that it was at variance with the purposes of the trust. The section appeared therefore to proceed upon the assumption that the transaction in question was in fact at variance with the trust purposes.

5.9 There was a proviso to that subsection, to the effect that where trustees were under the supervision of the Accountant, the section was to have effect only if the Accountant consented to the transaction. (In that regard we note that section 17 of the 1921 Act provides for the court, on the application or one or more trustees, to order the Accountant to superintend the administration of the trust in relation to the investment of the trust funds.) It

[2] For a similar proposal in relation to the law of trusts, see Discussion Paper on *Trustees and Trust Administration* (Scot Law Com DP No 126, 2004), proposal 9 A (1), available at http://www.scotlawcom.gov.uk/index.php/download_file/view/147/130/ .
[3] 1975 c. 30.
[4] 1961 c. 57.

would therefore be possible to interpret section 2 as applying only to trustees properly so called.

5.10 But, as we have noted earlier in this Report,[5] "trustee", for the purposes of the 1921 and 1961 Acts, is defined as including "judicial factor", and "trust" is defined as including the appointment of any judicial factor. It would be theoretically possible, but practically difficult, to read section 2 as applying to judicial factors. It would involve translating "trust purposes" into "purposes of the appointment of the judicial factor". More importantly, it would leave considerable doubt as to the effect of the proviso. All judicial factors are subject to the supervision of the Accountant. An enactment making special provision for judicial factors subject to that supervision makes no sense.

5.11 Nor is such a strained treatment of the matter necessary, on a proper consideration of the statute as a whole. The interpretation sections of both Acts recite the usual mantra to the effect that the definitions are to apply "except where the context otherwise requires". Even in its original form, we would have been of the view that this was a case where the context did so require.

5.12 The matter was in our view put beyond serious question by the insertion of new subsections (3) to (6) into section 2 of the 1961 Act by section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980.[6] These subsections make special provision for judicial factors appointed on trust estates. They enable such a judicial factor, with the consent of the Accountant, to do things which are at variance with the purposes of the trust. Further, they provide that where a judicial factor has the consent of the Accountant, the act in question is not to be treated as at variance with the purposes of the trust. This treatment is to be contrasted with that in the original provision. In the new provision the transaction is specifically validated: in the original it is merely rendered unchallengeable.

5.13 On the whole matter, we are of the opinion that the original provisions of section 2 of the 1961 Act applied only to trustees properly so called, and did not apply to judicial factors. We have also come to the view that the new provisions inserted by the 1980 Act would be better in the draft Bill attached to this Report. We recommend:

> **43. That the statutory provision, currently in section 2(3) to (6) of the Trusts (Scotland) Act 1961, which enables a judicial factor on a trust estate, with the consent of the Accountant, to act in a way at variance with the trust purposes, should be re-enacted in the draft Bill attached to this Report.**

(Draft Bill, section 24)

Additional powers

5.14 In addition, we have provided for the court to have a discretion to add to or exclude specific powers from those conferred by the operation of the statute. We envisage that any request for additional powers might be made at the time of the original appointment. But it should also be possible for the factor to apply to the court if later events make that

[5] See paras 2.37 *et seq* above.
[6] 1980 c. 55.

expedient. Equally, there may be circumstances in which the court may wish specifically to prevent the judicial factor from doing particular things.

5.15 We accordingly recommend:

> **44. That the court should have a discretion to add to, or to exclude, any of the judicial factor's powers in a particular case.**
>
> **45. That the factor should be able to apply to the court for additional powers during the course of the judicial factory.**

(Draft Bill, section 13)

Power to require information

5.16 At present, a judicial factor is under a duty to ingather all the property comprised in the judicial factory estate.[7] For that purpose, and more generally in the course of the judicial factory, it may be necessary for the factor to seek information as to the affairs of the estate from institutions, such as companies, banks etc. Such information may be readily available, whether for a fee or otherwise. Nevertheless, we consider that it would be useful to provide the factor with a specific power to require information from persons, bodies and other institutions with regard to the judicial factory estate. Any such formal request should be accompanied by a copy of the certified copy interlocutor of the judicial factor's appointment, and a body or institution receiving such a request should be under a duty to comply with any such request.

5.17 Finally, on this matter, we have considered whether a sanction should be available in case any such institution should fail to comply with such a request. On balance, we have concluded that that is unnecessary. We see no reason to import further criminal sanctions into the law. There is no reason to suppose that institutions holding funds or other materials on behalf of others will be reluctant or dilatory in complying with formal requests for information, properly supported by the certified copy interlocutor. In the final analysis, it would no doubt be open to the judicial factor to seek an order from the court, and failure to comply with such an order would raise questions of contempt of court.

5.18 On the other hand, the power conferred by the draft Bill should not be able to be used as an alternative to any existing statutory method of requiring information to be provided. We recommend:

> **46. That, without prejudice to any other lawful means of requiring information to be provided, a judicial factor should have a specific power to request information from persons and bodies holding information as to the affairs of the judicial factory estate; and such persons and bodies should be under a duty to comply with any such request.**

(Draft Bill, section 12)

[7] See para 4.17 above.

Chapter 6 Termination, recall and discharge

Introduction

6.1 In this Chapter we deal with the termination of the judicial factory, the recall of the appointment of the judicial factor, and the discharge of the judicial factor.[1] In many cases all three will occur at or about the same time; and there are numerous examples of their being used interchangeably in the cases and commentaries. Nevertheless, it is still useful to attempt to distinguish between the processes. Each of the processes involves different considerations, and can and on occasion does take place independently of the others while still forming part of one coherent process.

Termination

6.2 There is clearly no point in continuing the judicial factory, with its associated expense, when its *raison d'être* has gone. Nor can it sensibly be carried on if there are insufficient funds in the estate to meet that expense. The termination of the judicial factory will obviously lead to the recall of the appointment of the judicial factor who is in office at that time.

6.3 The *termination* of the judicial factory should occur only when the purpose for which the factor has been appointed has been fulfilled (or it is no longer possible to fulfil it). Equally, it seems reasonably clear that a judicial factory should subsist only as long as is necessary. The institution is normally intended to fill a gap in the proper management of an estate by those legally responsible. No matter how effective the judicial factor may be, the appointment, with the associated remuneration, is an added expense to the estate. Accordingly, the judicial factory should also be brought to an end where it becomes clear that the estate cannot bear the expense of continuing it.

6.4 In many cases the date for termination will be clear, and the process will be routine. For example, a judicial factory on the estate of a child will terminate when the child reaches the age of sixteen years. That date is predictable, and the business of handing over the estate can be organized in advance. There are, on the other hand, cases where the appointment of the judicial factor, and the way in which the estate is managed, are not welcomed by some or all of those with an interest in the estate. The most obvious example is perhaps a partnership the members of which are a couple who are involved in a marital dispute. The administration of such an estate may be carried on in spite of those who are entitled to it, rather than with their co-operation. In circumstances such as these, the parties may, additionally, resent the factor's involvement.

6.5 The same reluctance to co-operate might well be true of a firm of solicitors, where a judicial factor has been appointed by virtue of the 1980 Act. In that case the matter is

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[1] This matter was dealt with in Part 8 of the Discussion Paper.

complicated by the presence of numbers of clients, some perhaps supporting the solicitor, and some perhaps concerned about any money they might have lodged with the firm.

6.6 The procedures for termination of the appointment must be apt to cover all circumstances.

Recall

6.7 The *recall* of the appointment of a particular judicial factor will certainly take place where the judicial factory is terminated; but it may occur at any time, and for a number of reasons – illness, death, retirement etc. Where the purpose of the appointment has not been fulfilled, however, the recall of the appointment of one factor should be accompanied by the appointment of a replacement. And the mere recall of the appointment, for whatever reason, is separate from the issue of whether the factor in office at the time of the recall should be discharged, although the normal expectation would be that the two would occur at the same time.

Discharge

6.8 *Discharge* is a recognition that the judicial factor has properly fulfilled the duties imposed by the appointment, has accounted for all intromissions with the estate and is in consequence entitled to be relieved of all future responsibilities and liabilities to the estate. It is, logically and legally, a separate process, with separate considerations, from termination of the judicial factory, or recall of appointment. As will appear later in this Chapter, it appears to us to be very important that, allegations of criminal conduct aside, a factor, once discharged, has no further responsibility to account to the estate.

Application to part of the estate

6.9 While, in the normal case, the termination of a judicial factory will take place in relation to the whole of the estate, there will be occasions when it may be desirable or necessary to go through the processes described in this Chapter in relation to part only of the whole. For example, a judicial factor may be appointed on the estate of three young children, each of whom, upon attaining the age of sixteen years, will be entitled to one third of the estate. In such a case it will be necessary for the share belonging to each child to be transferred when that child reaches that age. The judicial factory will therefore be terminated, and the appointment recalled, in relation to one third of the estate at a time. We understand from the Accountant that in such cases the application for discharge is in practice left until after the termination of the last part of the judicial factory, but it would – and should – be competent for the judicial factor to seek, and to be granted, formal discharge after the termination of each part. We recommend:

47. That the processes for termination of the judicial factory, recall of the appointment of the judicial factor, and discharge of the judicial factor, should apply to a part of the judicial factory estate as they apply to the whole.

(Draft Bill, section 37)

The present law – petition for recall of appointment and discharge

6.10 As set out in Part 8 of the Discussion Paper, section 34 of the 1849 Act provides that "it shall be competent for [a judicial] factor, at the termination of his office, to present a petition to the court for his discharge."[2] After the petition is lodged, the Accountant must put together a report, which will deal with the disposal of the estate, and the accounts produced by the factor.[3] If these matters are in order, the court will formally recall the appointment and discharge the factor. If any of the parties called objects to the discharge, the court will make such inquiries as it considers necessary.

6.11 Where more than one party is entitled to a share in the estate, the judicial factor prepares a scheme of division. If that is satisfactory to the parties, matters proceed upon that basis. If it is not, then the factor can petition for discharge on the basis of proposals as to the division of the estate. It will then be for the court, in the light of the representations of the parties, to determine upon what basis the estate is to be distributed.[4]

Administrative discharge

6.12 Rules of court made under section 34A of the 1849 Act[5] permit the Accountant, on an application by the judicial factor, to grant a certificate of discharge, where the purpose of the appointment has come to an end, or the estate is or will soon be exhausted.[6] The existence of such a procedure enables matters to be brought to a conclusion more economically than is the case where a petition is lodged.

Discussion

6.13 As we noted in the Discussion Paper,[7] section 34A is stated to apply only to a limited range of the circumstances in which a judicial factor may be appointed. Its use is also limited by reference to the circumstances giving rise to the application for recall. Essentially it applies only where the judicial factory is terminated because of the recovery, death or attainment of the age of legal capacity of the beneficiary, or due to the exhaustion of the estate.

6.14 We note, in passing, that the present law subsumes questions of the termination of the judicial factory, and the recall of the appointment of the judicial factor, in the general concept of "discharge" which, as we have noted above, does not necessarily follow from the fact that the judicial factory has been terminated and the appointment of the judicial factor has been recalled. For the remainder of this Chapter, we will deal with the concepts separately.

6.15 In the Discussion Paper[8] we asked whether the procedure (for administrative discharge) should be extended to all judicial factories. The Law Society were in favour of such an extension. The Accountant expressed no view on the general principle, but observed that it would not work where there was an outstanding dispute between those with

[2] The section assumes that there is no difficulty over the fact of termination.
[3] Addison, para 29.3.
[4] *Ibid*, para 29.4.
[5] Inserted by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, s 67.
[6] RCS, rr 61.31-33.
[7] At para 8.11.
[8] At para 8.13.

an interest in the estate. In such a case it would not be appropriate for the Accountant to seek to resolve the dispute, and it would be necessary for the factor to proceed by way of petition to the court.

6.16 The straightforward case is where the judicial factor has come to the view, either *ex proprio motu* or on the suggestion of another person, that the purpose of the appointment has come to an end, or that there are insufficient funds to justify the continuation of the judicial factory, and where, in either case, there is no dispute as to the disposal of the estate. In such a case, approval of a scheme for the distribution of the factory estate should be routinely sought. We would anticipate that the judicial factor would discuss the matter informally with those with an interest in the estate. Thereafter, having prepared a scheme for the distribution of the estate, the factor would seek the Accountant's agreement to that scheme. No doubt there would be discussion and, where appropriate, adjustment of the scheme.

6.17 The next step would be for the judicial factor formally to intimate the scheme, together with the accompanying documentation, to those to whom the estate is to be transferred. They would have 21 days to intimate to the Accountant any disagreement as to the scheme. Where no objections were made, the judicial factor would distribute the estate as set out in the scheme.

6.18 We recommend:

> **48. That a judicial factor who considers that the purpose of the appointment has been fulfilled, or is impossible to fulfil, should seek the agreement of the Accountant to a scheme for the distribution of the estate.**
>
> **49. That the judicial factor should be required to intimate the scheme so agreed, with the accompanying documentation, to those with an interest in the estate.**
>
> **50. That any person with an interest in the estate should be entitled to lodge objections with the Accountant within 21 days of such intimation.**
>
> **51. That, if no objection is lodged, the judicial factor should distribute the estate in accordance with the scheme.**

(Draft Bill, section 33(1)–(5))

Disputes over disposal of the estate

6.19 We turn to consider the case where there is some dispute over the judicial factor's proposed division of the estate. Elsewhere in this Report[9] we recommend that where there is such a dispute amongst those with an interest in the estate, the judicial factor should be placed under a duty to attempt to resolve it. Where that attempt is successful, there will be no difficulty. But a factor who has tried, and failed, to secure an agreement should nevertheless be under a duty to propose a solution. We would not attempt to predict what form that might take. It might, for example, be a recommendation that a permanent manager

[9] Paras 4.34-4.37 above.

should be appointed. It might involve what appears to the judicial factor to be an equitable division of disputed assets.

6.20 In that connection, we accept the logic of the Accountant's argument that it is not for the Accountant to decide questions as to the division of a disputed estate. If there are serious and irresoluble differences, then the court is the appropriate body to deal with the matter. On the other hand, it may be that, when parties are presented with an objectively reasonable plan for the division of a disputed estate, they will accept that plan rather than enter into litigation which their advisers would recommend against.

6.21 In considering this question we have borne in mind that the judicial factor and the Accountant are public officers tasked with the impartial and efficient administration of the estate in accordance with the requirements of the legislation under which the appointment has been made, and the terms of the interlocutor appointing the judicial factor. If they are agreed that the purpose of the appointment has come to an end, or that the estate cannot continue to bear the costs of the judicial factory, and that a particular set of proposals for the distribution of the estate is equitable, then that view should be accorded considerable weight.

6.22 In such a case, we consider that a judicial factor should seek the agreement of the Accountant to a scheme for the distribution of the estate. If a prospective beneficiary still wishes to dispute the proposed scheme, the Accountant should refer the matter to the court. Since it may be that parties will assume that the expenses of any such referral will be met out of the estate, a beneficiary who insists on that course should in our view be required to find caution for the expenses of the ensuing litigation. That would be without prejudice to the court's discretion not to make such a requirement where it seemed inappropriate to do so, and to the court's general discretion in relation to awards of expenses at the end of the proceedings. But we are firmly of the view that there should be at least an initial disincentive to persons pursuing disputes in these cases beyond the point at which, objectively, it is not sensible to do so. We recommend:

52. That the procedure seeking the agreement of the Accountant to a scheme for the distribution of the judicial factory estate should be followed even in cases where the persons with an interest in the estate do not agree with the judicial factor's proposed distribution of it.

(Draft Bill, section 33(1)(b))

53. That where a person with an interest objects to the proposed distribution, the Accountant should refer the matter to the court.

(Draft Bill, section 33(6))

54. That where such a matter is referred to the court, the person making the objection occasioning the reference should be required to find caution for the expenses of the ensuing litigation, unless that appears to the court to be unjust in the circumstances.

(Draft Bill, section 33(7))

55. That in any such proceedings the court should make such orders as to the disposal of the estate as seem to it to be appropriate.

(Draft Bill, section 33(8))

6.23 There is a further contingency for which the legislation should provide. It is possible that a judicial factor who considers, for example, that the purpose of the appointment has come to an end may not be able to persuade the Accountant that that is the case. Or it may prove to be impossible to secure the Accountant's agreement to a proposed distribution of the estate. Equally, it may be that there is someone with an interest in seeking the distribution of the estate who considers, for example, that the purpose of the appointment of the judicial factor has been fulfilled, but who is unable to persuade the judicial factor, or the Accountant, to that view.

6.24 In either case the person concerned should be able to petition the court directly. Where the petitioner is not the judicial factor, it would in our view be appropriate if the court were to require the petitioner to find caution for the expenses of the litigation, unless that seemed, in the circumstances, to be unjust. Further, in either case, the petitioner should be required to satisfy the court that reasonable steps had been taken to secure the agreement of the Accountant and/or of the judicial factor to the proposed distribution.

6.25 Where a petition was raised, the court would, after hearing the parties, decide whether the estate should in fact be distributed, in accordance with the petitioner's proposals or otherwise, and would direct the judicial factor to proceed accordingly. We recommend:

56. That it should be competent:

(a) for a judicial factor who considers that it is appropriate to distribute the factory estate with a view to the judicial factory being terminated, but who has failed to persuade the Accountant of that position; or

(b) for a person with an interest in seeking the distribution of the estate, who considers that it is appropriate to distribute the factory estate with a view to the judicial factory being terminated, but who has failed to persuade the judicial factor and/or the Accountant of that fact,

to petition the court directly for distribution of the estate.

57. That, in either case, the petitioner should be required to satisfy the court that reasonable attempts have been made to persuade the judicial factor to formulate a scheme for distribution and seek the Accountant's approval of it, or to obtain the Accountant's approval, as the case may be.

58. That a person with an interest in seeking the distribution of the estate who raises such a petition should be required to find caution for the expenses of the litigation, unless that appears to the court to be unjust in the circumstances.

59. That where such a petition is successful, the court should direct the judicial factor to distribute the judicial factory estate as seems to it to be appropriate.

(Draft Bill, section 34)

Uniform procedure for termination, recall and discharge

6.26 In the preceding paragraphs we have considered three contingencies. The first is where the judicial factor, the Accountant and those with an interest in the estate agree that the purpose of the appointment has been fulfilled. The second is where the factor and the Accountant are in agreement, but the matter is referred to the court because of the disagreement of a party with an interest. The third is where the factor and the Accountant are not in agreement, or a person with an interest has failed to persuade them that the purpose of the appointment has been fulfilled. In the first of these cases the outcome will be, and in the others it may be, that the judicial factor will distribute the estate. Until that distribution has taken place, the judicial factory must continue.

6.27 Thereafter, it will be necessary for the judicial factory to be terminated, for the factor's appointment to be recalled, and for the factor to be granted a discharge. Where the matter is being dealt with on a consensual basis, that can be done administratively. We envisage that the timescales for the various steps, including the submission of accounts, would be set out in rules of court. But even in cases where the court has become involved, we consider that there is no need for there to be further expense before the court in relation to the formal termination of the judicial factory, the recall of the factor's appointment, and the granting of discharge. The point of the litigation will have been whether and, if so, upon what basis, the estate should be distributed. Once that has been settled, the other matters can and should be dealt with administratively. In the event that the Accountant considered or suspected misconduct or failure by the judicial factor, matters would proceed according to the relevant procedure set out in the draft Bill.[10] We recommend:

60. That a judicial factor who has distributed the estate in accordance with the scheme, or as instructed by the court, should apply to the Accountant for termination of the judicial factory, recall of the appointment and discharge; and should submit with that application final accounts.

61. That the Accountant should audit the accounts and, where they are satisfactory, should issue a certificate terminating the judicial factory, recalling the judicial factor's appointment and, where so advised, discharging the judicial factor.

(Draft Bill, sections 35 and 46)

Writing off

6.28 At present there is a procedure whereby the Accountant can "write off" a judicial factory in circumstances where there are insufficient funds even to pay the limited expenses

[10] At s 46. See paras 8.21-8.23 below.

of an application for an administrative discharge. We asked, in the Discussion Paper, whether that procedure should be abolished, and all such cases dealt with by an administrative discharge along the lines of that contained in section 34A.[11] While some consultees were in favour of this approach, the Accountant pointed out that there would still be cases where the funds were insufficient even for the administrative procedure.

6.29 In principle, we would favour a formal discharge, either by the court or the Accountant, to bring any appointment of a judicial factor fully to an end. Nevertheless, as a matter of practicality, we acknowledge that there will be cases where that will not be a sensible approach. In addition, we appreciate that these will not be the only cases where matters are left in an unsatisfactory state. As the Accountant has also pointed out, there will be cases where, because of some inadequacy in accounting, a judicial factor cannot be discharged. On the whole matter, we accordingly recommend:

> **62. That it should remain open to the Accountant to write off a judicial factory, and, where appropriate, grant a formal discharge to the judicial factor, where the funds available are insufficient to meet the expenses of formulating, and obtaining approval of, a scheme for distribution of the estate.**

(Draft Bill, sections 41 and 46)

Recall in the course of a judicial factory

6.30 There will be occasions where, for one or more of a variety of reasons, a judicial factor seeks recall of the appointment and discharge before the judicial factory comes to an end. In such cases, at present, the factor must proceed by way of petition to the court. We propose no alteration in that procedure. The judicial factor is an officer of the court, and is responsible to the court. It is entirely appropriate that a factor who wishes to demit office before the completion of the responsibilities of the office should seek the approval of the court. A judicial factor who intends to petition the court for recall and discharge, should present the Accountant with accounts to date (including an inventory and balance sheet). It is then for the Accountant to audit those accounts and check that the inventory is correct, before, if so advised, making a report to the court as to those accounts. The report should include the Accountant's view as to whether the appointment should be recalled, and whether discharge should be granted. While the two processes will be dealt with in one set of proceedings, they are separate, and recall could be granted without the factor being discharged. We are aware that there are cases where the Accountant has felt unable to report satisfactorily, and where the factor has accordingly remained undischarged.

6.31 We recommend:

> **63. That a judicial factor who seeks recall of the appointment, and discharge, before the purpose of the appointment is fulfilled, should do so by way of petition to the court.**

(Draft Bill, section 39(1) and (2))

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[11] See para 6.12 *et seq,* above.

64. That such a judicial factor should prepare accounts, and submit them to the Accountant.

(Draft Bill, section 39(7))

65. That the Accountant should audit the judicial factor's accounts, and prepare a report on them, and on whether, in the Accountant's opinion, the appointment should be recalled and discharge granted, for submission to the court.

(Draft Bill, section 39(9))

6.32 It should also be possible for a person with an interest to petition the court for the recall of the appointment of a judicial factor. The basis for such an application would (presumably) be a lack of confidence in the particular judicial factor. (We have dealt, above, with the situation where a petitioner is of the view that the judicial factory could be terminated but has been unable to persuade the factor and the Accountant.) It is right that such a person should be able to go directly to the court. Since any such application would proceed upon the basis that the responsible officers, the judicial factor and the Accountant, were not persuaded that it was required, we are of the view that in such a case it would be appropriate for the court to require such a person to find caution for the expenses of the litigation (with the usual discretion not to do so). We recommend:

66. That it should be competent for any person with an interest to petition the court for the recall of the appointment of the judicial factor.

(Draft Bill, section 39(1) and (3))

67. That any person initiating such a petition should, unless the court determines that it would not be in the interests of justice, be required to find caution for the expenses of the litigation.

(Draft Bill, section 39(8)(a))

6.33 Where a discharge of a judicial factor is to take place before the purposes of the judicial factory are fulfilled, it will be necessary to appoint a replacement factor. It is in our view essential, for the maintenance of the proper management of the estate, that the appointment of the incoming factor should take place at the same time as the recall of the appointment of the outgoing factor. The two applications – for the recall of the appointment of the existing judicial factor and for the appointment of the successor – will be included in one petition. We recommend:

68. That any petition for the recall and discharge of a judicial factor, which does not also seek termination of the judicial factory, should contain a crave for the appointment of a successor.

(Draft Bill, section 39(4))

69. That the appointment of the new judicial factor should take place at the same time as the recall of the appointment of the previous judicial factor.

(Draft Bill, section 39(5))

6.34 It will be for the court to decide, on the basis of the representations made by the various parties, whether to appoint a replacement judicial factor, whether to grant recall of the appointment of the present judicial factor, and whether to grant the present judicial factor a discharge. We make no recommendation as to the expenses of a petition presented by an existing judicial factor. It seems to us that if the petition is reasonable in the circumstances, the expenses should fall upon the judicial factory estate. But the court has a wide discretion in these matters, and would be able to require the factor to pay the expenses personally if that seemed the appropriate course of action. We recommend:

70. That, upon consideration of the petition, and the Accountant's report, the court should, if so advised:

(a) recall the present judicial factor's appointment and appoint a successor;

(b) discharge the present judicial factor.

(Draft Bill, section 39(10))

6.35 Where the accounts, inventory and balance sheet of the outgoing judicial factor have been approved by the Accountant, and where the outgoing judicial factor has been discharged, there is no reason why those records should not constitute the opening records for the replacement judicial factor. It would be unnecessarily bureaucratic to require the new judicial factor to go over the same ground again.

6.36 That may not of course be practicable. It is possible that there will be outstanding questions as to the previous judicial factor's intromissions and accounts. It may be that the Accountant recommends, and the court agrees, that the appointment of the present judicial factor should be recalled, but that neither is of the view that a discharge should be granted.

6.37 In such a case, it would clearly not be possible for the incoming judicial factor to accept the accounts, inventory and balance sheet of the outgoing judicial factor as the opening records for the new appointment. It may even be that the outgoing judicial factor will appear as a debtor in the opening accounts of the newly appointed judicial factor. Where that is the case, therefore, the incoming judicial factor should prepare an inventory and balance sheet, and agree them with the Accountant, in the normal way. We recommend:

71. That, provided they have been approved by the Accountant, the outgoing judicial factor's closing accounts should be the opening accounts of the successor.

72. That, where there is no agreed closing inventory or balance sheet, the incoming judicial factor should make up an inventory and balance sheet, and agree them with the Accountant.

(Draft Bill, section 40)

6.38 There will of course be cases where a factor becomes incapacitated, or dies in office. In such cases, and in particular in cases of death, the position at present is that it is the factor's representatives, perhaps the family, who must deal with the application for discharge. It seems to us that this is unsatisfactory. Where, as will normally be the case, the judicial factor is a professional person, it is unreasonable to expect the family of the deceased to be responsible for sorting out this aspect of the deceased's professional responsibilities.

6.39 We consider that in such cases it should be for the Accountant to deal with the situation. The Accountant is in a position to apply to the court for the appointment of a replacement factor and, where appropriate, for the recall of the appointment of the predecessor factor.[12] The replacement factor would ingather the estate, and prepare an inventory and management plan, as set out in Chapter 4, in the normal way.

6.40 But any such inventory can only provide a snapshot of the physical and financial condition of the judicial factory estate. There is a requirement to update and close the accounts of the predecessor judicial factor, so that the estate of the predecessor, or the predecessor personally, can be formally discharged. The replacement judicial factor should accordingly be under a duty to bring the accounts of the predecessor factor up to date, from the date of the last set of accounts audited and approved by the Accountant of Court to the date of the replacement factor's appointment; and to agree an opening balance sheet with the Accountant.

6.41 Thereafter, the replacement judicial factor should apply to the Accountant for the formal discharge of the predecessor judicial factor.

6.42 The foregoing proceeds upon the assumption that the accounts etc will be found to be in order. Where that is the case, the Accountant of Court should be under a duty to grant discharge. Where the accounts are not in order, the appropriate action should be taken against [the estate of] the predecessor judicial factor.

6.43 We recommend:

73. That where a judicial factor dies or becomes incapacitated in office, the Accountant should petition the court for the appointment of a replacement judicial factor and, where appropriate, for the recall of the appointment of the predecessor judicial factor.

74. That the replacement judicial factor should ingather the estate and prepare an inventory and management plan.

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[12] We imagine that it would not, for example, be appropriate to seek the recall of the appointment of a judicial factor who had died.

75. That the replacement judicial factor should, in addition, update and close the accounts of the predecessor factor as at the date of the replacement factor's appointment.

76. That a replacement judicial factor who considers it appropriate to do so should then apply to the Accountant for the discharge of the predecessor; and that the Accountant should, if it appears appropriate, grant a certificate of discharge.

(Draft Bill, section 38)

Registration

6.44 Finally, on this matter, there is the question of registration. We have already recommended that the appointment of a judicial factor should be registered in the Register of Inhibitions. It seems equally sensible to register the termination of the judicial factory. We recommend:

77. That a certificate of termination granted by the Accountant should be registered in the Register of Inhibitions by the Accountant.

(Draft Bill, section 36)

Judicial factor not to be accountable following discharge

6.45 There is one further matter to be discussed in relation to termination, recall and discharge. It is the effect which such a process should have for the future. We are of the view that where a judicial factor has been discharged, either by the Accountant or by the court, that discharge should conclusively end any obligation of the factor to account further to the estate or those representing it. A judicial factor who has carried out the duties of the office conscientiously, as demonstrated by the Accountant's approval of the audited accounts, should not be at risk of further challenge by those now responsible for managing the judicial factory estate. Naturally, we exclude from that ending of accountability any instances where there are allegations of criminal conduct. But such cases will be rare. We recommend:

78. That, allegations of criminal conduct apart, a judicial factor who has been granted a discharge should not be accountable for what has taken place during the course of the judicial factory.

(Draft Bill, section 42)

Chapter 7 Miscellaneous matters

Introduction

7.1 This Chapter deals with a variety of small but significant matters, which do not fall neatly into any of the other Chapters. They range from the basis on which judicial factors are remunerated to whether it is necessary, in modern times, to replicate all the provisions of the earlier legislation.

Remuneration of judicial factor

7.2 At present, a judicial factor is paid a commission, annually, on production of the annual accounts. Judicial factors who commented on the matter indicated that this was not a satisfactory system. Further, and perhaps unsurprisingly, there is a concern as to the level of payment. The Scottish Court Service noted that the current system was coherent and enabled a judgment to be reached, at the end of the financial year, as to the appropriate remuneration. On the other hand, there can be few remaining offices where payment is made on an annual basis. If the institution of judicial factory is to be fit for purpose in modern times, it should be on the basis of a more modern system of payment.

7.3 In the Discussion Paper, and in particular when we were considering the possibility of recommending the transfer of the majority of judicial factories to a public office created for that purpose, we observed that most of the duties of the judicial factor are administrative in nature, and that it was not clear that all or most of them required the undivided attention of highly qualified professional persons.[1] At the same time, we suggested that if professionals such as lawyers and financial experts were to be employed, then they should be entitled to appropriate professional remuneration.

7.4 The Accountant pointed out that these two observations are not compatible. The Accountant commented that, if some of the duties of a judicial factor did not in fact require to be carried out by a professional, the remuneration should reflect the qualifications appropriate for a person carrying out those functions.

7.5 We see no reason why estates should pay more for professional persons acting as judicial factors than they would if the same person were acting as a financial adviser, or as a solicitor. In the latter case the solicitor would prepare a note of the basis on which fees would be charged, which would differentiate between the level of person who would carry out particular pieces of work, and the rate of payment which the client would have to pay for that work. We see no reason why judicial factors should not operate on that, or a similar basis, nor did any of the judicial factors who assisted us with their observations dissent from that suggestion. It would in our view be entirely feasible for the work of professionals appointed as judicial factors to be charged on the same basis as their other professional duties.

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[1] At para 9.9.

7.6 On the other hand, there is no competitive element here. The judicial factor is not being appointed because the rates which would be charged are lower than those of others. The appointment of a person as a judicial factor is a public affirmation of the confidence which the court has in the abilities and character of the person in question. It is to be supposed that publication of the fact of the appointment will be of benefit to the factor professionally. The fees should accordingly be set at a rate which will take into account not only the level of expertise which the judicial factor will be expected to demonstrate, but also that wider advantage which such an appointment will confer on the person appointed.

Accountant to fix rates and frequency of remuneration

7.7 There remains of course the question of what the rates of payment should be, and who should be responsible for setting them. It would be possible for that to be done by rules of court. This would provide certainty while particular rates were in operation, and it would not be too difficult for changes to be made. On the other hand, it would be highly desirable for the fixing of rates to be sufficiently flexible to allow for variations in particular circumstances, or where unusual duties were imposed upon a particular judicial factor. On balance, it seems to us that the best person to fix rates of payment would be the Accountant, who is in an unrivalled position to form a view as to the appropriate level of payments. Before fixing any general rates, the Accountant should be required to consult, which would give existing and potential judicial factors an opportunity to make representations. Further, the Accountant could, where appropriate, adjust the general rates where individual cases so required.

7.8 If judicial factors are to be paid for their work as factors on (broadly) the same basis as for their other professional work, it would be appropriate for them also to have the right to be remunerated regularly, on the basis of accounts showing in appropriate detail what work had been done, at what level of professional or administrative engagement, and how long it had taken. In that regard, the Accountant pointed out that remuneration during the year would involve both the factor and the Accountant in additional work, in preparing the invoices, on the one hand, and in checking them, on the other.

7.9 There is obviously room for manoeuvre here. It may be that in particular cases the factor will be content to include with the annual accounts a statement of fees for the year. On the other hand, there is no reason why a judicial factor who has been involved in substantial work during the year should be out of pocket. Further, there is no reason why the Accountant and the factor should not agree that any payment made during the year would be subject to the audit process at the year end. In principle, however, we are firmly of the view that it should be possible for judicial factors to be paid more frequently than on the current, annual, basis.

Outlays

7.10 In addition to remuneration for professional services, judicial factors should be entitled to recover all their reasonable outlays, as and when these are incurred.

7.11 We recommend:

79. That judicial factors should be entitled to be remunerated for the work they do, on the basis of fees fixed by the Accountant after appropriate consultation.

(Draft Bill, section 53(1)-(2))

80. That different rates should be able to be fixed for different levels of work, different circumstances and for interim judicial factors.

(Draft Bill, section 53(3))

81. That judicial factors should be entitled to be paid, at intervals throughout the year as agreed with the Accountant, for the work done prior to the submission of the relevant fee note.

(Draft Bill, section 53(4))

82. That the invoices which judicial factors submit should enable the Accountant to determine what work has been done, by which level of professional or administrative person, and how long it has taken.

83. That judicial factors should be entitled to recover all their reasonable outlays as and when they are incurred.

(Draft Bill, section 53(9))

Relations with third parties etc

7.12 In Part 7 of the Discussion Paper,[2] we considered a number of instances where the appointment of a judicial factor appeared to have had an unexpected effect on the normal rules regulating relations between the estate and third parties, causing confusion as to whether costs should be borne by the judicial factor personally or by the estate. It seems to us that it would be desirable to deal with these concerns definitively on the face of the draft Bill. We have accordingly inserted a fasciculus of sections into the draft Bill, to make the position clear. In relation to contract, delict and unjustified enrichment, we recommend:

84. That in relations between the judicial factory estate and third parties, it should be made clear that liabilities fall upon the estate, and not upon the judicial factor.

(Draft Bill, sections 27, 29 and 30)

Expenses of litigation

7.13 Some of the early case law seemed to produce a situation, in relation to litigation expenses, where the factor was considered to be personally liable for the expenses of an unsuccessful action, but with (in most cases) a right of relief against the judicial factory estate.[3] This seemed, and still seems, unsatisfactory. If it is appropriate for a judicial factor to pursue or defend a litigation – and a wise judicial factor will consult the Accountant, and take appropriate legal advice, before taking either course – then the costs of that litigation

[2] Paras 7.18-7.46.
[3] See the Discussion Paper, para 7.30.

should fall upon the judicial factory estate. If there is a serious question as to whether it was appropriate to take part in the litigation, then it is possible that the Accountant might hold the factor to account. But the responsibility *quoad* the third party should be the estate's. We recommend:

> **85. That where the estate is involved in litigation, the expenses of that litigation should fall upon the estate, and not upon the judicial factor.**

(Draft Bill, section 28)

Personal liability of judicial factor

7.14 The recommendations above make it clear that, generally, the sole remedy of third parties dealing with the factor, *qua* factor, is against the estate. Where, however, it appears to the court that a liability of the estate has been occasioned by some breach of duty of the factor, we consider that the court should have an explicit discretion to find the judicial factor personally liable for all or part of the liability. We therefore recommend:

> **86. That where a liability of the factory estate is due to a breach of duty by the judicial factor, the factor may be found personally liable for all or part of that liability.**

(Draft Bill, section 31)

Judicial factor as representative of the estate

7.15 Further in relation to dealings with third parties, we are concerned that it might not be sufficiently clear that the effect of a judicial factor's appointment is that the factor stands in the place of the estate so that, for example, the factor, as factor, will be liable for all of the estate's debts and will be entitled, as factor, to all debts due to the estate. The same is true in relation to obligations. We therefore recommend:

> **87. That it should be made clear that the judicial factor stands in place of the judicial factory estate, and any persons having an interest in it, for the purposes of dealings with third parties.**

(Draft Bill, section 26)

Persons acquiring title from judicial factor

7.16 In principle, we are of the view that there should be no question as to the judicial factor's competence to transfer a sound title to a third party. But, just as we have recommended that it should be made clear, by means of a considerable list in schedule 1 to the draft Bill, what the factor's powers are, so we are persuaded that some third parties might require re-assurance as to the validity of titles transferred to them by a factor. A difficulty may arise in this respect, for example, where the transfer is made by a judicial factor whose appointment is subsequently recalled. We accordingly consider that it should be made clear that where a person acquires, in good faith and for value, a title to property granted by a judicial factor, that title should not be challengeable on the ground that the factor's appointment is subsequently recalled.

7.17 Furthermore, for the avoidance of questions arising out of the further transfer of the property, it should be made clear that where a judicial factor has transferred property to a

second party, and a third party has, in good faith and for value, acquired that property from the second party, the title granted to the third party is not challengeable on the ground that the transfer from the judicial factor to the second party should not have been made. We recommend:

> **88. That a title obtained, in good faith and for value, from a judicial factor is not challengeable on the ground that the appointment of the factor is subsequently recalled.**
>
> **89. That where a person has, in good faith and for value, obtained title to property from a person who has obtained that property from a judicial factor, that title is not challengeable on the ground that the transfer from the judicial factor should not have been made.**

(Draft Bill, section 25)

Prescription

7.18 A particular issue which is still causing concern is in relation to prescription of claims against the estate. As we noted in the Discussion Paper:[4]

> "Obligations of judicial factors in relation to claims against the estate are not in the list of imprescriptible rights and obligations listed in Schedule 3 to the Prescription and Limitation (Scotland) Act 1973. The argument that they should nevertheless be considered imprescriptible is based on the fact that obligations of trustees to make furthcoming to any person entitled to trust property do appear on that list[5] and the 1973 Act adopts the definition given in the Trusts (Scotland) Act 1921[6] in which judicial factors are considered to be trustees. Other points in favour of the argument that claims for payment from judicial factors are imprescriptible are that a judicial factor has, as one of his usual powers, the power to pay lawful debts[7] and that the very purpose for which a judicial factor is appointed may be to distribute the estate.[8]
>
> This argument has been criticised[9] on the basis that there is no reason why the appointment of a judicial factor should have the effect that claims against the estate suddenly become imprescriptible. Further, there are similar categories of office where it has not been argued that appointment should have this effect[10] and there is no reason why a claim against an estate over which a judicial factor is appointed should be given special treatment in this way. David Johnston suggests that claims against trustees and those assimilated to trustees have to be read narrowly to include only those claims actually having a fiduciary quality and not to include ordinary claims between debtors and creditors which should prescribe in the normal way.[11] This would appear to proceed on the basis that he regards the provisions as applicable to judicial factors. We agree."

7.19 On reflection, we still agree. The appointment of a judicial factor should make no difference to the law in relation to obligations owed to or by the estate by or to third parties.

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[4] Paras 7.39-7.40.
[5] Prescription and Limitation (Scotland) Act 1973, Sch 3(e)(iii).
[6] *Ibid*, s 15(1).
[7] Trusts (Scotland) Act 1921, s 4(1)(l). See Addison, para 43.1.
[8] Addison, para 43.1; Petition of judicial factor on the estate of *Beltmoss Quarry Co*, 28 April 1994, Extra Division of the Inner House, unreported, para 11.
[9] D Johnston, *Prescription and Limitation* (1st ed, 1999), para 3.42.
[10] Those mentioned are executors (who are also said to be trustees under the Trusts (Scotland) Act 1921, s 2), liquidators and trustees in bankruptcy.
[11] D Johnston, *Prescription and Limitation* (1st ed, 1999), para 3.43.

The normal rules on prescription should operate against, and in favour of, the estate as if no judicial factor had been appointed. Naturally, any obligation of the judicial factor to the estate cannot prescribe during the course of the judicial factory. We recommend:

90. That it should be made clear that:

(a) obligations to or by the estate should be subject to the normal rules of prescription, notwithstanding the appointment of a judicial factor; and

(b) obligations due by a judicial factor to the factory estate should not prescribe during the course of the judicial factory.

(Draft Bill, section 32)

7.20 In relation to that particular issue, more than one of our consultees raised the issue of a judicial factor appointed at the instance of the Law Society, on the estate of a solicitor whose affairs had become confused. In such a case it is, as we understand it, customary for the judicial factor to communicate with the clients and creditors of the solicitor concerned, informing them of the fact of the appointment, and asking for time in which to ascertain the exact state of the solicitor's affairs.[12] The question put to us was whether, in such a case, a creditor or client would subsequently be at risk of the judicial factor's claiming that the prescriptive period had expired, and that any claim had therefore prescribed. We were specifically asked whether it might be wise for us to recommend the making of some appropriate amendment to the Prescription and Limitation (Scotland) Act 1973[13] to meet the contingency.

7.21 We have considered that matter carefully. We do not think that there is any real risk that a judicial factor appointed at the instance of the Law Society, who had asked creditors and clients of the solicitor's firm concerned for a period of grace before they pressed their claims, would thereafter seek to defeat any claim by those creditors or clients with a plea based on the operation of the 1973 Act. Leaving aside questions of personal bar (and we consider that such questions would be highly relevant), we are persuaded that such a factor would not act in that way.[14]

Judicial factor to be accountable to the Accountant

7.22 It is possible that a judicial factor will be found to have acted injudiciously or wrongly in carrying out the functions of the office. The factor may, for example, make investments contrary to professional advice, or without taking such advice. In such a case it should of course be open for the Accountant to hold the factor to account. We consider below[15] the specifics of how such misconduct by the factor might be dealt with.

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[12] We have recommended, above (at para 4.19) that a judicial factor should communicate the fact of the appointment to creditors and debtors of the estate.
[13] 1973 c. 52.
[14] In any event, while we are of the view that the 1973 Act would benefit from a review, it lies outwith the scope of the present project.
[15] See paras 8.21-8.23 below.

Accountability of judicial factor to persons with an interest in the estate

7.23 At present, there are a number of provisions with regard to the accountability of the judicial factor to persons with an interest in the estate, in particular, in relation to accounts. Section 15 of the 1849 Act provides for a somewhat complicated procedure as between the Accountant and the factor, in relation to each year's accounts, and leaves open the possibility of the accounts for the whole judicial factory being opened up, on cause shown, at the termination of the judicial factory. We did not direct a specific question to this issue in the Discussion Paper, and in our conversations with practitioners the issue did not arise as something requiring attention. In particular, we were not informed of any case in which a person with an interest in an estate had sought to open up the whole accounts of the judicial factory at its termination.

7.24 That said, it is not difficult to imagine cases in which disgruntled persons might wish to do so. The question is whether that should be allowed, or whether the other avenues of representation and complaint are adequate safeguards, in addition, of course, to the fact that the judicial factor and the Accountant are disinterested public administrators of the estate.

7.25 As we pointed out in Chapter 3, the present law leaves uncertain precisely what is the relationship between a judicial factor and the persons with an interest in the estate. If our recommendations in that Chapter are accepted, then that position will be much clearer in the future. The management of the estate will be the responsibility of the judicial factor, supervised by the Accountant and, where necessary, by the court.

7.26 It seems to us that, in relation to accountability, the public interest in sound administration and the private interest in the estate concerned will be sufficiently secured if the judicial factor's accounts are audited by the Accountant. Once that is done, with a proper opportunity for the factor to raise questions and, where necessary, challenge decisions made by the Accountant, those accounts should be regarded as conclusive against all persons with an interest in the judicial factory estate.[16]

7.27 Persons with an interest in the estate will not be party to the accounting process. They will have, as recommended elsewhere in this Report,[17] the right to raise issues with the Accountant and, in extreme circumstances, to apply directly to the court for the removal of the judicial factor. It is not necessary, nor is it desirable that they should have a right to seek to re-open accounts which have been subject to the process outlined above, other than in the context of court proceedings. We anticipate that it would be difficult to persuade responsible professionals to undertake the duties of a judicial factor if, in addition to the comprehensive accounting responsibilities to the Accountant, they were at risk of further challenge, essentially in relation to the same questions, from persons who in many cases will simply be seeking ways to upset the process.

7.28 In practical terms, the judicial factor is placed under a duty to report to the Accountant with regard to the management of the estate at intervals normally not less than one year nor more than two. The Accountant's duty is to consider that report and, in relation to the financial aspects of it, to audit the accounts, either personally or by employing outside

[16] Paras 8.24-8.26 below.
[17] Paras 6.32 above and 8.21-8.23 below.

accountants. As noted above,[18] this is in our view a particularly important function. The periodic audit process will result in accounts which will be conclusive against all persons with an interest in the judicial factory estate for the period to which they relate.

7.29 But there is a wider consideration. We are suggesting elsewhere[19] that a judicial factor who has been discharged at the end of the judicial factory should, allegations of criminal wrongdoing apart, be free from challenge as to the management of the estate during the course of the judicial factory. In a judicial factory subsisting over a number of years, it is important that the year on year accounts should be properly audited; not least because otherwise the audit process at the end of the judicial factory would be immensely cumbersome. We recommend:

> **91. That persons with an interest in the estate should not have any locus directly to raise questions as to the judicial factor's actings, or, in particular, to the audited accounts, other than by making representations to the Accountant, or by seeking the replacement of the judicial factor.**

Judicial factors and *curators bonis*

7.30 As noted in the Discussion Paper,[20] the 1849 Act defined "judicial factor" as including tutors at law and *curators bonis*, with the result that the provisions of the Act applied to all of those persons. Section 11 of the 1889 Act, as originally enacted, provided for an automatic progression, where the estate of a child was concerned, from a factor *loco tutoris* to a *curator bonis*, since the former position could obtain only until the person to whom the factor was appointed reached the age of 12, if a girl, or 14, if a boy.

7.31 The 1889 Act went further. In addition to those persons already subject to the judicial factors legislation, and therefore already under the supervision of the Accountant, section 6 of the Act provided that the legislation also applied to all persons appointed to "hold administer, or protect any property or funds belonging to persons or estates in Scotland". This had the satisfactory result that all such persons were subject to proper supervision. Further, the Age of Legal Capacity (Scotland) Act 1991[21] ('the 1991 Act') added guardians appointed under that Act to the list of officers subject to the supervision of the Accountant.

7.32 It was and remains of course possible for other arrangements to be made. Both the Proceeds of Crime (Scotland) Act 1995[22] and the Terrorism Act 2000[23] make provision for the appointment of administrators to look after property which has been taken from individuals under those measures. In the case of the 1995 Act, paragraph 1(9) of Schedule 1 expressly disapplies section 6 of the 1889 Act, so that administrators appointed under that Act are not supervised by the Accountant under the powers conferred by the judicial factors legislation. (But paragraph 5 of that Schedule to the Act provides for the supervision of administrators by the Accountant.)

7.33 In the Terrorism Act 2000, section 6 of the 1889 Act is not expressly disapplied, but paragraph 17(3) of Schedule 4 provides for administrators appointed under that Act to be

[18] Para 7.26 above.
[19] Para 6.45 above.
[20] At Appendix B.
[21] 1991 c. 50.
[22] 1995 c. 43.
[23] 2000 c. 11.

supervised by the Accountant. No doubt the legislation relating to judicial factors is applied to such administrators, in addition to any specific provision made in the Terrorism Act itself.

7.34 More significantly, as mentioned in Chapter 1, the Adults with Incapacity (Scotland) Act 2000[24] set up a new system under which guardians are appointed to administer the estates of persons over the age of 16 years who are incapable, on grounds mentioned in the Act, of carrying out that function themselves. These appointments replace the appointment of *curators bonis* under the previous law. The Act created a new public official, the Public Guardian, who supervises persons appointed as guardians, and provides that the Accountant is to be the Public Guardian. Further, section 80 of the Act makes it incompetent to appoint a *curator bonis* to the estate of an adult with incapacity. In consequence, all references to *curators bonis* have been removed, by schedule 6 to the Act, from the legislation relating to judicial factors.

7.35 This gives rise to an anomaly. Prior to the passing of the 1991 Act,[25] it was competent to appoint a person, known as a factor *loco tutoris,* over the estate of a pupil (a girl under the age of 12 or a boy under the age of 14). The 1991 Act made it incompetent to make any such appointment after the coming into force of the Act.[26] But it remained competent to appoint a person as *curator bonis* in relation to the safeguarding of the estates of persons under the age of 16. As was pointed out in one of the responses to the Discussion Paper,[27] this, taken with the repeal of the provisions in the judicial factors legislation relating to *curators bonis*, produces the result that such an appointment, if made, is not subject to any formal supervision either by the Accountant or of his or her *alter ego*, the Public Guardian.

7.36 We have considered whether anything need be done about this anomaly. It remains competent for a judicial factor to be appointed on the estate of a person under the age of 16 years. That is provided for specifically in section 9 of the Children (Scotland) Act 1995.[28] It may be that courts will exercise a wise discretion, and always appoint a judicial factor. On the other hand, it does appear as if the possibility of the appointment of a *curator bonis* in the "gap" between the age of 12, for girls, and 14, for boys, and, in both cases, 16, was simply overlooked between the 1991 Act and the adults with incapacity legislation. Be that as it may, we suggest that it would be unwise to leave open the possibility of an unsupervised appointment.

7.37 We accordingly recommend:

92. That it should no longer be competent to appoint a *curator bonis* on the estate of any person.

(Draft Bill, section 55)

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[24] 2000 asp 4.
[25] 1991 c. 50.
[26] 1991 Act, s 5(4).
[27] By Mr Adrian Ward, solicitor.
[28] 1995 c. 36.

Wider functions of the Accountant

7.38 By virtue of section 35 of the 1849 Act, the Accountant is made responsible for the custody of a wide variety of sums of money consigned to or under the authority of the Court of Session. (Seen from the perspective of the 21st century, section 35 looks like a successful move by the principal clerk of session to transfer responsibility for these sums to the (then newly created) office of the Accountant.)

7.39 Be that as it may, section 35 of the 1849 Act has been overtaken by the Court of Session (Consignations) (Scotland) Act 1895.[29] That Act not only repeated the provision as to the Accountant's being the sole custodier, but provided also for returns to be made to HM Treasury of sums consigned which had not been recovered or reclaimed for seven years. The Treasury was then empowered to require the Queen's and Lord Treasurer's Remembrancer to transfer some or all of that unclaimed money to the Exchequer. Provision was made for repayments to be made in the event of some later claim.[30]

7.40 No doubt that was and remains a valuable provision, so as to prevent large sums of unclaimed money from accumulating uselessly in banks in Scotland. The question for us is whether, standing the provisions of the 1895 Act, it is necessary for us to recommend the re-enactment of section 35 of the 1849 Act. On reflection, we have decided that it is not. It seems to us that the 1895 Act is quite sufficient to deal with the question of consignations, and the equivalent provision in the 1849 Act can safely be repealed.

7.41 We recommend:

93. That section 35 of the 1849 Act be repealed without re-enactment.

(Draft Bill, schedule 3, Part 1)

Section 37 of the 1849 Act

7.42 Section 37 of the 1849 Act requires any institution with which money is lodged by a judicial factor, in an interest-bearing account, to accumulate the capital and interest every year, so that interest in the years following the first year is paid on the accumulated capital and interest. Effectively it provides, by statute, for banks and other similar institutions to pay compound interest. It seems to us that such a provision is no longer necessary. We are persuaded that no sensible judicial factor would consign money to an institution which did not, at least, give compound interest. We consider that this provision need not be replicated. We recommend:

94. That section 37 of the 1849 Act be repealed without re-enactment.

(Draft Bill, schedule 3, Part 1)

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[29] 1895 c. 19.

[30] Similar provision had already been made in relation to the sheriff court by the Sheriff Courts Consignations (Scotland) Act 1893 (c. 44).

Chapter 8 The Accountant of Court

Introduction

8.1 The Accountant of Court's functions were set out in Appendix A to the Discussion Paper. While the Accountant's functions obviously feature prominently in previous Chapters, this Chapter deals with the matter more generally.

8.2 Since the coming into force of the 1849 Act, the Accountant has been the officer responsible for supervising all aspects of the work of judicial factors. Further provision as to the functions of the office was made in the 1889 Act. Since the coming into force of the Adults with Incapacity (Scotland) Act 2000,[1] the offices of Public Guardian and Accountant have been held by the same person.

Function

8.3 In terms of section 10 of the 1849 Act:

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

8.4 The importance of such a function is obvious. The judicial factor is given – by the court – sweeping powers in relation to the property of someone else, who may in many cases be in no position to scrutinise or monitor its management. It is essential that the conduct of such a factor should be properly supervised. Since the persons with an interest in the property will *ex hypothesi* be unable to carry out that function, it falls to the Accountant to see that the court's instructions to the factor are implemented as required.

8.5 In our Discussion Paper, we floated the idea of an "Official Judicial Factor".[2] Had that idea found favour with consultees, and been implemented, it might at some future date have been possible to consider whether it was necessary also to maintain the Accountant of Court as a separate public officer, at least in relation to judicial factors. But, as we have noted, our consultees were uniformly of the view that the current system of judicial factors should continue. Accordingly, we are satisfied that the Accountant remains an essential part of the institution of judicial factors.

8.6 We should note at this point that, as Accountant, the office-holder has functions additional to the responsibilities in relation to judicial factors. As noted in Chapter 7 of this Report, the Accountant has important functions under the Court of Session (Consignations) (Scotland) Act 1895.[3] Those functions continue. Our concern here is with regard to judicial factors. We recommend:

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[1] 2000 asp 4.
[2] At para 9.5 *et seq.*
[3] 1895 c. 19.

95. That it should continue to be the function of the Accountant generally to supervise the conduct of judicial factors, and to see that they observe the terms of the relevant legislation and of their appointment.

(Draft Bill, section 44)

Appointment

8.7 After a number of changes of status, the Accountant is now appointed and employed by the Scottish Court Service, by virtue of the Judiciary and Courts (Scotland) Act 2008.[4] The provisions relating to the qualifications of a person holding that appointment still remain as set out in the nineteenth century legislation. Essentially, that legislation required the Accountant to be a person "versant in law and accounts".[5] We consider that, subject to appropriate updating of the language, that remains a necessary criterion, although it would be unreasonable to require the Accountant to be formally qualified in both, or either, discipline. Given that any Depute Accountant of Court appointed would require to carry out the Accountant's functions in any circumstances in which the Accountant is unable to do so, we are of the view that any Depute Accountant of Court must also be similarly knowledgeable.

8.8 Originally, it was provided that the Accountant should hold no other appointment, nor receive any income other than that provided for in the legislation.[6] Since the Accountant is now also the Public Guardian appointed under the Adults with Incapacity (Scotland) Act 2000,[7] an exception is made in relation to that appointment. We see no reason to alter that position. We recommend:

96. That it should continue to be a requirement for the appointment of a person to the office of the Accountant or Depute Accountant of Court that that person should have a knowledge of law and accounts.

97. That, subject to the provisions of any other enactment, the Accountant should hold no other office.

98. That the Accountant should not be entitled to receive any income other than that set by the Scottish Court Service.

(Draft Bill, section 43)

Powers and duties

8.9 The Accountant has a range of powers, enabling the office holder properly to supervise judicial factors.

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[4] 2008 asp 6.
[5] 1889 Act, s 1.
[6] 1889 Act, s. 2.
[7] 2000 asp 4.

Initial powers and duties

8.10 As stated in Chapter 3,[8] the Accountant currently fixes the amount of caution to be found by the judicial factor, and certifies to the court that that requirement has been complied with. That function will continue, where necessary, under the new legislation. The Accountant will also ensure that, so far as is possible, the initial inventory prepared by the factor is a sound "baseline" for the management of the estate. If our recommendations are accepted, the Accountant will also agree the management plan prepared by the factor.[9]

8.11 We recommend:

99. That the Accountant should be under a duty

(a) to approve the inventory; and

(b) to approve, amend or, where necessary, set out the management plan to be implemented by the judicial factor.

(Draft Bill, section 16)

Continuing management

8.12 Once the judicial factory is in operation, the Accountant has to require the production of regular reports as to the factor's management of the estate. Further, in addition to monitoring what the factor is doing, the Accountant will, where required, advise and assist the factor. Many of the previous applications to the court for additional powers arose following discussion, sometimes inconclusive, between the Accountant and the factor as to whether what the factor wished to do was within the powers conferred by the interlocutor of appointment. It is our hope that such occasions will be fewer in the future, since the powers conferred generally on factors are more comprehensive. But the Accountant remains an officer with an unrivalled experience of the operation of judicial factories. We are certain that the office holder will frequently be called upon to advise factors who are in doubt as to how they should proceed.

Directions to judicial factor

8.13 We have no doubt that in the ordinary case the Accountant and the judicial factor will be able to cooperate well. But, since we are proposing a comprehensive statutory basis for the institution, it is necessary to cover all contingencies.

8.14 Under the present law, the Accountant has the power to direct the judicial factor as to how the duties of the office should be performed. We have already noted, at paragraph 4.24, that the Accountant is to have the power to direct the judicial factor as to the management plan. It seems to us that while that is a necessary way of settling differences of view in relation to that particular issue, it is desirable that the power should be wider, and that the Accountant should retain a general power of direction. As a corollary, a judicial

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[8] Para 3.36 above.

[9] See recommendations 35 and 37 for the duties of the judicial factor regarding the inventory and management plan.

factor who is aggrieved by a decision of the Accountant should be able to have that decision reviewed by the court. We recommend:

100. That the Accountant should have a general power to direct a judicial factor as to the performance of the duties of the office.

(Draft Bill, section 45)

101. That a judicial factor should be able to apply to the court to challenge a decision of the Accountant.

(Draft Bill, section 52)

Fees

8.15 At present, the Accountant charges fees for the various things done in relation to judicial factories and judicial factors.[10] It appears to us that it is correct that the expenses of the institution of judicial factory, including the cost of the supervisory function exercised by the Accountant and the various outlays which will be incurred, should be borne by the estates which benefit from it. No doubt, in accordance with modern practice, those fees will be set at a level which seeks to do neither more nor less than to recover the costs of carrying out the functions of the office. Accordingly, we are of the view that the Accountant should continue to charge fees; but that there should be a specific provision in the legislation to enable – and indeed to require – that to be done.

8.16 The duty to charge fees should in our view be accompanied by a discretion to remit liability for any fee where it appears to the Accountant that it would not be possible or practicable to recover it. For example, where, as is envisaged in the draft Bill, a judicial factory is being brought to an end because there are insufficient funds in the estate to enable it to continue, it may be fruitless to seek payment of fees notionally owed to the Accountant. In such a case we see no point in having a "paper" liability on the Accountant's books. It would be better to confer a discretion to recognise the financial realities of the situation, and write off those fees.

8.17 We recommend:

102. That the Accountant should be:

(a) required to charge fees in respect of the various functions carried out in relation to judicial factories; and

(Draft Bill, section 43(5) and (6))

(b) empowered to remit payment of fees where it appears that it will not be possible or practicable to recover them.

(Draft Bill, section 43(10))

[10] The duty to charge fees, essentially on a full recovery basis, was first imposed by section 39 of the 1849 Act.

Information

8.18 The Accountant has, and requires, a power and a duty to acquire the information necessary for the carrying out of the functions of the office. That is currently provided for in section 33 of the 1849 Act. As in the case of the judicial factor,[11] the procedure under the attached draft Bill should be used only where there is no other way of conveniently securing the information; it is not intended that it should operate instead of any existing statutory method of requiring bodies to provide information.

8.19 Conversely, we consider that certain of the paperwork relating to a given judicial factory, such as the inventory, management plan, annual accounts and audit report, should be available for inspection (on cause shown) by any person with an interest in the factory estate, provided that that person pays the requisite fee. Further, should such a person require copies of any of these documents, these should be provided, again subject to payment of fees.

8.20 We recommend:

103. That, without prejudice to any other lawful means of requiring the provision of information, the Accountant should have a power to require any person or body in the United Kingdom to supply information necessary for the carrying out of the duties of the office in relation to judicial factors.

(Draft Bill, section 47)

104. That the inventory, management plan, annual accounts and audit report relating to a given judicial factory should be made available, either for inspection or in hard copy, to persons with an interest in the estate, upon cause shown and payment of the requisite fee.

(Draft Bill, section 51)

Particular duties

Misconduct by judicial factor

8.21 Under the existing legislation, there are various penalties which can be imposed in the event of any misconduct on the part of the judicial factor. We are of the view that it remains necessary to have in place a mechanism for holding the factor accountable for any misdeeds. We consider that the Accountant should be the conduit for dealing with these matters, either *ex proprio motu* or following a report from a third party, and, where they are sufficiently serious, for reporting them to the court. The court should have wide powers to deal with any such misconduct. At paragraph 7.22 we mentioned the example of a judicial factor who might have invested money contrary to advice, and unwisely. In such a case we would envisage that the court might require repayment of any loss by the factor to the estate.

8.22 It would also be appropriate, since most judicial factors will be members of professional bodies, to require the Accountant, where a matter is reported to the court, to

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[11] See paras 5.16-5.18 above.

report it also to the professional body. This would be without prejudice to a discretion on the part of the Accountant to mention matters to such a body where it seemed to be proper to do so. "Misconduct" in this context has been left deliberately broad to enable the Accountant to exercise a broad discretion as to the judicial factor's conduct, and could therefore range from undue delay in carrying out functions to fraudulent actings.[12]

8.23 We recommend:

105. That the Accountant, upon reaching the conclusion that the judicial factor is guilty of serious misconduct or has materially failed to discharge the duties of the office, may report this misconduct or failure to the court for determination, and to any professional body of which the judicial factor is a member.

(Draft Bill, section 46(1) – (6))

106. That the court, on being satisfied that there has been such misconduct or failure on the part of the judicial factor, should have power to make such orders as it considers appropriate.

(Draft Bill, section 46(7) and (8))

Accounts

8.24 The judicial factor is placed under a duty to report to the Accountant with regard to the management of the estate over a period normally not less than one year nor more than two. The Accountant's duty is to consider that report and, in relation to the financial aspects of it, to audit the accounts, either personally or by employing outside accountants. This is a particularly important function. We are suggesting elsewhere[13] that a judicial factor who has been discharged at the end of the judicial factory should, allegations of criminal wrongdoing apart, be free from challenge as to acts or omissions during its course. We are also suggesting that the right of challenge of a person with an interest in the estate should be exercisable only by way of representation to the Accountant, or by petition for the appointment of a replacement judicial factor and, accordingly, that the audited annual accounts should therefore also be conclusive against all persons with an interest in the judicial factory estate.[14] Where a judicial factory subsists over a number of years, it is all the more important that the year on year accounts should be properly audited.

8.25 Accordingly it is in our view vital that the audit of the judicial factor's accounts, by or on the instructions of the Accountant, should be meticulously carried out; so that when the judicial factor presents final accounts, with a view to the termination of the judicial factory, the recall of the appointment, and discharge, it will not be necessary for the Accountant to go back further than the previous set of annual accounts. Any auditing fees incurred in carrying out this exercise will be met from the factory estate.

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[12] One of our consultees specifically noted that one of the most unsatisfactory elements of the current regime is the difficulties in getting things done quickly. Although we envisage that the Accountant of Court will generally encourage judicial factors to deal with matters promptly, this provision should enable the Accountant of Court to hold a judicial factor to account in the event of undue delay.
[13] At para 6.45 above.
[14] See para 7.26 above.

8.26 We recommend:

107. That the Accountant should be under a duty to audit, or to secure the audit of, the judicial factor's annual accounts.

108. That the costs of any external audit should also be borne by the judicial factory estate.

(Draft Bill, section 48)

109. That the judicial factor should be entitled to challenge any decisions taken by the Accountant in relation to those accounts, if necessary by application to the court.

110. That, once any challenge has been dealt with, the audited accounts should be conclusive as between the Accountant and the judicial factor, and against all other persons.

(Draft Bill, section 49)

Diversity of judgment or practice

8.27 At present,[15] an Accountant who considers that there is an undesirable diversity in judgment or practice in terms of how judicial factories are dealt with in the sheriff courts can report to this effect to the First Division of the Court of Session, outlining the relevant issues and recommending any change to the rules to remove this inconsistency. We think that this is a useful way in which to ensure consistency of practice across Scotland; but, having regard to the new structure of court administration, we are of the view that the report should be to the Lord President, who should have a wide discretion as to how to deal with it.

8.28 We recommend:

111. That an Accountant who is of the view that there is diversity in terms of how judicial factory proceedings are dealt with in the sheriff court should report the matter to the Lord President of the Court of Session.

112. That the Lord President should deal with any such report in such a way as seems to him or her to be appropriate.

(Draft Bill, section 54)

Accountant's annual review

8.29 At present, by virtue of section 18 of the 1849 Act, the Accountant is required to produce an annual report of all judicial factories in Scotland. That obligation has recently been subsumed into the annual report of the Scottish Court Service. We have considered this matter. It appears to us that the institution of judicial factory is an important one, which enables society, through the courts, to administer the property of private citizens who are, for whatever reason, unable or unwilling to do it themselves. It would not be unreasonable for there to be an annual review as to how many factories, and of what nature, are in operation,

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[15] See the 1880 Act, s 4(7).

together with other information as to the cost of the institution. The detail of what might be included could be left to rules of court, and could be supplemented as the Accountant sees fit. We recommend:

> **113. That the Accountant should be under a duty to make an annual review, in accordance with such requirements as may be set out in rules of court, and supplemented as the Accountant sees fit.**

(Draft Bill, section 50)

Chapter 9 Summary of recommendations

1. That the Acts of Sederunt of 31 July 1690, 25 December 1708, 22 November 1711, 31 July 1717 and 13 February 1730 be expressly revoked.

(paragraph 2.14)

2. That section 33 (limitations on vesting) of the Bankruptcy (Scotland) Act 1985 be amended to ensure that property held by a person as a judicial factor will not vest in the trustee in sequestration.

(paragraph 2.43)

3. That applications for the appointment of a judicial factor should continue to be made by way of petition.

(paragraph 3.3)

4. That petitions for the appointment of a judicial factor should continue to be competent in both the Court of Session and the sheriff court.

(paragraph 3.6)

5. That the provisions of the draft Bill attached to this Report should be without prejudice to the appointment of a judicial factor under any other enactment or rule of law.

(paragraph 3.10)

6. That the provisions of the draft Bill should apply to any judicial factor, so called, appointed under that Bill or any other enactment or rule of law.

(paragraph 3.10)

7. That petitions for the appointment of a judicial factor made under section 41 of the Solicitors (Scotland) Act 1980 should no longer be made in the Inner House of the Court of Session.

(paragraph 3.11)

8. That it should be competent, in either the Court of Session or the sheriff court, for the appointment of a judicial factor to be made in the course of other proceedings.

(paragraph 3.14)

9. That it should continue to be competent to appoint interim judicial factors.

(paragraph 3.22)

10. That an interim appointment should be kept under review by the Accountant.

(paragraph 3.22)

11. That, subject to any modifications which the appointing court may make, the provisions of the draft Bill should apply to an interim judicial factor as they apply to a permanent judicial factor.

(paragraph 3.22)

12. That intimation of the petition should be made to those appearing to the petitioner to have an interest in the estate.

(paragraph 3.23)

13. That the definition of "interest" should be expressed widely enough to enable the court to make an appointment whenever it considers it appropriate to do so.

(paragraph 3.24)

14. That any natural person of full legal capacity, and who is in the view of the court a suitable person, should be eligible to be appointed as a judicial factor.

(paragraph 3.27)

15. That it should be competent to appoint as a factor a person who is not domiciled in Scotland.

(paragraph 3.27)

16. That a person domiciled outside Scotland who accepts appointment as a judicial factor is deemed thereby to prorogate the jurisdiction of the Scottish courts.

(paragraph 3.27)

17. That the court should have a discretion as to whether or not to require a judicial factor to find caution; but that that discretion should be exercised sparingly.

(paragraph 3.36)

18. That where caution is required, the amount of caution should be fixed by the Accountant, who should also be able to vary the amount from time to time.

(paragraph 3.36)

19. That the grounds for the appointment of a judicial factor should be that there is property which requires to be managed properly and:

    (a) that it appears to the court that it is not possible, or not practicable, or not sensible, for those responsible to manage it; or

    (b) that there would otherwise be benefit in having it managed by a judicial factor.

(paragraph 3.45)

20. That all property in relation to which the factor is appointed should vest in the factor, in that capacity.

(paragraph 3.74)

21. That a certified copy of the interlocutor of appointment should be sufficient warrant for the factor to intromit with the factory estate. Where, however, a requirement for caution has been imposed, the certified copy interlocutor should not be issued before the Accountant has informed the court that the requirement has been complied with.

(paragraph 3.74)

22. That where the property is of a nature such that the completion of title to it requires some further formal step, such as the registration of a notice of title in the Land Register, the factor should have a discretion to take that step.

(paragraph 3.74)

23. That section 24 of the Titles to Land Consolidation (Scotland) Act 1868, section 13 of the 1889 Act and section 25 of the Trusts (Scotland) Act 1921 should be repealed.

(paragraph 3.74)

24. That section 1 of the Conveyancing Amendment (Scotland) Act 1938 should be repealed, in so far as relating to judicial factors.

(paragraph 3.74)

25. That, without prejudice to sections 41 and 42 of the Solicitors (Scotland) Act 1980, a judicial factor appointed on the estate of a solicitor by virtue of that Act should be vested in all the property held by the solicitor in question, including, unless the court determines otherwise, all such property held by that solicitor in a fiduciary capacity.

(paragraph 3.82)

26. That the appointment of a judicial factor should be:

    (a) registered in the Register of Inhibitions; and

    (b) intimated to the Accountant

    by the clerk of court.

(paragraph 3.86))

27. That, where an appointment of a judicial factor subsists for 5 years, a fresh registration should be made in the Register by the judicial factor.

(paragraph 3.86)

28. That a general duty should be imposed upon a judicial factor to manage the estate for the benefit of those who have an interest in it.

(paragraph 4.14)

29. That that general duty should be subject to:

    (a) any special statutory regime under which a judicial factor may be appointed; and

(b) the terms of the interlocutor appointing the judicial factor.

(paragraph 4.14)

30. That a court appointing a judicial factor should have a discretion to add to, or subtract from, the duties which would otherwise be imposed upon a judicial factor under or by virtue of any enactment.

(paragraph 4.14)

31. That a judicial factor should be able at any time to apply to the court to be relieved of any duty imposed by or by virtue of the interlocutor of appointment.

(paragraph 4.14)

32. That a judicial factor should be required to exercise care, diligence and prudence in carrying out the functions of the office.

(paragraph 4.14)

33. That a judicial factor should be under a duty to ingather the whole of the judicial factory estate.

(paragraph 4.17)

34. That the judicial factor should ensure that all cash accounts, share certificates and other assets of a like nature, appertaining to the judicial factory, should be readily identifiable as such.

(paragraph 4.17)

35. That the judicial factor should be under a duty to prepare an inventory of the estate, and send it to the Accountant within six months of being appointed.

(paragraph 4.19)

36. That the judicial factor should be under a duty to inform persons appearing to be creditors or debtors of the judicial factory estate of the fact of the appointment.

(paragraph 4.19)

37. That the factor should be under a duty to prepare a management plan, to be agreed with the Accountant, in such detail as the Accountant may stipulate.

(paragraph 4.25)

38. That a judicial factor should be under a duty:

- to prepare regular reports, including accounts, for the consideration of the Accountant, at such intervals and in such form as the Accountant may specify.
- not to delegate any functions, unless authorised by the draft Bill, or permitted to do so by the appointing court or the Accountant.
- to take professional advice where it is appropriate to do so.

- to consider whether and, if so, how, to invest the funds of the estate.

- where it is sensible to do so, to enforce or defend any claim in relation to the estate.

(paragraph 4.33)

39. That, where the parties with an interest in the estate are in disagreement, the judicial factor should be under a duty, either personally or through others, to mediate, or otherwise to attempt to persuade them to come to an agreement.

(paragraph 4.37)

40. That where it proves impossible to persuade the parties to resolve their differences, the judicial factor should be required to prepare a scheme for the solution of the difficulty, either by a suggested distribution of the estate or otherwise.

(paragraph 4.37)

41. That a judicial factor should have all the powers of a natural person beneficially entitled to the estate.

(paragraph 5.7)

42. That those powers should include the specific powers:

    (a) mentioned in the schedule to the draft Bill; and

    (b) conferred on the judicial factor by any other enactment.

(paragraph 5.7)

43. That the statutory provision, currently in section 2(3) to (6) of the Trusts (Scotland) Act 1961, which enables a judicial factor on a trust estate, with the consent of the Accountant, to act in a way at variance with the trust purposes, should be re-enacted in the draft Bill attached to this Report.

(paragraph 5.13)

44. That the court should have a discretion to add to, or to exclude, any of the judicial factor's powers in a particular case.

(paragraph 5.15)

45. That the factor should be able to apply to the court for additional powers during the course of the judicial factory.

(paragraph 5.15)

46. That, without prejudice to any other lawful means of requiring information to be provided, a judicial factor should have a specific power to request information from persons and bodies holding information as to the affairs of the judicial factory estate; and such persons and bodies should be under a duty to comply with any such request.

(paragraph 5.18)

47. That the processes for termination of the judicial factory, recall of the appointment of the judicial factor, and discharge of the judicial factor, should apply to a part of the judicial factory estate as they apply to the whole.

(paragraph 6.9)

48. That a judicial factor who considers that the purpose of the appointment has been fulfilled, or is impossible to fulfil, should seek the agreement of the Accountant to a scheme for the distribution of the estate.

(paragraph 6.18)

49. That the judicial factor should be required to intimate the scheme so agreed, with the accompanying documentation, to those with an interest in the estate.

(paragraph 6.18)

50. That any person with an interest in the estate should be entitled to lodge objections with the Accountant within 21 days of such intimation.

(paragraph 6.18)

51. That, if no objection is lodged, the judicial factor should distribute the estate in accordance with the scheme.

(paragraph 6.18)

52. That the procedure seeking the agreement of the Accountant to a scheme for the distribution of the judicial factory estate should be followed even in cases where the persons with an interest in the estate do not agree with the judicial factor's proposed distribution of it.

(paragraph 6.22)

53. That where a person with an interest objects to the proposed distribution, the Accountant should refer the matter to the court.

(paragraph 6.22)

54. That where such a matter is referred to the court, the person making the objection occasioning the reference should be required to find caution for the expenses of the ensuing litigation, unless that appears to the court to be unjust in the circumstances.

(paragraph 6.22)

55. That in any such proceedings the court should make such orders as to the disposal of the estate as seem to it to be appropriate.

(paragraph 6.22)

56. That it should be competent:

(a) for a judicial factor who considers that it is appropriate to distribute the factory estate with a view to the judicial factory being terminated, but who has failed to persuade the Accountant of that position; or

(b) for a person with an interest in seeking the distribution of the estate, who considers that it is appropriate to distribute the factory estate with a view to the judicial factory being terminated, but who has failed to persuade the judicial factor and/or the Accountant of that fact,

to petition the court directly for distribution of the estate.

(paragraph 6.25)

57. That, in either case, the petitioner should be required to satisfy the court that reasonable attempts have been made to persuade the judicial factor to formulate a scheme for distribution and seek the Accountant's approval of it, or to obtain the Accountant's approval, as the case may be.

(paragraph 6.25)

58. That a person with an interest in seeking the distribution of the estate who raises such a petition should be required to find caution for the expenses of the litigation, unless that appears to the court to be unjust in the circumstances.

(paragraph 6.25)

59. That where such a petition is successful, the court should direct the judicial factor to distribute the judicial factory estate as seems to it to be appropriate.

(paragraph 6.25)

60. That a judicial factor who has distributed the estate in accordance with the scheme, or as instructed by the court, should apply to the Accountant for termination of the judicial factory, recall of the appointment, and discharge; and should submit with that application final accounts.

(paragraph 6.27)

61. That the Accountant should audit the accounts and, where they are satisfactory, should issue a certificate terminating the judicial factory, recalling the judicial factor's appointment and, where so advised, discharging the judicial factor.

(paragraph 6.27)

62. That it should remain open to the Accountant to write off a judicial factory, and, where appropriate, grant a formal discharge to the judicial factor, where the funds available are insufficient to meet the expenses of formulating, and obtaining approval of, a scheme for distribution of the estate.

(paragraph 6.29)

63. That a judicial factor who seeks recall of the appointment, and discharge, before the purpose of the appointment is fulfilled, should do so by way of petition to the court.

(paragraph 6.31)

64. That such a judicial factor should prepare accounts, and submit them to the Accountant.

(paragraph 6.31)

65. That the Accountant should audit the judicial factor's accounts, and prepare a report on them, and on whether, in the Accountant's opinion, the appointment should be recalled and discharge granted, for submission to the court.

(paragraph 6.31)

66. That it should be competent for any person with an interest to petition the court for the recall of the appointment of the judicial factor.

(paragraph 6.32)

67. That any person initiating such a petition should, unless the court determines that it would not be in the interests of justice, be required to find caution for the expenses of the litigation.

(paragraph 6.32)

68. That any petition for the recall and discharge of a judicial factor, which does not also seek termination of the judicial factory, should contain a crave for the appointment of a successor.

(paragraph 6.33)

69. That the appointment of the new judicial factor should take place at the same time as the recall of the appointment of the previous judicial factor.

(paragraph 6.33)

70. That, upon consideration of the petition, and the Accountant's report, the court should, if so advised:

(a) recall the present judicial factor's appointment and appoint a successor;

(b) discharge the present judicial factor.

(paragraph 6.34)

71. That, provided they have been approved by the Accountant, the outgoing judicial factor's closing accounts should be the opening accounts of the successor.

(paragraph 6.37)

72. That, where there is no agreed closing inventory or balance sheet, the incoming judicial factor should make up an inventory and balance sheet, and agree them with the Accountant.

(paragraph 6.37)

73. That where a judicial factor dies or becomes incapacitated in office, the Accountant should petition the court for the appointment of a replacement judicial factor and, where appropriate, for the recall of the appointment of the predecessor judicial factor.

(paragraph 6.43)

74. That the replacement judicial factor should ingather the estate and prepare an inventory and management plan.

(paragraph 6.43)

75. That the replacement judicial factor should, in addition, update and close the accounts of the predecessor factor as at the date of the replacement factor's appointment.

(paragraph 6.43)

76. That a replacement judicial factor who considers it appropriate to do so should then apply to the Accountant for the discharge of the predecessor; and that the Accountant should, if it appears appropriate, grant a certificate of discharge.

(paragraph 6.43)

77. That a certificate of termination granted by the Accountant should be registered in the Register of Inhibitions by the Accountant.

(paragraph 6.44)

78. That, allegations of criminal conduct apart, a judicial factor who has been granted a discharge should not be accountable for what has taken place during the course of the judicial factory.

(paragraph 6.45)

79. That judicial factors should be entitled to be remunerated for the work they do, on the basis of fees fixed by the Accountant after appropriate consultation.

(paragraph 7.11)

80. That different rates should be able to be fixed for different levels of work, different circumstances and for interim judicial factors.

(paragraph 7.11)

81. That judicial factors should be entitled to be paid, at intervals throughout the year as agreed with the Accountant, for the work done prior to the submission of the relevant fee note.

(paragraph 7.11)

82. That the invoices which judicial factors submit should enable the Accountant to determine what work has been done, by which level of professional or administrative person, and how long it has taken.

(paragraph 7.11)

83. That judicial factors should be entitled to recover all their reasonable outlays as and when they are incurred.

(paragraph 7.11)

84. That in relations between the judicial factory estate and third parties, it should be made clear that liabilities fall upon the estate, and not upon the judicial factor.

(paragraph 7.12)

85. That where the estate is involved in litigation, the expenses of that litigation should fall upon the estate, and not upon the judicial factor.

(paragraph 7.13)

86. That where a liability of the factory estate is due to a breach of duty by the judicial factor, the factor may be found personally liable for all or part of that liability.

(paragraph 7.14)

87. That it should be made clear that the judicial factor stands in place of the judicial factory estate, and any persons having an interest in it, for the purposes of dealings with third parties.

(paragraph 7.15)

88. That a title obtained, in good faith and for value, from a judicial factor is not challengeable on the ground that the appointment of the factor is subsequently recalled.

(paragraph 7.17)

89. That where a person has, in good faith and for value, obtained title to property from a person who has obtained that property from a judicial factor, that title is not challengeable on the ground that the transfer from the judicial factor should not have been made.

(paragraph 7.17)

90. That it should be made clear that:

(a) obligations to or by the estate should be subject to the normal rules of prescription, notwithstanding the appointment of a judicial factor; and

(b) obligations due by a judicial factor to the factory estate should not prescribe during the course of the judicial factory.

(paragraph 7.19)

91. That persons with an interest in the estate should not have any locus directly to raise questions as to the judicial factor's actings, or, in particular, to the audited accounts, other than by making representations to the Accountant, or by seeking the replacement of the judicial factor.

(paragraph 7.29)

92. That it should no longer be competent to appoint a *curator bonis* on the estate of any person.

(paragraph 7.37)

93. That section 35 of the 1849 Act be repealed without re-enactment.

(paragraph 7.41)

94. That section 37 of the 1849 Act be repealed without re-enactment.

(paragraph 7.42)

95. That it should continue to be the function of the Accountant generally to supervise the conduct of judicial factors, and to see that they observe the terms of the relevant legislation and of their appointment.

(paragraph 8.6)

96. That it should continue to be a requirement for the appointment of a person to the office of the Accountant or Depute Accountant of Court that that person should have a knowledge of law and accounts.

(paragraph 8.8)

97. That, subject to the provisions of any other enactment, the Accountant should hold no other office.

(paragraph 8.8)

98. That the Accountant should not be entitled to receive any income other than that set by the Scottish Court Service.

(paragraph 8.8)

99. That the Accountant should be under a duty:

(a) to approve the inventory; and

(b) to approve, amend or, where necessary, set out the management plan to be implemented by the judicial factor.

(paragraph 8.11)

100. That the Accountant should have a general power to direct a judicial factor as to the performance of the duties of the office.

(paragraph 8.14)

101. That a judicial factor should be able to apply to the court to challenge a decision of the Accountant.

(paragraph 8.14)

102. That the Accountant should be:

(a) required to charge fees in respect of the various functions carried out in relation to judicial factories; and

(b) empowered to remit payment of fees where it appears that it will not be possible or practicable to recover them.

(paragraph 8.17)

103. That, without prejudice to any other lawful means of requiring the provision of information, the Accountant should have a power to require any person or body in the United Kingdom to supply information necessary for the carrying out of the duties of the office in relation to judicial factors.

(paragraph 8.20)

104. That the inventory, management plan, annual accounts and audit report relating to a given judicial factory should be made available, either for inspection or in hard copy, to persons with an interest in the estate, upon cause shown and payment of the requisite fee.

(paragraph 8.20)

105. That the Accountant, upon reaching the conclusion that the judicial factor is guilty of serious misconduct or has materially failed to discharge the duties of the office, may report this misconduct or failure to the court for determination, and to any professional body of which the judicial factor is a member.

(paragraph 8.23)

106. That the court, on being satisfied that there has been such misconduct or failure on the part of the judicial factor, should have power to make such orders as it considers appropriate.

(paragraph 8.23)

107. That the Accountant should be under a duty to audit, or to secure the audit of, the judicial factor's annual accounts.

(paragraph 8.26)

108. That the costs of any external audit should also be borne by the judicial factory estate.

(paragraph 8.26)

109. That the judicial factor should be entitled to challenge any decisions taken by the Accountant in relation to those accounts, if necessary by application to the court.

(paragraph 8.26)

110. That, once any challenge has been dealt with, the audited accounts should be conclusive as between the Accountant and the judicial factor, and against all other persons.

(paragraph 8.26)

111. That an Accountant who is of the view that there is diversity in terms of how judicial factory proceedings are dealt with in the sheriff court should report the matter to the Lord President of the Court of Session.

(paragraph 8.28)

112. That the Lord President should deal with any such report in such a way as seems to him or her to be appropriate.

(paragraph 8.28)

113. That the Accountant should be under a duty to make an annual review, in accordance with such requirements as may be set out in rules of court, and supplemented as the Accountant sees fit.

(paragraph 8.29)

Appendix A

Judicial Factors (Scotland) Bill

[DRAFT]

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Judicial Factors (Scotland) Bill

[DRAFT]

An Act of the Scottish Parliament to make new provision as respects judicial factors and the functions of the Accountant of Court; to make it incompetent to appoint a curator bonis to any person; and for connected purposes.

PART 1

APPOINTMENT OF JUDICIAL FACTOR OR OF INTERIM JUDICIAL FACTOR

1 Petition for appointment of judicial factor

(1) Any person who the court is satisfied has an interest in the appointing of a judicial factor on an estate may petition the court for such an appointment to be made.

(2) The petitioner must, without delay, intimate the petition to all persons who, so far as is known to the petitioner after reasonable enquiry, have an interest in the estate.

(3) For the purposes of subsection (1), "the court" is the Court of Session or an appropriate sheriff court.

(4) In subsection (3), the reference to "an appropriate sheriff court" is—

(a) where the petition relates to an estate a substantial part of which (that is to say a part comprising at least one fifth of its value) is situated in a particular sheriffdom, to the sheriff court of that sheriffdom,

(b) where the petitioner, or any person who has an interest in the estate, is habitually resident in a particular sheriffdom, to the sheriff court of that sheriffdom,

(c) where the petition relates to the estate of a person other than a natural person, to the sheriff court of a sheriffdom in which the person has a place of business, or

(d) where none of paragraphs (a) to (c) is applicable, to the sheriff court at Edinburgh.

NOTE

Section 1 implements recommendations 3, 4, 12 and 13 by providing for appointments as judicial factor to be sought by petition to the Court of Session or sheriff court.

In subsection (1), the definition of a person who has an "interest" to petition for an appointment is to be interpreted broadly thereby enabling the court to appoint a judicial factor whenever it considers it appropriate to do so.

2 Interim judicial factor

(1) The court may, at its own instance or on the motion of the petitioner, appoint an interim judicial factor on the estate if it considers it necessary or expedient to do so pending the disposal of a petition under section 1(1).

(2) Except where the context otherwise requires, the provisions of this Act apply in relation to an interim judicial factor appointed under subsection (1) as they apply to a judicial factor.

(3) Such provisions as apply by virtue of subsection (2) apply with such modifications (if any) as the appointing court may consider appropriate.

(4) The Accountant is from time to time to review the progress of any such interim judicial factory.

NOTE

Section 2 provides for the appointment of a judicial factor on an interim basis thereby implementing recommendations 9 to 11. Such appointments will be made, pending the appointment of a permanent judicial factor, in circumstances where speed is of the essence.

3 Appointment of judicial factor in course of proceedings

In the course of proceedings in the Court of Session or in the sheriff court, the court may at its own instance or on the motion of a party to the proceedings appoint a judicial factor on an estate if it considers it appropriate to do so.

NOTE

Section 3, in implementing recommendation 8, provides that it is open to the Court of Session or the sheriff to appoint a judicial factor in the course of other proceedings. This is a new power for the sheriff court.

4 Grounds on which judicial factor may be appointed

The grounds on which a judicial factor may be appointed under this Act are that it appears to the court there is an estate which requires to be managed or in relation to which actings of some kind are required and (either or both)—

(a) for whatever reason, it is not possible, not practicable or not sensible for that management or those actings to be carried out by those who would ordinarily be responsible for carrying them out,

(b) it would be to the advantage of the estate were a judicial factor to be appointed to manage it or to carry out the requisite actings.

NOTE

Section 4 implements recommendation 19. It sets out the grounds for appointing a judicial factor, which permit the possibility of an appointment being made where, strictly speaking, it is not necessary but would be advantageous.

5 Other powers of appointment

(1) Sections 1 to 4 are without prejudice to—

(a) the power of the Court of Session to appoint a judicial factor (or interim judicial factor) by virtue of the *nobile officium,* or

(b) any power of that court or of the sheriff court to make such an appointment under or by virtue of any other enactment.

(2) But the following provisions of this Act apply in relation to a judicial factor (or interim judicial factor) appointed under any of those powers as those provisions apply in relation to a judicial factor (or interim judicial factor) appointed under this Act.

NOTE

Section 5 implements recommendations 5 and 6 by preserving other powers of appointment and applying the provisions of the draft Bill to judicial factors (both interim and permanent) appointed by virtue of those other powers.

6 Qualifications for appointment as judicial factor

(1) To be appointed a judicial factor on an estate, a person must be—

(a) an individual,

(b) of full legal capacity, and

(c) in the opinion of the court to which it falls to make the appointment, a suitable person to hold that office.

(2) A person may be so appointed whether or not domiciled in Scotland; and if domiciled furth of Scotland prorogates the jurisdiction of the Scottish courts by accepting the appointment.

NOTE

Section 6, in implementing recommendations 14 to 16, sets out the necessary qualifications for a judicial factor.

Subsection (2) states that if an appointee is not ordinarily subject to the jurisdiction of the Scottish courts, that individual will be deemed to have accepted that jurisdiction, for the purposes of the appointment, by accepting the appointment.

7 Finding of caution

(1) The court, in appointing a person as a judicial factor, may require the appointee to find caution for the observance and performance of the duties incumbent on the appointee by virtue of the appointment; but it is to impose such a requirement only where it considers that exceptional circumstances peculiar to the particular appointment make it prudent to do so.

(2) The Accountant—

(a) is to fix the amount of caution to be found, and

(b) may, at any time while the judicial factory subsists—

(i) require the person to find new, or additional, caution, or

(ii) authorise a reduction in the amount of caution to be found.

NOTE

Section 7 implements recommendations 17 and 18 by making a requirement for the judicial factor to find caution discretionary. This represents a change from the current position which is that all judicial factors must find caution. It is intended that the court should exercise this discretion sparingly.

8 Intimation and registration of notice of appointment

(1) Where a person is appointed a judicial factor, the clerk of court must as soon as reasonably practicable and in any event within 7 days after the interlocutor containing the order for the appointment is pronounced—

(a) intimate the appointment to the Accountant, and

(b) register notice of the appointment in the Register of Inhibitions.

(2) Notice under subsection (1)(b) must specify an address at which service of documents may be effected on the person so appointed.

(3) And the judicial factor must re-register notice of the appointment in the Register of Inhibitions every 5 years until the appointment is recalled (on each occasion informing the Accountant, without delay, that the requirement for re-registration has been complied with).

(4) Any amount payable by virtue of subsection (1)(b) is to be met from the factory estate.

NOTE

Section 8 implements recommendations 26 and 27 by introducing two new requirements. First it provides for intimation of all appointments to the Accountant of Court; in view of the functions of the Accountant in relation to judicial factors, it is vital that that officer is informed promptly of all such appointments. Secondly, it provides for publication of all appointments of judicial factors by means of registration of the notice of appointment in the Register of Inhibitions.

9 Vesting

(1) The whole estate on which a judicial factor is appointed vests in the appointee (in the appointee's capacity as judicial factor) on the date on which the interlocutor containing the order for the appointment is pronounced.

(2) Without prejudice—

(a) to the generality of subsection (1), and

(b) to sections 41 (appointment of judicial factor on estate of solicitor) and 42 (distribution of sums in client account) of the Solicitors (Scotland) Act 1980 (c.46),

in the case of an appointment under section 41 of that Act of a judicial factor on the estate of a solicitor, the estate vesting by virtue of subsection (1) includes, unless the appointing court otherwise determines, all property held by the solicitor in a fiduciary capacity (irrespective of whether it is held at the credit of any client account or is held other than in the solicitor's professional capacity).

NOTE

Section 9 implements recommendations 20 and 25 by clarifying the position of a judicial factor in relation to the judicial factory estate. It provides for the vesting of the estate in the judicial factor, as factor.

Subsection (2) clarifies that, in the case of appointments in terms of the Solicitors (Scotland) Act 1980, without prejudice to sections 41 and 42 of that Act, the estate which vests in the judicial factor includes assets held in any fiduciary capacity. The judicial factor would hold the assets on the same basis.

10 Warrant to intromit with estate

(1) A certified copy of an interlocutor containing the order for the appointment of a person as a judicial factor on an estate—

(a) is the appointee's warrant to intromit with the estate, and

(b) is to be issued to the appointee without delay by the clerk of court.

(2) But where the court has imposed on the appointee a requirement under section 7, that copy is not to be issued before—

(a) the appointee's bond of caution is transmitted to the Accountant, and

(b) the Accountant—

(i) is satisfied that the requirement has been met, and

(ii) so informs the court.

NOTE

Section 10 implements recommendation 21. It explains the judicial factor's authority to deal with the estate over which the factor has been appointed.

Subsection (2) provides that, in cases where the court has required the judicial factor to find caution, the certified copy interlocutor of appointment, which is the factor's authority to deal with the estate, cannot be issued before the court has received confirmation that the Accountant of Court is content with the bond of caution.

PART 2

POWERS AND DUTIES OF JUDICIAL FACTORS

11 Powers of judicial factor: general

(1) On the date mentioned in section 9(1) there vest in the judicial factor all the powers of a natural person beneficially entitled to the estate.

(2) Subsection (1) is without prejudice to any other enactment conferring powers on, or by virtue of which powers vest in, a judicial factor.

(3) Schedule 1 provides for the interpretation of the expression "all the powers of a natural person beneficially entitled to the estate".

NOTE

Section 11 implements recommendations 41 and 42. It gives a judicial factor all the powers of a natural person beneficially entitled to the estate. Subsection (3) introduces schedule 1, which provides that the powers of a judicial factor include, but are not limited to, the powers there listed.

12 Power of judicial factor to require information

(1) A judicial factor may by written notice require any—

(a) public body,

(b) other body corporate,

(c) unincorporated association, or

(d) individual,

to disclose to the judicial factor such information specified in the notice as the judicial factor reasonably considers relevant to the judicial factor's functions.

(2) The judicial factor is to send with any such notice the certified copy interlocutor containing the order for the judicial factor's appointment.

(3) A body or association which, or individual who, receives such a notice and its accompanying interlocutor is to comply with the notice without delay.

(4) Subsection (5) applies where the information specified in the notice can readily be obtained by the judicial factor (either or both)—

(a) free of charge,

(b) under or by virtue of any other enactment.

(5) The body, association or individual complies with the notice if, without delay, it (or as the case may be the individual) directs the judicial factor to the means by which the information can be so obtained.

(6) If the body, association or individual is entitled by, under or by virtue of any other enactment to charge a fee for supplying the information requested, this section is without prejudice to that entitlement.

NOTE

Section 12 gives a judicial factor power to require information of relevance to the factor's functions. It implements recommendation 46.

13 Further provision as to judicial factors' powers

(1) In appointing a judicial factor the court may (either or both)—

(a) specify in the interlocutor of appointment powers which are granted to the appointee and are not mentioned in section 11(1) or 12(1),

(b) specify in that interlocutor that certain of the powers mentioned in section 11(1) are not to be exercisable by the appointee.

(2) A judicial factor may, at any time, apply to the court to be granted powers additional to those which the judicial factor has by virtue of the interlocutor of appointment.

(3) Any application under subsection (2) must be intimated to the Accountant who, after such inquiry (if any) as appears to that officer to be appropriate, must in a report to the court indicate whether in the opinion of that officer it would be expedient to grant the additional powers sought.

NOTE

Section 13 implements recommendations 44 and 45. It enables the court appointing the judicial factor both to give the factor additional powers and to prevent the factor from exercising certain powers. The judicial factor may also apply for additional powers during the course of the judicial factory.

14 Duties of judicial factor: general

(1) It is the duty of a judicial factor to hold, manage, administer and protect the factory estate for the benefit of such persons as have an interest in the estate.

(2) But subsection (1) is subject to the provisions of any other enactment and to such provision as is made in the interlocutor appointing the judicial factor.

(3) In the performance of the duty imposed by subsection (1), a judicial factor must exercise care, prudence and diligence.

NOTE

Section 14 implements recommendations 28, 29 and 32.

Subsection (1) obliges the judicial factor, as an overarching duty, generally to carry out the functions of the office for the benefit of those with an interest in the estate. "Interest in the estate" is defined in section 56 to mean an interest in the residual estate, that is, in the estate after payment of any debts.

Subsection (3) sets out the duty of care expected of judicial factors in carrying out their functions.

15 Ingathering

(1) It is the duty of a judicial factor to ingather the factory estate.

(2) The judicial factor may take such steps as are requisite to complete title to such property as is vested in the judicial factor by virtue of that person's appointment.

(3) It is the duty of the judicial factor, on becoming aware that a person is a creditor or debtor of the factory estate, to inform the person of the judicial factor's appointment.

(4) It is the duty of the judicial factor to ensure that all—

(a) cash accounts and share certificates, and

(b) other assets of a like nature,

held by that person as judicial factor are readily identifiable as being so held.

(5) This section is subject to section 23.

NOTE

Section 15 implements recommendations 22, 33, 34 and 36. It sets out some specific duties concerning the gathering in of the factory estate.

In order to facilitate further certainty as to the judicial factor's position in relation to the factory estate which has vested in the factor, subsection (2) gives the factor a discretion to complete title to any part of such estate by taking any necessary formal steps, such as registering a notice of title in the Land Register.

Subsection (4) requires the judicial factor to make sure that all cash accounts, share certificates and similar assets are readily identifiable as being held by the factor in that capacity. This is to avoid confusion between the factor's personal assets and those of the judicial factory estate.

16 Inventory and management plan

(1) A judicial factor is, within 6 months after the date on which the certified copy of the interlocutor containing the order for the judicial factor's appointment is issued, to send to the Accountant—

(a) an inventory of the factory estate,

(b) a management plan (that is to say a plan as to how the judicial factor intends to administer the estate), and

(c) such accompanying documents as may be required by rules of court.

(2) The Accountant may require the judicial factor to produce such further documents relevant to the inventory or management plan as the Accountant considers it necessary to examine.

(3) The judicial factor is to seek to obtain the Accountant's agreement both to the inventory and to the management plan.

(4) The Accountant may suggest or require (either or both)—

(a) an amendment to the inventory before agreeing to that inventory,

(b) an amendment to the management plan before agreeing to that plan.

(5) The inventory, when agreed by the Accountant, is to be signed by the judicial factor and the Accountant as constituting, as at the date mentioned in subsection (1), a definitive statement of the estate for which the judicial factor is accountable.

(6) The judicial factor and the Accountant may, at any time and in such manner as the Accountant may determine, take account of information discovered after the inventory is signed under subsection (5).

(7) If the agreement of the Accountant to the management plan can be obtained, the judicial factor must administer the estate in accordance with that plan; but, if that agreement cannot be obtained, the judicial factor must administer the estate in accordance with the directions of the Accountant.

(8) The judicial factor is to review an agreed management plan—

(a) from time to time (and at least annually), and

(b) whenever required to do so by the Accountant.

(9) If, whether or not by virtue of a review under subsection (8), the judicial factor considers that an amendment to the management plan is required, the judicial factor may make the amendment provided that the Accountant's agreement is first obtained.

(10) The Accountant may suggest or require an additional amendment to the management plan before agreeing to the amendment mentioned in subsection (9).

(11) But if an additional amendment which the Accountant requires under subsection (10) is not effected by the judicial factor, the judicial factor must administer the factory estate in accordance with the directions of the Accountant.

(12) It is the duty of the judicial factor to report to the Accountant, at such intervals as the Accountant may determine, as to how the administration of the estate is progressing.

(13) This section is subject to section 23.

NOTE

Section 16, in implementing recommendations 35, 37 and 99, provides for the drawing up by the judicial factor of an inventory of the estate and a plan as to how the factor proposes to carry out the duties in relation to it. The inventory and the plan are to be agreed with the Accountant of Court. Where agreement cannot be obtained, however, the judicial factor must administer the estate as directed by the Accountant.

In terms of subsection (12), the judicial factor must report on the progress of the administration of the estate to the Accountant at intervals set by the Accountant.

17 Submission of accounts etc.

(1) It is the duty of a judicial factor to report to the Accountant (including by the submission of accounts) the judicial factor's intromissions with the factory estate.

(2) Accounts prepared for the purposes of subsection (1) must be in such form as the Accountant may agree with the judicial factor (or, in the absence of such agreement, in such form as the Accountant may specify).

(3) Without prejudice to subsection (2), reporting for the purposes of subsection (1) must be in a way agreed with the Accountant (or, in the absence of such agreement, in a way specified by the Accountant).

(4) Accounts and other documents prepared for the purposes of subsection (1) must be submitted to the Accountant at such intervals as the Accountant may specify.

(5) An interval specified under subsection (4)—

(a) is not to exceed 2 years, and

(b) is not ordinarily to be less than 1 year.

(6) But, subject to subsection (5)(a), the Accountant may, on cause shown, defer a date by which accounts and other documents are to be submitted by virtue of subsection (4).

(7) This section is subject to section 23.

NOTE

Section 17 implements part of recommendation 38. It provides that the factor must, at appropriate intervals, report to the Accountant of Court, including by the submission of accounts, the factor's intromissions with the factory estate. The form of accounts and manner of reporting must be agreed with the Accountant. It is vital that the accounts are sufficient to enable the Accountant to be satisfied as to the performance of the factor's functions.

18 Delegation

(1) The judicial factor is not to delegate any of the judicial factor's functions and responsibilities other than—

(a) with the consent of the Accountant, or

(b) in so far as given the power to do so by this Act, by any other enactment or by the interlocutor appointing the judicial factor.

(2) This section is subject to section 23.

NOTE

Section 18 implements part of recommendation 38. It prevents the judicial factor delegating any functions and responsibilities except in certain circumstances.

19 Taking of professional advice

(1) It is the duty of a judicial factor to take professional advice where it is appropriate to do so.

(2) In determining whether it is appropriate to take professional advice in a particular case, a judicial factor may consult the Accountant.

(3) This section is subject to section 23.

NOTE

Section 19 implements part of recommendation 38. It requires a judicial factor to take professional advice wherever it is appropriate to do so. This will enable the factor to seek proper advice in relation to matters where the factor does not have the technical expertise to make a judgement.

Subsection (2) envisages that it is likely that a factor will consult the Accountant of Court on these matters.

20 Investment

(1) It is the duty of a judicial factor to consider whether (and if so how) to invest some or all of the funds of the factory estate.

(2) This section is subject to sections 19 and 23.

NOTE

Section 20 implements part of recommendation 38. It places a judicial factor under a duty in relation to investment.

This section is subject to a judicial factor's duty to take professional advice and to any alteration of duties by the court.

21 Enforcing or defending claims

(1) It is the duty of a judicial factor to enforce or defend any claim in relation to the estate provided that the judicial factor is satisfied that to do so would be sensible in all the circumstances.

(2) In determining whether it is sensible in all the circumstances of a particular claim to enforce or defend the claim, a judicial factor may consult the Accountant.

(3) This section is subject to sections 19 and 23.

NOTE

Section 21 implements part of recommendation 38. It places a judicial factor under a duty in relation to litigation on behalf of the factory estate. It is envisaged that it is likely that a factor will consult the Accountant of Court on such matters.

This section is subject to a judicial factor's duty to take professional advice and to any alteration of duties by the court.

22 Duty where estate object of dispute

(1) This section applies where—

  (a) the factory estate was, immediately before the appointment of the judicial factor, not being managed adequately because persons who required to agree among themselves on how to manage it could not reach such agreement, and

  (b) the appointment was made wholly or mainly for that reason.

(2) It is the duty of the judicial factor, by whatever method the judicial factor considers appropriate in the circumstances, to promote agreement on how to manage the estate; and if that method is mediation or arbitration the mediator or arbitrator may, but need not, be the judicial factor.

(3) If agreement is not attained, or does not appear to the judicial factor to be attainable, by virtue of subsection (2), it is the duty of the judicial factor to formulate a scheme, being a scheme which the judicial factor considers equitable, for the management or distribution of the estate.

(4) Without prejudice to the generality of subsection (3), the scheme may comprise—

  (a) the appointment of a manager by the persons mentioned in subsection (1)(a),

  (b) the division and sale of all or part of the factory estate.

(5) This section is subject to section 23.

NOTE

Section 22 implements recommendations 39 and 40. It provides for the case where the reason, or the main reason, for the appointment of the judicial factor was that those who were responsible for managing the estate could not reach any agreement amongst themselves as to how to do so. In such circumstances, the judicial factor is required to promote agreement on how to manage the estate. Where such efforts fail, the judicial factor must put forward a scheme for the management or distribution of the estate.

23 Further provision as to judicial factors' duties

(1) In appointing a judicial factor the court may (either or both)—

(a) specify in the interlocutor of appointment duties which are imposed on the appointee and are not duties mentioned in sections 15 to 22,

(b) specify in that interlocutor certain duties (whether or not duties mentioned in those sections) from which the appointee is to be free.

(2) A judicial factor may, at any time, apply to the court to be free from certain of the duties which the judicial factor has by virtue of the interlocutor of appointment.

(3) Any application under subsection (2) must be intimated to the Accountant who, after such inquiry (if any) as appears to that officer to be appropriate, must in a report to the court indicate whether in the opinion of that officer it would be expedient to grant what is sought by the judicial factor.

NOTE

Section 23 implements recommendations 30 and 31. In order to provide flexibility to a regime which can potentially encompass an enormous variety of situations, this section provides that the court may both impose additional duties upon the judicial factor and relieve the factor from certain of those duties. Furthermore, the judicial factor may apply to the court at any time to be relieved from any of the duties set out in the interlocutor of appointment.

24 Validity of certain transactions by judicial factor appointed on trust estate

(1) This section applies where a judicial factor is appointed on a trust estate and in relation to that estate, or any part of that estate—

(a) thinks it expedient to exercise a power enjoyed by virtue of this Act, but

(b) considers that its exercise might be at variance with the purposes of the trust.

(2) The judicial factor may apply to the Accountant for the Accountant's consent to the exercise of the power.

(3) The Accountant may grant the application (subject to such conditions, if any, as the Accountant may think fit to impose) provided that—

(a) the exercise is, in the opinion of the Accountant, in the best interests of all parties interested in the trust estate,

(b) the Accountant is satisfied that the judicial factor has complied with subsection (4) and with the provisions of any rules under that subsection, and

(c) the Accountant is satisfied either—

(i) that no objection is made, under subsection (4), to the exercise, or

(ii) that any objection so made is not sufficient cause for dismissing the application.

(4) A judicial factor who proposes to make an application under subsection (2) must give such notification as is mentioned in subsection (5) to such persons, or such class or classes of person, as may be specified in rules of court and must do so in such manner as may be so specified.

(5) The notification is—

(a) of the proposal to apply to the Accountant for consent to the exercise in question,

(b) of what that exercise would comprise, and

(c) of the person notified being entitled, by virtue of this section, to object (within such time and in such manner as the rules of court may specify) to the exercise.

(6) Where a judicial factor exercises any power in accordance with a consent duly obtained under this section, the exercise is to be treated as not being at variance with the purposes of the trust.

(7) This section is without prejudice to section 13(2).

NOTE

Section 24 implements recommendation 43. It enables a judicial factor appointed on a trust estate to act at variance with the trust purposes provided that the consent of the Accountant of Court is obtained. This section is without prejudice to the ability of a judicial factor to apply for additional powers.

PART 3

DEALINGS ETC. WITH THIRD PARTIES

25 Protection of person acquiring title

Where a person has, in good faith and for value, acquired title from—

(a) a judicial factor, the title acquired is not challengeable on the ground that, subsequent to the acquisition, the judicial factor's appointment was recalled, or

(b) a person deriving title directly from a judicial factor, the title acquired is not challengeable on the ground that the title should not have been transferred to that person.

NOTE

Section 25 clarifies, in certain situations where there may be some doubt, the position in terms of the title of a person who has in good faith and for value acquired title either from a judicial factor or from a person deriving title directly from a judicial factor. It implements recommendations 88 and 89.

26 Entitlements and liabilities of judicial factor

A judicial factor stands in place of the factory estate in any dealings with a third party and accordingly the judicial factor, in the judicial factor's capacity as such—

(a) is liable for any debt or obligation of the estate to the third party, and

(b) is entitled to receive any amount due to the estate by the third party and to enforce any obligation of the third party to the estate.

NOTE

Section 26 makes it clear that the judicial factor stands in place of the factory estate in any dealings with a third party. It implements recommendation 87.

27 Contracts entered into by judicial factor

(1) Where a judicial factor, in the judicial factor's capacity as such, enters into a contract with another person and that person either is aware, or ought to be aware, that the judicial factor is entering into the contract in that capacity—

(a) any rights which that person or any third party has under or by virtue of the contract are enforceable against the factory estate only, and

(b) if the contract gives rise to litigation, the action is to be raised by, or as the case may be directed against, the judicial factor in the judicial factor's capacity as such.

(2) Subsection (1) is subject to section 31.

NOTE

Section 27 implements recommendation 84 in part. It clarifies the liability of a judicial factor in relation to contracts entered into *qua* factor. This section is subject to section 31 which deals with the personal liability of a judicial factor where there has been a breach of duty.

28 Expenses of litigation on behalf of factory estate

(1) Where a judicial factor engages in litigation on behalf of the factory estate, any expenses of the litigation awarded against the judicial factor fall to be met from the factory estate.

(2) Subsection (1) is subject to section 31.

NOTE

Section 28 implements recommendation 85. It changes the position under the existing law where, certainly in some cases, the judicial factor was personally liable for costs of litigation on behalf of the factory estate, albeit with a right of relief against the estate. In terms of this section, where the judicial factor litigates on behalf of the factory estate, it is the estate which has the primary liability for any expenses awarded against the factor. This is subject to section 31 which deals with the personal liability of a judicial factor where there has been a breach of duty.

29 Delict

(1) Where the acts or omissions of—

(a) a judicial factor, in the judicial factor's capacity as such, or

(b) an agent appointed, or person employed, by the judicial factor to carry out the business of the judicial factory,

give rise to a claim in delict, any action to enforce the claim is to be brought against the judicial factor in that capacity.

(2) Any damages awarded against the judicial factor by virtue of the action fall to be met from the factory estate.

(3) This section is subject to section 31.

NOTE

Section 29 implements recommendation 84 in part. It clarifies that where loss arises from the act or omission of a judicial factor, or someone for whom the factor is responsible, it is the estate which has the

primary liability for any damages awarded against the factor. This is subject to section 31 which deals with the personal liability of a judicial factor where there has been a breach of duty.

30 Unjustified enrichment

(1) Where the acts or omissions of a judicial factor, in the judicial factor's capacity as such, give rise to a claim for unjustified enrichment against the factory estate, any liability resulting from the claim falls to be met from the estate.

(2) Subsection (1) is subject to section 31.

NOTE

Section 30 implements recommendation 84 in part. It clarifies that where liability results from a claim for unjustified enrichment arising from the acts or omissions of a judicial factor, it is the estate which has the primary liability. This is subject to section 31 which deals with the personal liability of a judicial factor where there has been a breach of duty.

31 Personal liability of judicial factor where breach of duty

(1) This section applies where liability arises from a claim against a factory estate.

(2) The claim falls to be met out of the estate unless the court—

(a) finds that the liability arose by virtue of a breach of duty on the part of the judicial factor, and

(b) considers it appropriate that the judicial factor be found personally liable for (as the court thinks fit) all, or some part of, the liability.

NOTE

Section 31 implements recommendation 86. It gives the court a discretion to find a judicial factor personally liable for all or part of a liability of the judicial factory estate where that liability has been caused by a breach of duty by the factor.

32 Prescription of obligations

(1) Subject to subsection (2), obligations due to or by a factory estate prescribe in the ordinary way; that is to say as if there had been no appointment of a judicial factor on the estate.

(2) Obligations due by a judicial factor to the factory estate are imprescriptible during the course of the judicial factory.

NOTE

Section 32 implements recommendation 90. It provides, first, that obligations due to or by the factory estate prescribe in the same way as other obligations, that is, as if the appointment of the judicial factor on the estate had never been made; and, secondly, that while the judicial factory continues, the factor's duty to account to those for whom the estate is being managed is imprescriptible.

PART 4

DISTRIBUTION, TERMINATION, RECALL AND DISCHARGE

33 Approval of judicial factor's scheme for distribution of factory estate

(1) This section applies where a judicial factor has formulated—

(a) a scheme for the distribution of the factory estate because it appears to the judicial factor —

(i) that the purpose for which that person was appointed is fulfilled or no longer exists, or

(ii) that there are not, or may not be, sufficient funds in the factory estate to meet the continuing expenses of the judicial factory, or

(b) a scheme by virtue of section 22(3), being a scheme comprising a distribution of the factory estate.

(2) The judicial factor must—

(a) send to the Accountant—

(i) a current inventory of the factory estate, and

(ii) a copy of the proposed scheme, and

(b) seek the Accountant's approval of a distribution in accordance with the scheme in question,

and may, if to obtain that approval it seems to the judicial factor to be appropriate to do so, amend that scheme.

(3) If the Accountant approves the scheme (or, if the scheme has been amended, the scheme as amended), the judicial factor must without delay—

(a) intimate that approval to all persons who, so far as is known to the judicial factor after reasonable enquiry, have an interest in the factory estate, and

(b) send each of those persons—

(i) a copy of the current inventory of the factory estate, and

(ii) a copy of the approved scheme.

(4) A person to whom intimation is given under paragraph (a) of subsection (3) may, within 21 days after receiving the copy documents mentioned in paragraph (b) of that subsection, lodge with the Accountant an objection to there being any distribution in accordance with the approved scheme.

(5) If no objection is lodged timeously under subsection (4) (or an objection is lodged timeously but is then withdrawn) the judicial factor must distribute the estate in accordance with the approved scheme.

(6) If an objection is lodged timeously under subsection (4) (and is not withdrawn) the Accountant must refer the objection to the court which appointed the judicial factor; and the Accountant is in that event to inform accordingly—

(a) the judicial factor, and

(b) any person to whom intimation is given under subsection (3)(a).

(7) The court to which an objection is referred by virtue of subsection (6) is to require the objector to find caution for the expenses of the court proceedings unless it considers that, in all the circumstances, it would not be in the interests of justice to impose such a requirement.

(8) The court, after hearing the objector, the judicial factor and any other person who it is satisfied has an interest in the matter may (unless it rejects the objection, in which case the judicial factor must distribute the estate in accordance with the approved scheme) instruct the judicial factor to distribute the estate in such manner as the court orders.

NOTE

Section 33 implements recommendations 48 to 55. It provides for approval by the Accountant of Court of a scheme for distribution of the factory estate with a view to bringing the judicial factory to an end. This may take place where (a) the purpose of the appointment is fulfilled or no longer exists; (b) there are, or may be, insufficient funds to meet the continuing expenses of the judicial factory; or (c) a scheme for distribution has been formulated by virtue of section 22 (3), that is where the estate is the object of dispute. This is the preferred route towards bringing a judicial factory to an end. In the event of a timeous objection to the scheme, the Accountant must refer it to the court.

34 Petition for distribution of factory estate

(1) This section applies where the court is satisfied that a petitioner has an interest in seeking the distribution of a factory estate.

(2) The petitioner may petition the court for the estate to be distributed in such manner as the court thinks fit.

(3) The petitioner must intimate the petition to any person to whom the court considers intimation should be made.

(4) The court, after hearing the petitioner, the judicial factor (if not heard by virtue of being the petitioner), the Accountant and any other person who it is satisfied has an interest in the petition may, unless it refuses the application, instruct the judicial factor to distribute the estate in such manner as the court orders.

(5) If the petitioner is not the judicial factor, the court must be satisfied that reasonable steps have been taken to persuade the judicial factor—

(a) to formulate a scheme for the distribution of the factory estate, and

(b) to seek, under section 33(2)(b), the Accountant's approval of a distribution in accordance with a scheme so formulated,

but that the judicial factor will not do those things (or cannot obtain the requisite approval).

(6) If the petitioner is the judicial factor, the court must be satisfied that the petitioner cannot obtain the approval mentioned in subsection (5).

(7) The court is to require the petitioner (other than the judicial factor) to find caution for the expenses of the court proceedings unless it considers that, in all the circumstances, it would not be in the interests of justice to impose such a requirement.

NOTE

Section 34 implements recommendations 56 - 59. It provides for court approval of a scheme for distribution of the factory estate with a view to bringing the judicial factory to an end.

Subsections (5) and (6) make clear that approval by the Accountant of Court, as opposed to approval by the court, of a scheme for distribution of the factory estate is to be the primary method of bringing a judicial factory to an end.

35 Termination, recall and discharge after distribution of factory estate by virtue of section 33(5) or (8) or 34(4)

(1) This section applies where a judicial factor has distributed the factory estate by virtue of section 33(5) or (8) or 34(4).

(2) The judicial factor is to apply to the Accountant—

(a) for the judicial factory to be terminated,

(b) for the judicial factor's appointment to be recalled, and

(c) to be granted a certificate of discharge.

(3) With any application under subsection (2) the judicial factor is to send a copy of the judicial factor's final accounts.

(4) After auditing those accounts the Accountant is, except where subsection (6) applies, to grant the judicial factor a certificate—

(a) terminating the judicial factory,

(b) recalling the judicial factor's appointment, and

(c) discharging the judicial factor.

(5) Subsection (6) applies if, after auditing the judicial factor's final accounts, the Accountant considers or suspects there has been misconduct or failure on the part of the judicial factor.

(6) The Accountant is to take action under section 46 rather than to proceed as mentioned in subsection (4).

NOTE

Section 35 implements recommendations 60 and 61. Where a judicial factory estate has been distributed in accordance with an agreed scheme or as instructed by the court, this section provides for termination of the judicial factory, recall of the appointment of the judicial factor and the discharge of the judicial factor by the Accountant of Court. Where the Accountant considers or suspects that there has been misconduct or failure by the judicial factor, matters will proceed in terms of section 46 of the draft Bill rather than in terms of this section.

36 Registration where judicial factory terminated under section 35

(1) This section applies where a judicial factory is terminated under section 35.

(2) As soon as reasonably practicable (and in any event within 7 days after the date on which a certificate is granted under subsection (4)(a) of that section) the Accountant must register in the Register of Inhibitions a certified copy of that certificate.

NOTE

Section 36 implements recommendation 77. Just as, for reasons of publicity, appointments of judicial factors must be registered in the Register of Inhibitions, this section provides for registration there, at the end of a judicial factory, of the certificate terminating it.

37 Formulations, approvals, petitions and registrations relating to part only of factory estate

Sections 33 to 36 apply in relation to any formulation, approval, petition or, as the case may be, registration in relation to a part only of a factory estate as they apply in relation to a factory estate.

NOTE

Section 37 implements recommendation 47. It provides that all processes in the draft Bill relating to the termination of a judicial factory, the recall of appointment of a judicial factor and the discharge of a judicial factor apply to any part of the factory estate as they would apply to the whole.

38 Duty of Accountant to apply for appointment of replacement where judicial factor has died undischarged etc.

(1) Where a judicial factor (in this section referred to as "JF")—

(a) has died undischarged but no petition has been lodged by any person for a judicial factor to be appointed in place of JF, subsection (2) applies,

(b) though undischarged, has ceased for whatever reason to perform the duties of a judicial factor but no petition has been lodged by any person for a judicial factor to be appointed in place of JF, subsection (3) applies.

(2) If the Accountant is of the opinion that the purpose for which JF was appointed still exists, it is the duty of the Accountant to petition the court, under section 1(1), for a judicial factor to be appointed in place of JF.

(3) If the Accountant is of the opinion that the purpose for which JF was appointed still exists, it is the duty of the Accountant to petition the court—

(a) under section 1(1), for a judicial factor to be appointed in place of JF, and

(b) for the recall of JF's appointment.

(4) A judicial factor appointed by virtue of subsection (2) or (3) must—

(a) (in addition to fulfilling the duties imposed by sections 15 and 16) bring JF's accounts up to date and close them as at the date on which the interlocutor containing the order for the appointment is pronounced, and

(b) on its appearing to the appointee to be appropriate to do so, apply to the Accountant for JF's discharge.

(5) The Accountant may grant an application made under paragraph (b) of subsection (4) if satisfied that it is appropriate to do so.

(6) The expenses of any petition lodged under subsection (2) or (3) are, unless the court determines otherwise, to be met from the factory estate.

NOTE

Section 38 implements recommendations 73 – 76. It provides for the Accountant of Court to take the initiative in applying for a replacement judicial factor, and the recall of the outgoing factor, in specified circumstances. This section also sets out certain duties of the replacement judicial factor, some of which may lead to the discharge of the outgoing factor.

39 Other petitions for recall and discharge

(1) In this section—

(a) subsection (2) applies where, in circumstances other than those mentioned in section 33(1), a judicial factor wishes to resign, and

(b) subsection (3) applies where, in such other circumstances, some person other than the judicial factor, being a person who the court is satisfied has an interest, seeks to have the judicial factor's appointment recalled.

(2) The judicial factor may petition the court—

(a) to recall the judicial factor's appointment, and

(b) for the judicial factor's discharge.

(3) The person may petition the court to recall the judicial factor's appointment and the judicial factor may apply by motion for the court, if it grants the petition, also to grant the judicial factor's discharge.

(4) A petition under subsection (2) or (3) is to include a crave for the appointment of a judicial factor on the factory estate in place of the judicial factor whose appointment is to be recalled.

(5) A petition under subsection (2) or (3) is not to be granted until the certified copy of an interlocutor containing an order for the appointment of a judicial factor on the factory estate in place of the judicial factor whose appointment has been recalled has been issued to that new judicial factor by the clerk of court.

(6) The petitioner must intimate any petition under subsection (2) or (3) to—

(a) the Accountant, and

(b) any other person to whom the court considers intimation should be made.

(7) When a petition is lodged under subsection (2), the petitioner must send a copy of the judicial factor's accounts to the Accountant.

(8) In the case of any petition under subsection (3), the court—

(a) must require the petitioner to find caution for the expenses of the court proceedings unless it considers that, in all the circumstances, it would not be in the interests of justice to impose such a requirement, and

(b) if minded to grant the petition, must require the judicial factor to prepare and send to the Accountant of Court a copy of the judicial factor's accounts.

(9) On receiving a copy of the judicial factor's accounts by virtue of subsection (7) or (8)(b), the Accountant must audit those accounts and present to the court a report—

(a) with regard to the audit, and

(b) as to whether, in the Accountant's view, the judicial factor's appointment ought to be recalled and (if so) whether discharge ought to be granted.

(10) Neither recall nor discharge is to be granted by virtue of a petition under subsection (2) or (3) without the court having received and considered a report under subsection (9) and made such further inquiry (if any) as it considers necessary.

NOTE

Section 39 implements recommendations 63 to 70. It provides for a judicial factor to petition the court for recall of appointment and discharge where a judicial factor wishes to resign in circumstances where it is necessary for the judicial factory to continue. The section also provides for a petition by someone with an interest who wishes to have the appointment of a judicial factor recalled even although it is necessary for the judicial factory to continue. As there is a need for the judicial factory to continue, any petition under this section must include a request for the appointment of a replacement judicial factor.

40 Inventory and balance sheet where judicial factor appointed by virtue of section 38 or 39

(1) Where a judicial factor is appointed by virtue of section 38(2) or (3), the opening balance sheet of the appointee is to be such as is agreed between the appointee and the Accountant.

(2) Where a judicial factor is appointed by virtue of section 39(4)—

(a) the final inventory and balance sheet of the judicial factor replaced constitute the opening inventory and balance sheet of the appointee, but

(b) if, in consequence of the judicial factor replaced having been replaced undischarged, there is—

(i) no agreed final inventory of the judicial factor replaced, the opening inventory of the appointee,

(ii) no agreed final balance sheet of the judicial factor replaced, the opening balance sheet of the appointee,

is to be such as is agreed between the appointee and the Accountant.

NOTE

Section 40 implements recommendations 71 and 72. It makes provision regarding the opening inventory and balance sheet in cases where a replacement judicial factor is appointed.

41 Writing off

(1) This section applies where the Accountant is satisfied that, were the judicial factor to formulate a scheme, under section 33(1), for the distribution of a factory estate and to seek approval of a distribution in accordance with the scheme, such funds (if any) as there are in the estate would not be sufficient even to meet the expenses of, or arising in connection with, doing those things.

(2) The Accountant is, except where subsection (5) applies, to—

(a) direct the judicial factor to distribute such funds (if any) as there are in the estate in any way the Accountant considers appropriate,

(b) terminate the judicial factory,

(c) recall the judicial factor's appointment, and

(d) discharge the judicial factor.

(3) As soon as reasonably practicable after terminating a judicial factory under subsection (2)(b) the Accountant must register a notice of its termination in the Register of Inhibitions.

(4) Subsection (5) applies if the Accountant considers or suspects there has been misconduct or failure on the part of the judicial factor.

(5) The Accountant is to take action under section 46 rather than to proceed as mentioned in subsection (2).

NOTE

Section 41 implements recommendation 62. It enables the Accountant of Court to write off a judicial factory and grant a discharge to the judicial factor where it is clear that any remaining funds of the judicial factory would be insufficient to finance the process of formulating a scheme for distribution to be approved by the Accountant. Where the Accountant considers or suspects that there has been misconduct or failure by the judicial factor, matters will proceed in terms of section 46 of the draft Bill rather than in terms of this section.

42 Ending of judicial factor's accountability on discharge

On—

(a) an interlocutor containing an order for discharge of a judicial factor being issued by the clerk of court, or

(b) a certificate of discharge being granted to a judicial factor,

(whether in relation to the entire factory estate or to part only of that estate) the judicial factor's accountability for acts and omissions in the judicial factor's capacity as judicial factor in relation to that estate, or as the case may be in relation to that part, ends except if and in so far as the judicial factor has incurred criminal liability in the course of holding, managing, administering or protecting the estate.

NOTE

Section 42 implements recommendation 78. It provides for the accountability of a judicial factor to end on discharge. There is an exception where the judicial factor has incurred criminal liability in the course of carrying out the functions of the judicial factory.

PART 5

ACCOUNTANT

43 Accountant and Depute Accountant

(1) The Accountant must be an individual knowledgeable in matters of law and accounting as must any Depute Accountant.

(2) A Depute Accountant (if any is appointed) is to carry out the functions of the Accountant at any time when the Accountant is unable to do so.

(3) Subject to the provisions of any other enactment, the Accountant is not to hold any other office.

(4) The sole remuneration of the Accountant is to be of such amount as the Scottish Court Service may determine.

(5) The Accountant is to charge a fee for anything done by that officer in connection with that officer's functions under this Act.

(6) Without prejudice to the generality of subsection (5), the fees charged by virtue of that subsection are to be such as will ensure that the Accountant is reimbursed for any outlays reasonably incurred by that officer in connection with that officer's functions under this Act.

(7) Any fee received by the Accountant by virtue of subsection (5), and any sum received by that officer other than as remuneration, is to accounted for in such manner as the Scottish Court Service may direct.

(8) Amounts payable by virtue of subsection (5) are to be met from the factory estate.

(9) But subsection (8) is subject to section 51.

(10) The Accountant may, if satisfied in relation to a particular case that a fee payable by virtue of subsection (5) is unlikely to be recovered, waive the right to recover it.

NOTE

Section 43 updates the current general provisions in relation to the requirements of the office of the Accountant of Court and implements recommendations 96 – 98, 102 and 108.

Subsection (3) provides that, other than in accordance with any other enactment, the Accountant cannot hold any other office. (Currently, the Accountant of Court is also the Public Guardian in terms of the Adults with Incapacity (Scotland) Act 2000).

Sums charged by virtue of subsection (5) are to be paid by the factory estate. It should be noted however that this is subject to section 51 of the draft Bill which provides for the payment by a person with an interest in a particular factory estate of fees in connection with the inspection of, and obtaining copies of, certain records held by the Accountant. (See subsection (9).)

44 Functions of Accountant: general

(1) The Accountant is—

(a) to supervise the performance by judicial factors of the functions conferred on them by this or any other enactment or by any rule of law, and

(b) to ensure that they duly observe such legal requirements and guidance as affect that performance.

(2) Subsection (1) is without prejudice to any duty imposed on the Accountant by or by virtue of any other enactment.

NOTE

Section 44 implements recommendation 95. It sets out the general functions of the Accountant of Court.

45 Power of Accountant to instruct judicial factor

The Accountant may instruct a judicial factor as to the manner in which that person is to carry out the functions of judicial factor.

NOTE

Section 45 implements recommendation 100. It gives the Accountant of Court a specific power to direct a judicial factor as to how the factor's functions in respect of a particular judicial factory are to be carried out.

46 Misconduct or failure of judicial factor

(1) Subsection (2) applies where the Accountant has reason to believe that a judicial factor—

(a) has engaged, or is engaging, in misconduct,

(b) has failed, or is failing, to discharge certain duties, or

(c) has failed, or is failing, to comply with an instruction given under section 45.

(2) The Accountant is to make such inquiries into the matter as that officer considers appropriate and is to seek comments and representations from the judicial factor as respects the matter.

(3) Any other person who has reason to believe that a judicial factor—

(a) has engaged, or is engaging, in misconduct, or

(b) has failed, or is failing, to discharge certain duties,

may so inform the Accountant.

(4) On receiving information under subsection (3), the Accountant is to make such inquiries into the matter as that officer considers appropriate and is to seek comments and representations from the judicial factor as respects the matter.

(5) Subsection (6) applies where, having made inquiries under subsection (2) or (4), the Accountant concludes that there has been, on the part of the judicial factor, some appreciable—

(a) misconduct, or

(b) failure.

(6) The Accountant must report the misconduct or failure—

(a) to the court which appointed the judicial factor, and

(b) if the judicial factor is a member of a professional body, to that body.

(7) If the court receives a report under subsection (6), it is to give the judicial factor an opportunity to make representations and to be heard before it disposes of the matter.

(8) The court may dispose of the matter in whatever manner it considers appropriate.

(9) A determination of the court under subsection (8) is final and is conclusive against both the Accountant and the judicial factor.

(10) But any such determination is without prejudice to any right which a person may have in respect of any loss consequent upon the judicial factor's—

(a) misconduct,

(b) failure to discharge a duty, or

(c) failure to comply with an instruction under section 45.

(11) And subsections (1) to (8) are without prejudice to any right, under Part 4, to petition the court to recall the judicial factor's appointment and to the powers of the court in relation to any such petition.

NOTE

Section 46 implements recommendations 105 and 106. It provides a procedure to be followed where there appears to have been misconduct or failure on the part of the judicial factor. It enables the Accountant of Court, either on the Accountant's initiative or on a report from someone else, to investigate certain matters including any allegation of misconduct on the part of the judicial factor. If satisfied that there has been misconduct or failure of an appreciable nature, the Accountant must report it to the court and any professional body of which the judicial factor is a member. On receipt of such a report the court concerned may, after hearing any representations from the judicial factor, dispose of the matter as it sees fit.

47 Power of Accountant to require information

(1) The Accountant may by written notice require any—

(a) judicial factor,

(b) public body,

(c) other body corporate,

(d) unincorporated association, or

(e) individual,

to provide such information as is specified in the notice (being information which the Accountant considers relevant to the Accountant's functions under this Act).

(2) It is the duty of the judicial factor, body, association or individual to comply with the notice without delay.

(3) Subsection (4) applies where the information specified in the notice can readily be obtained by the Accountant (either or both)—

(a) free of charge,

(b) under or by virtue of any other enactment.

(4) A body, association or individual complies with the notice if, without delay, the body, association or individual directs the Accountant to the means by which the information can be so obtained.

(5) If a body, association or individual is entitled, by, under or by virtue of any other enactment, to charge a fee for supplying the information requested, this section is without prejudice to that entitlement.

NOTE

Section 47 implements recommendation 103. It enables the Accountant of Court to require any person or body to provide information which is relevant to the carrying out of the functions of that office. It also imposes a duty on those persons or bodies to comply with that request.

48 Audit by Accountant

(1) On receipt, by virtue of this Act, of accounts prepared by a judicial factor the Accountant is, after considering such further information as the Accountant thinks it appropriate to obtain, to audit the accounts.

(2) The Accountant may, if the Accountant considers it necessary or expedient to do so, remit the accounts for auditing to such duly qualified persons as the Accountant may select.

(3) But all such audits are to be supervised by the Accountant; and the Accountant is responsible for their correctness.

(4) When the audit is completed, the Accountant is to set out its results in the form of a report.

(5) On completing that report the Accountant is to send a copy of it to the judicial factor.

(6) If in the course of the audit the Accountant (or as the case may be a person to whom the accounts have been remitted)—

(a) comes to the view that some aspect of the accounts requires to be explained, then the judicial factor is to be given an opportunity to provide the requisite explanation before the audit is completed, or

(b) has made any correction to the accounts, then the Accountant (or that person), on being required to do so by the judicial factor, must explain the correction and the reason for making it.

(7) Persons to whom accounts are remitted by virtue of subsection (2) are to be remunerated for their services.

NOTE

Section 48 implements recommendation 107. It provides that the Accountant of Court is to audit the accounts prepared by a judicial factor, or have them audited. As this is a particularly important function, the Accountant is responsible for the correctness of all audits.

49 Further provision as regards audit and report under section 48

(1) Subject to subsections (2) to (6), the audit completed under section 48, together with the accounts to which that audit relates and the report of its results, are conclusive.

(2) The judicial factor to whom the report relates may lodge a written objection to the report with the Accountant.

(3) Any such written objection must be lodged within 21 days after the judicial factor receives the report by virtue of section 48(5).

(4) The Accountant is to consider any objection which is lodged timeously under subsection (2) and may, if that officer considers it appropriate to do so, alter the results and report of the audit in order to take account of matters raised in the objection.

(5) Where the Accountant dismisses an objection considered under subsection (4) the judicial factor may require that officer to refer the objection to the court which appointed the judicial factor.

(6) The determination of that court in relation to an objection so referred is final and is conclusive.

NOTE

Section 49 implements recommendations 109 and 110. It enables a judicial factor who does not agree with the Accountant of Court's report on the audited accounts to make representations to the Accountant on the matter. Where the Accountant dismisses an objection, it is open to the factor to require the Accountant to refer the matter to the court. Subject to such processes, the audited accounts are conclusive against all persons with an interest in the judicial factory estate.

50 Annual review

(1) The Accountant must publish annually a review of that officer's activities in relation to the judicial factories mentioned in subsection (3).

(2) The review—

(a) is to contain such particulars, and be published in such manner, as may be prescribed by rules of court, and

(b) may contain such other particulars as the Accountant thinks it appropriate to include.

(3) The judicial factories are those which at any time subsist during the year in question (irrespective of whether they came into being before or after the coming into force of this section).

NOTE

Section 50 implements recommendation 113. It provides for the annual publication of a review of the Accountant of Court's activities.

51 Inspection of certain records held by Accountant

(1) The inventory, management plan, annual accounts and audit report relating to a particular judicial factory and kept by the Accountant are open to inspection, by any person with an interest in the factory estate, on cause shown and on payment to the Accountant of a fee by that person.

(2) Copies of any such records or papers, attested by the Accountant, are to have the same authority as the originals and are to be provided to any person—

(a) requiring them, and

(b) with an interest in the factory estate,

on cause shown and on payment to the Accountant of a fee by that person.

NOTE

Section 51 implements recommendation 104. It provides that a person with an interest in the factory estate may, on payment of a fee and provided that cause can be shown, inspect certain documents relating to the factory estate or receive copies of those documents.

PART 6

MISCELLANEOUS AND GENERAL

Miscellaneous

52 Right of judicial factor to require determination as regards decision of Accountant: general

(1) A judicial factor may apply to the court which appointed the judicial factor for a determination as regards any decision of the Accountant which relates to the judicial factory.

(2) But (without prejudice to sections 49 and 53) subsection (1) does not apply as regards—

(a) a decision to dismiss an objection considered under section 49(4), or

(b) a decision by virtue of which an appeal is competent under section 53(7).

(3) The determination of the court in relation to a decision so referred to it is final and is conclusive against both the Accountant and the judicial factor.

NOTE

Section 52 implements recommendation 101. The draft Bill gives the Accountant of Court wide powers in relation to the function of supervising judicial factors. This section enables a judicial factor to challenge a decision of the Accountant and have it reviewed by the court.

53 Remuneration and reimbursement of judicial factors

(1) A judicial factor is entitled to be remunerated from the factory estate for carrying out the functions of that office.

(2) The Accountant is, after such consultation as appears to that officer to be appropriate, to fix rates for the remuneration of judicial factors.

(3) Different rates may be fixed by virtue of subsection (2)—

(a) for interim judicial factors,

(b) for different kinds of work, and

(c) for different circumstances.

(4) The Accountant and the judicial factor are to agree the frequency with which amounts are to be paid to the judicial factor by way of remuneration; but if they are unable to agree, the Accountant is to determine that frequency.

(5) The Accountant must review at least annually the rates so fixed.

(6) The Accountant may fix a rate of remuneration for a particular interim judicial factor other than by virtue of subsections (2) to (5).

(7) A judicial factor may appeal to the court which appointed that person in respect of (either or both)—

(a) the amounts paid to the judicial factor by way of remuneration,

(b) any determination of the Accountant under subsection (4).

(8) The decision of the court in an appeal to it under subsection (7) is final and is conclusive against both the Accountant and the judicial factor.

(9) A judicial factor is entitled to be reimbursed from the factory estate—

(a) for any outlays reasonably incurred, and

(b) as and when those outlays are so incurred.

NOTE

Section 53 implements recommendations 79 – 81 and 83. It provides that a judicial factor is entitled to be paid remuneration and to recover outlays. It also requires the Accountant of Court to fix rates of remuneration for judicial factors, with different rates being able to be fixed for certain situations. Rates are to be reviewed at least annually and a judicial factor who is not satisfied with the Accountant's decision on the amount of remuneration or frequency of payment may apply to the court.

54 Diversity of judgment or practice

(1) This section applies where it appears to the Accountant that—

(a) there is a diversity of judgment or practice in proceedings in judicial factories in the sheriff courts, and

(b) it is important to put an end to that diversity.

(2) It is the duty of the Accountant to report the matter to the Lord President of the Court of Session, specifying the proceedings in which the diversity has appeared and proposing that a rule be framed to secure uniformity of judgment and practice in such proceedings.

(3) The Lord President is to consider the report and take such action in the matter as the Lord President thinks appropriate.

NOTE

Section 54 implements recommendations 111 and 112. To ensure consistency of practice across Scotland, this section requires the Accountant of Court, where the Accountant considers that there is a diversity of practice or judgment in sheriff courts in proceedings involving judicial factories, to report that matter to the Lord President in order that the matter may be addressed.

55 Competence of appointing curator bonis

In any proceedings begun after the coming into force of this section it is not competent to appoint a curator bonis to any person.

NOTE

Section 55 implements recommendation 92. It removes an anomaly in the existing law by providing that it should no longer be competent to appoint a *curator bonis* to any person.

General

56 Interpretation

In this Act—

"the Accountant" means the accountant of the Court of Session,

"clerk of court" means the sheriff clerk or as the case may be a clerk of session,

"estate" means whole estate, irrespective of whether the property in question is heritable or moveable,

"factory estate" means the estate on which a judicial factor is appointed,

"interest in the estate" means an interest in the residual estate (that is to say, in the estate after payment of any debts), and

"judicial factor" means a person appointed as such by a court (whether under an enactment or a rule of law) to hold, manage, administer and protect property.

57 Modification of enactments

Schedule 2 makes provision for the modification of enactments.

58 Repeals and revocations

Schedule 3 contains repeals and revocations.

59 Ancillary provision

(1) The Scottish Ministers may, by order, make such incidental, supplemental, consequential, transitory, transitional or saving provision as they consider appropriate for the purposes of, in consequence of, or for giving full effect to, any provision made by, under or by virtue of this Act.

(2) An order under subsection (1) may modify any enactment (including this Act).

(3) An order under subsection (1)—

(a) is subject to the affirmative procedure if it modifies any enactment, and

(b) is otherwise subject to the negative procedure.

60 Commencement

(1) This section and section 61 come into force on the day after Royal Assent.

(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by order appoint.

61 Short title

The short title of this Act is the Judicial Factors (Scotland) Act 2013.

SCHEDULE 1

(introduced by section 11(3))

INTERPRETATION OF SECTION 11(1)

1 Without prejudice—

(a) to the generality of section 11(1), and

(b) to section 13(1)(b),

the powers mentioned in section 11(1) include powers to take any of the measures mentioned in paragraph 2.

2 (1) To take possession of, collect and ingather the property of the factory estate.

(2) On behalf of the factory estate—

(a) to bring or defend any action,

(b) to make any application to the court, or

(c) to engage in any other legal proceedings.

(3) To carry out works.

(4) To grant any deed necessary for carrying into effect a power vested in the judicial factor.

(5) To carry on—

(a) the business (if any) of the factory estate, or

(b) any part of that business.

(6) To enter into, or take over, a contract.

(7) To pay a debt due by the estate without requiring the creditor to constitute the debt, provided that the judicial factor is satisfied that the debt is a proper debt of the factory estate.

(8) To employ, or dismiss from employment, any person.

(9) To appoint an agent to carry out business which the judicial factor does not have the competence to carry out.

(10) To remunerate any person appointed under sub-paragraph (9).

(11) To sell the factory estate, or any part of the factory estate, (whether heritable or moveable).

(12) To grant, vary or accept the surrender of a lease or tenancy of any duration of the heritable factory estate or of any part of the heritable estate.

(13) To remove a tenant.

(14) To take a lease or tenancy of any duration of any property if it is a lease or tenancy required for the business of the estate.

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

(16) To appoint a person as the judicial factor's nominee, to exercise the judicial factor's power of investment under sub-paragraph (15).

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

(18) To exchange any part of the heritable factory estate for heritable estate of a like, or greater, value.

(19) To acquire property (whether heritable or moveable).

(20) To borrow money on the security of the factory estate or of any part of the factory estate (whether heritable or moveable).

(21) On behalf of the factory estate, to draw, accept, make or endorse any bill of exchange or promissory note.

(22) To refer to arbitration a question affecting the factory estate.

(23) To formulate and propose a scheme for division of the factory estate.

(24) To petition the court for (either or both)—

(a) authority to act at variance with the purposes of the judicial factory,

(b) a variation of the judicial factor's powers.

(25) To concur, in respect of any securities of a company which are comprised in the factory estate and in like manner as if the judicial factor was entitled to the securities beneficially, in any scheme or arrangement for—

(a) the reconstruction of the company,

(b) the sale of the property and undertaking of the company, or any part of that property and undertaking, to another company,

(c) the acquisition of the securities of the company, or of control of those securities, by another company,

(d) the amalgamation of the company with another company, or

(e) the release, modification or variation of any rights, privileges or liabilities attached to the securities or to any of the securities.

(26) To accept any securities of the reconstructed, purchasing or new company in lieu of, or in exchange for, all or any of the original securities.

(27) To retain any such securities for any period for which the judicial factor could properly have retained the original securities.

(28) To such extent as the judicial factor thinks fit—

(a) to exercise any conditional or preferential right to subscribe for any securities in a company,

(b) to apply capital of the factory estate in payment of the consideration for such subscription,

(c) to retain the securities for any period for which the judicial factor has power to retain the holding in respect of which the right to subscribe was offered (but subject to any conditions subject to which the judicial factor has that power),

(d) to renounce any such conditional or preferential right, or

(e) to assign to any person, for the best consideration that reasonably can be obtained the benefit of, or title to, any such conditional or preferential right.

3 "Person" in paragraph 2(28)(e) includes any person having an interest in the factory estate.

SCHEDULE 2

(introduced by section 57)

MODIFICATION OF ENACTMENTS

Trusts (Scotland) Act 1921 (c.5)

1 (1) The Trusts (Scotland) Act 1921 is amended as follows.

(2) In section 2 (definitions)—

(a) in the definition of "Trust", paragraph (b) and the word "and" immediately preceding that paragraph are repealed,

(b) in the definition of "Trust deed", paragraph (b) and the word "and" immediately preceding that paragraph are repealed,

(c) in the definition of "Trustee", for the words ", executor nominate and judicial factor" there is substituted "or executor nominate".

(3) In the proviso to section 3 (what trusts shall be held to include), paragraph (3) and the word "and" immediately preceding that paragraph are repealed.

(4) In section 8(2)(b) (conveyances to non-existing or unidentifiable persons), the words "or judicial factor", in the second place at which they occur, are repealed as are the words from ", or a warrant" to "as the case may be".

(5) In each of sections 22 (appointment of new trustees by the court) and 24 (completion of title by the beneficiary of a lapsed trust), the words from "in like manner" to "1874" are repealed.

(6) Section 25 (completion of title of judicial factors) is repealed.

Conveyancing (Scotland) Act 1924 (c.27)

2 In section 5(3)(b) of the Conveyancing (Scotland) Act 1924 (deduction of title)—

(a) for the words from the beginning to "are" there is substituted "Section 44 of the Conveyancing (Scotland) Act 1874 is",

(b) for the words "section forty four of the said Act of 1874, as hereby amended," there is substituted "that section", and

(c) the words "shall be applicable to all judicial factors within the meaning of section three of the said Act of 1868, and both of such sections hereby amended" are repealed.

Bankruptcy (Scotland) Act 1985 (c.66)

3 (1) The Bankruptcy (Scotland) Act 1985 is amended as follows.

(2) In section 33(1) (limitations on vesting), after paragraph (b) there is inserted—

"(bb) property held by the debtor in the debtor's capacity as a judicial factor.".

(3) After section 51 there is inserted the following section—

“51A Modification of section 51 and Schedule 1 where judicial factor appointed

(1) This section applies where a judicial factor is appointed under the Judicial Factors (Scotland) Act 2013 on the estate of a deceased person and that estate is absolutely insolvent.

(2) Section 51 of, and Schedule 1 to, this Act shall apply as if for references –

(a) to the interim trustee or permanent trustee there were substituted references to the judicial factor; and

(b) to the date of sequestration there were substituted references to the date of the judicial factor’s appointment.”.

Companies Act 1989 (c.40)

4 In section 182(3)(b) of the Companies Act 1989 (powers of court in relation to certain proceedings begun before the commencement of that section)—

(a) the words “by a judicial factor appointed under section 11A of the Judicial Factors (Scotland) Act 1889” are repealed, and

(b) after the word “person” there is inserted “by a judicial factor appointed under the Judicial Factors (Scotland) Act 2013”.

Pension Schemes Act 1993 (c.48)

5 (1) The Pension Schemes Act 1993 is amended as follows.

(2) In section 123 (interpretation of Chapter 2 of that Act), in subsection (2)(b), for the words “section 11A of the Judicial Factors (Scotland) Act 1889 is required by that section” there is substituted “the Judicial Factors (Scotland) Act 2013 is required by virtue of section 51A of the Bankruptcy (Scotland) Act 1985”.

(3) In section 127(2)(b) (transfer to Secretary of State of rights and remedies), for the words “11A of the Judicial Factors (Scotland) Act 1889” there is substituted “51A of that Act”.

Employment Rights Act 1996 (c.18)

6 (1) The Employment Rights Act 1996 is amended as follows.

(2) In each of sections 166(6)(b)(ii) (applications for payment) and 183(2)(b)(ii) (insolvency), for the words “section 11A of the Judicial Factors (Scotland) Act 1889 is required by that section to divide his insolvent” there is substituted “the Judicial Factors (Scotland) Act 2013 on his insolvent estate is required by section 51A of the Bankruptcy (Scotland) Act 1985 to divide the”.

(3) In section 189(2)(b) (transfer to Secretary of State of rights and remedies), for the words “11A of the Judicial Factors (Scotland) Act 1889” there is substituted “51A of that Act”.

Pensions Act 2004 (c.35)

7 In section 121(2)(e)(ii) of the Pensions Act 2004 (insolvency event, insolvency date and insolvency practitioner), for the words “section 11A of the Judicial Factors (Scotland) Act 1889 (c.39) is required by that section to divide the individual’s” there is substituted “the Judicial Factors (Scotland) Act 2013 on the individual’s insolvent estate is required by section 51A of the Bankruptcy (Scotland) Act 1985 to divide the”.

Bankruptcy and Diligence etc. (Scotland) Act 2007 (asp3)

8 In section 168(2)(a) of the Bankruptcy and Diligence etc. (Scotland) Act 2007 (inhibition effective against judicial factor), for the words “under section 11A of the Judicial Factors (Scotland) Act 1889 (c.39) (application for judicial factor on deceased person’s estate)” there is substituted “, under the Judicial Factors (Scotland) Act 2013 (asp 00), on the insolvent estate of a deceased person”.

Third Parties (Rights against Insurers) Act 2010 (c.10)

9 In section 5(2)(c) of the Third Parties (Rights against Insurers) Act 2010 (individuals who die insolvent), for the words “section 11A of the Judicial Factors (Scotland) Act 1889 in respect of” there is substituted “the Judicial Factors (Scotland) Act 2013 on”.

SCHEDULE 3

(introduced by section 58)

REPEALS AND REVOCATIONS

PART 1

REPEALS

Short title and chapter	*Extent of repeal*
Judicial Factors Act 1849 (c.51)	The whole Act.
Titles to Land Consolidation (Scotland) Act 1868 (c.101)	Section 24.
Conveyancing (Scotland) Act 1874 (c.94)	In section 44, the words “or judicial factor” in both places at which they occur.
Conveyancing and Land Transfer (Scotland) Act 1874 (c.95)	In section 43, the words “or judicial factor”. In section 44, the words “or judicial factor” in both places at which they occur.
Judicial Factors (Scotland) Act 1880 (c.4)	The whole Act.
Judicial Factors (Scotland) Act 1889 (c.39)	The whole Act.

Short title and chapter	*Extent of repeal*
Administration of Justice (Scotland) Act 1933 (c.41)	In section 25, the words "Accountant of Court,".
Conveyancing Amendment (Scotland) Act 1938 (c.24)	Section 1, in so far as relating to judicial factors.
Trusts (Scotland) Act 1961 (c.57)	Section 2(3) to (6). Section 3.
Conveyancing and Feudal Reform (Scotland) Act 1970 (c.35)	In Schedule 3, in paragraph 9(2)(b), the words "under section 11A of the Judicial Factors (Scotland) Act 1889".
Superannuation Act 1972 (c.11)	In Schedule 6, paragraph 2.
Law Reform (Miscellaneous Provisions) (Scotland) Act 1980 (c.55)	Section 7. Section 14.
Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40)	Section 67. In Schedule 8, paragraph 21.
Children (Scotland) Act 1995 (c.36)	In Schedule 4, paragraphs 2 and 4.
Adults with Incapacity (Scotland) Act 2000 (asp 4)	In schedule 5, paragraphs 3 and 6.
Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5)	In schedule 12, paragraph 8(8).
Bankruptcy and Diligence etc. (Scotland) Act 2007 (asp 3)	In schedule 5, paragraph 5.

PART 2

REVOCATIONS

Title and date	*Extent of revocation*
Act of Sederunt (Aliments and Factors Being Liable for Annual Rent) July 31st. 1690	The whole Act of Sederunt.
Act of Sederunt (Factors upon and Tacksmen of Sequestrate Estates) December 25th. 1708	The whole Act of Sederunt.

Title and date	*Extent of revocation*
Act of Sederunt (More Speedy Discussing of Compts and Reckonings) November 22nd. 1711	The whole Act of Sederunt.
Act of Sederunt (Dispatch of Business) July 31st. 1717	The whole Act of Sederunt.
Act of Sederunt (Factors Appointed by the Lords on the Estates of Pupils not Having Tutors and Others) February 13th. 1730	The whole Act of Sederunt.

Appendix B

DRAFT

STATUTORY INSTRUMENTS

2013 No. 0000

Judicial Factors

The Judicial Factors (Scotland) Act 2013 (Consequential Provisions and Modifications) Order 2013

Made---

Laid before Parliament----

Coming into force---

The Secretary of State makes the following Order in exercise of the powers conferred by sections 104 and 112 to 115 of, and Schedule 7, to the Scotland Act 1998.

Citation and commencement

1. This Order may be cited as the Judicial Factors (Scotland) Act 2013 (Consequential Provisions and Modifications) Order 2013 and comes into force on………..

Extent of certain provisions of the Judicial Factors (Scotland) Act 2013

2. Sections 9 to 15, 47, 56 to 58 and 60 and 61 of the Judicial Factors (Scotland) Act 2013 extend to the whole of the United Kingdom.

Repeals and revocations

3. The enactments mentioned in the Schedule are repealed, or as the case may be revoked, to the extent mentioned in the second column of that schedule.

Date

Signature

Article 3

SCHEDULE

REPEALS AND REVOCATION

PART 1

REPEALS

Enactment	*Extent of repeal*
Proceeds of Crime (Scotland) Act 1995 (c.43)	In Schedule 1, paragraph 1(9).
Proceeds of Crime Act 2002 (c.29)	In Schedule 3, paragraph 8(2).

PART 2

REVOCATION

Enactment	*Extent of revocation*
Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (S.I. 2005 No. 3181)	In Schedule 1, paragraph 8(2).

Appendix C

List of those who submitted written comments on Discussion Paper No 146

Ewen Alexander, Johnston Carmichael

Mary V Armstrong

Anne Buchanan, PKF

Civil Recovery Unit, SG, Ruaraidh MacNiven

Bryan Heaney, Advocate

Thomas Hughes, Gerber, Landa & Gee

Bryan A Jackson, PKF

The Keeper of the Registers of Scotland

Law Society of Scotland

Lord Penrose

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Senators of the College of Justice

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