# A HISTORY OF SCOTLAND'S OFFICERS OF COURT

*Although the following case-study refers directly only to a small county, perhaps far away, the story of the past, present and future of the judicial officer's profession in Scotland has a claim, it is suggested, to the attention of a wide audience of colleagues.*

Published at the XVIII Congress of U.I.H.J., Tunis, 6th May 2003

## Office of a Messenger-at-Arms

The Lord Lyon King of Arms has traditionally stood at the head of the corps of Scottish judicial officers who carry out the legal functions of, to use an old Scots word, *messengery*. "He was anciently employed in carrying public messages to foreign states; and to this day it is his province to denounce war and proclaim peace, to publish proclamations made by the king and council, and to assist at all public ceremonies in his robes, with his heralds and pursuivants." [1] Prior to the Debtors (Scotland) Act 1987, it was undoubted that a herald or pursuivant could still, as an officer of arms, exercise any of the powers or carry out any of the duties of a messenger-at-arms (but only with the leave of the Lord Lyon who would have issued a warrant to a specified officer of arms). [2] George Seton's standard work of 1863 refers to the Lord Lyon's important legal functions in the admission and control of messengers: "The authority and jurisdiction of the Scottish King-at-arms is, therefore, of a twofold character, embracing, first, the superintendence and regulation of all matters connected with armorial bearings; [3] and secondly, the nomination and control of the whole body of messengers-at-arms, in which last respect he may be regarded as essentially at the head of the Civil Branch of the Executive Department of the Law". [4] So central to the Lyon Court's functions was the admission and control of messengers then regarded to be that Seton recorded this suggestion: "with a view at once to give unity of management to the entire department, and to relieve the Sheriff of all but judicial duties, to impose upon the Lord Lyon and his Officers the execution of process of every kind, and the whole ministerial powers of the Sheriff, in so far as these are executive or auxiliary to the Courts of Law". [5]

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[1] Erskine's *Institute of the Law of Scotland,* I, iv, 33.
[2] *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol. 14. para. 1501.
[3] It is interesting to point to a parallel in this respect between the Lord Lyon and the French Minister who admits the huissiers to office, the Garde des Sceaux, "who is, or was, the French Minister who adjudicated on the question of titles [of nobility]." (Sir Bernard Burke, *Reminiscences, Ancestral, Anecdotal and Historic*, p. 238).
[4] G. Seton, *The Law and Practice of Heraldry in Scotland* (1863), p. 41.
[5] *Ibid*., and see *Encyclopaedia Britannica*, 7th ed., xix, p. 761.

A messenger-at-arms has therefore always been a member both of the junior and most numerous rank of the officers of arms in Scotland, and an officer - or, to use the English term, bailiff - of the courts of Scotland. Of heraldic duties he has none, except to execute warrants of the Court of the Lord Lyon. The province of *messengery* - the "judicial area" of his professional competence - is in the practical, rather than dignified, fields of *citation* (the service of court process) and *diligence* (the methods of enforcing judgments). These form, within certain limits, his monopoly in the Scottish legal system. Some experts have been of the view that the character of the office makes it, not improbably, of Celtic origin. [6] So ancient is the messenger's office that the work of statute has been to restrict the messenger's former competence at common law to act as an officer of all royal courts in Scotland. The most important restriction came by Section 77(2) of the Debtors (Scotland) Act 1987, which enacted that a messenger-at-arms is not authorised by his commission as a messenger-at-arms to execute a warrant granted in the sheriff courts. However, the corps of messengers-at-arms today still represents, as it has always done, the executive department of *all* Scottish courts: Section 77(1) and (3) of the same Act specifies that a messenger-at-arms cannot be appointed, or remain in office, unless he is also commissioned as a sheriff officer. At the end of February 2003, of the some 200 sheriff officers in Scotland, 118 held the superior qualification of messenger-at-arms. [7] It is noteworthy that it is the messengers-at-arms, not sheriff officers, who were designated as transmitting and receiving agencies for Scotland in terms of the EC Regulation No. 1348/2000 of 29th May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters. [8]

Since the origin of a *profession* lies, etymologically, in the taking of a vow, the messenger's special calling can be said to be as old as any connected with the law. The oath now simply records, "I do swear that I will well and truly serve our sovereign lady Queen Elizabeth in the office of a messenger-at-arms, so help me God". However, prior to February 1987, the oath to be professed also required the new entrant, amongst other things, to defend Her Majesty, "to the utmost of my power against all conspiracies and attempts whatever which shall be made against Her Person, Crown or Dignity, and do my utmost endeavour to disclose

[6] Thomas Innes of Learney, article on "Messengers-at-Arms", *Green's Encyclopaedia of the Laws of Scotland* (1930) vol. 9, s. 1423.
[7] Lyon Office.
[8] *Vide* C. Vanheukelen, *Le Reglement 1348/2000 - Analyse et Evaluation par un Praticien du Droit* (2003), Footnote 39. The quotation that sheriff officers can be transmitting agencies in respect of sheriff court processes is not correct: only the messengers-at-arms are designated under Article 2.

and make known to Her Majesty, Her Heirs and Successors, all treasons and traitorous conspiracies which may be formed against Her or them". [9] The nature of the oath reflects the historical fact that the messenger-at-arms has been peculiarly the "Officer of the King": indeed, in that style, the officer is mentioned in statute in the early 15th century. The designation has been sometimes given as "one of His Majesty's messengers". [10] The Officers of Arms Act 1587, c.46, stated that the office "ought indeed to be used by persons of discretion, honesty and credit"; who were to be counted amongst the "only two hundred persons, wearing and bearing our Sovereign Lord's arms in the whole bounds of the realm of Scotland." [11]

To this day, a messenger-at-arms is still issued with the *blazon*, or silver badge of the Royal Arms, from which he takes his name. The special significance of his being an officer whose status should immediately be recognised by everyone in the Kingdom, upon seeing the King's badge, has interesting parallels in other parts of Europe. The costume of the various degrees of *huissiers* and *sergents* in France, for example, was carefully regulated. By an ordinance of January 1560, a new costume included a shield with the King's arms, and an edict of January 1572 expressly stated that, to signify their status as officers of the crown, the *sergents* were to wear an escutcheon of the three fleurs de lys, on the shoulder, "to be visible, so that our subjects may not pretend ignorance". The fleur de lys also decorated the huissier's baton or wand. [12] Their modern day Scottish counterparts are left to continue some of the traditions of these times: messengers-at-arms are still issued with a silver tipped ebony baton, called the *Wand of Peace*.[13]

The messenger-at-arms' professional identity, therefore, is complicated. He is both *officer of court* and member of the corps of Her Majesty's *Officers of Arms*. The Scottish Law Commission in 1985 was to fix upon this as a guiding principle: "the Court of Session and the sheriffs principal should control the officers who execute the decrees of their respective courts." [14] But to categorise messengers-at-arms simply as officers of the civil courts, responsible for enforcing warrants of citation and diligence, would not have covered other aspects of their historic competency. As the Commission noted, [15] the old authority of

[9] Lyon Office.
[10] *Index to General Register of Sasines*, 1701-1720, George Gordon, 17 March 1720.
[11] *Vide* R. Campbell, *Law and Practice of Citation and Diligence* (1862), p. 492 (modernized English).
[12] *Hostarii*, 50th Anniversary Volume of the Chambre Nationale des Huissiers de Justice, (1995), pp. 174 to 176.
[13] *Vide* Exhibition *50 Years of the U.I.H.J.*, Paris, 10th - 14th December 2002.
[14] Scottish Law Commission, *Report on Diligence and Debtor Protection* (*Scot. Law Com. No 95*), 8.15.
[15] *Ibid.*, 8.38.

messengers-at-arms and sheriff officers to execute warrants of courts of criminal jurisdiction has never been abolished, and indeed has been re-affirmed by the statutory definitions of the term "officer of law", since the Criminal Justice (Scotland) Act 1980. [16] Moreover, the messengers' historic status has been as officers of the Sovereign, competent to execute the decrees of any of the Sovereign's courts; their function as officers of court is not restricted to the Supreme Courts (Court of Session and the High Court of Justiciary), but includes the Court of the Lord Lyon, the High Court of Parliament, and, indeed, possibly any new courts constituted in the future. [17]

The argument in favour of enforcement officers being dependent upon the courts prevailed. But because of the strong opposition of the Society of Messengers-at-Arms and Sheriff Officers and others to the suggestion that all the powers and jurisdiction to appoint, discipline and control messengers-at-arms, should be transferred from the Lord Lyon to the Court of Session, [18] a compromise appeared in the Debtors (Scotland) Act 1987 (Section 77 (1)): the number of new messengers-at-arms required was to be determined by the Court of Session; and none might become a messenger-at-arms, except upon recommendation by a judge of that court; but the appointment was to remain - as it had done, since at least the early 16th century [19] - with the Lyon King of Arms. The Lord Lyon still, in virtue of his office, is the Honorary President of the Society of Messengers-at-Arms and Sheriff Officers. And he also retains his role in the strategic development of the profession through his statutory membership of the Advisory Council on Messengers-at-Arms and Sheriff Officers, established by Section 76 of the 1987 Act.

The strong feeling of connexion between the messengers-at-arms and the Lyon Court has surely never been more vigorously expressed than in the Society of Messengers-at-Arms and Sheriff Officers' response in 1986 to the suggestion that such constitutional links should be ended. This is what was written on the topic of "Transfer of Control from the Lyon": "It is however - and this cannot be put in too strong terms - the Society's greatest disappointment that the position of the Lord Lyon will be tantamount to giving him the status of 'Toom Tabard' [i.e. a king without power] compared with the historic role of commissioning Messengers-at-

[16] s.25(1).
[17] *Scot. Law Com. No. 95*, 8.23.
[18] *Ibid.*, 8.22 - 8.28.
[19] *Green's Encyclopaedia, op. cit.*, s. 1441.

Arms, which he has enjoyed and which has functioned so successfully. The Society sees no good reason why, with the long history of many hundreds of years, the appointment and control of Her Majesty's Messengers should now be transferred in the manner proposed to the Court of Session which has no knowledge of the workings of Messengers-at-Arms. The relationship between the Lyon and the Messengers is a very close one. The Society strongly urges that the Lord Lyon King of Arms remains head of the Messengers-at-Arms, both for historic and practical reasons". [20]

An opinion on this transfer of control has been published recently: "To be candid, the arrangements for the supervision of the profession which obtained prior to the Debtors (Scotland) Act 1987 were in some respects better than those introduced by the statute. The central and universal authority of the Lord Lyon King of Arms over the messengers-at-arms showed the practical good sense of the concept of a centralised approach to the regulation of the profession. The Society of Messengers-at-Arms and Sheriff Officers argued strenuously in favour of the retention of the Lyon Court's role for the profession, in the face of the Scottish Law Commission's view [21] … that it was illogical to keep a function for a body - albeit a court of law, … whose practical usefulness in the functioning of the law could seemingly be dismissed by the observation that most of the Lord Lyon's functions belong to 'the dignified part of the Constitution'." [22] That the Lord Lyon King of Arms is himself a judge, presiding over the Lyon Court, is crucial to an understanding of precedent in the profession's history. The messengers-at-arms have always been officers appointed and controlled by a judge. The Society criticised the proposal to transfer control from one court to another. However, "the Scottish Law Commission and the Society were in complete agreement on this point of principle: court officers should be controlled by the courts." [23]

**Messengers-at-arms and the sheriff court**

The links between messengers-at-arms and the sheriffs of the counties are also ancient and intimate. For example, the Sheriff Principal of Elgin and Forres addressed a warrant of 1703 to "Messengers-at-Arms, *my officers* and sheriffs in that part, conjunctly and severally".

[20] *Responses by the Society of Messengers-at-Arms and Sheriff Officers to the Report on Diligence and Debtor Protection …* (1986), p. 30.
[21] *Scot. Law Com. No 95*, 8.22.
[22] R.A. Macpherson, *Scots Law Times,* 2003 (News) 15.
[23] *Ibid.*, 16.

[24] The personnel who usually executed warrants addressed to the *vicecomes in hac parte* were the messengers-at-arms. "Usually the 'sheriff in that part' was appointed for the service of brieves when objections of partiality or interest were raised against the sheriff of the shire or when the subjects were scattered through various shires." [25] However, the introduction to *The Sheriff Court Book of Fife 1515 - 1522* gives a valuable account of the distinct office of sheriff officer, about which so much less has been written than the office of a messenger. Its origins lie in the earlier titles of the mair and the sergeand. [26] "The mair was undoubtedly an earlier officer than the sheriff. He is pre-feudal. The word itself is the Latin *major*". [27] This was the 'orderly sergeant' of the sheriff court. "He executed every kind of summons, carried out poindings and arrestments … and, like the *Gerichtsbote* of the German *Weistümer,* called the suits. His insignia of office were a horn and a wand; later, a signet ring engraved with his initial. The wand was given him by the sheriff in open court, and was his sign of authority in the execution of his office. It was to be carried by him when on duty, and special regulations were laid down as to its size and colour. … If hindered in the execution of his office the mair broke his wand as a sign of deforcement." [28]

Notwithstanding the ancient authority of the messenger-at-arms and his constant involvement in the work of the Scottish courts through so many centuries, the nature of such an office as his has often been little understood, even amongst the judges. This was the cause of much controversy in the 1930s. "The post of Messenger-at-Arms is an office under the Crown, to which suitable persons are admitted by a high officer who is a Royal Lieutenant and who acts in the Sovereign's name, viz., the Lord Lyon King of Arms", wrote Thomas Innes of Learney, (himself a future holder of that high office) in an article entitled, *Messengers-at-Arms and the Sheriff Court*. "Nevertheless," he continued, "doubt has recently been expressed in quarters where one would not have expected doubt should exist, as to whether the post of a Messengers-at-Arms is, or is not, an office, and this notwithstanding the nature of the appointment, the fact that the appointee is given a badge of the Royal Arms to wear, and has to swear a solemn oath of admission, like other appointees to offices under the Crown". [29] This consideration of the nature of the messenger's appointment had been prompted by some recent

[24] *Scottish Law Review*, vol. 57, p. 29 (modernized English).
[25] W.C. Dickinson, *The Sheriff Court Book of Fife 1515 - 1522* (1928), p. 1xx.
[26] *Vide* W. Cramond, "The Ancient Office of Mair", *Transactions of the Banffshire Field Club*, 1899 - 1900, pp. 45-58.
[27] Dickinson, *op. cit.*, p. 1xii.
[28] *Ibid.*, pp. 1xiv - 1xv.
[29] *Scottish Law Review*, vol. 57, p. 7, (1941).

decisions in the sheriff courts repudiating the executions in citation and diligence of messengers-at-arms in sheriff court actions, upon the basis that only sheriff officers were proper officers of that court.

A sheriff had said this about a messenger-at-arms' competence to act: "His authority … to serve a citation does not come from his office. He is, as his name expresses, merely a messenger carrying the orders of a Court to someone who is to be affected by them. His authority to act as a messenger of that Court is derived only from the terms of the warrant issued by it." [30] To this, Innes of Learney retorted, "The Sheriff-Substitute has, in the first place, failed to distinguish between a mere messenger (the office-boy, maybe!) and a Messenger-at-Arms, *i.e.*, bearing the Ensigns of Public Authority of our Sovereign Lord the King, to wit, he who appointed the Sheriff himself". [31] Innes of Learney went so far as to suggest that, "In the light of what has been now explained, the attitude to Messengers-at-Arms in the Sheriffdom of Dumbarton appears to be little short of - what at one period, anyway, would have been - high treason, … The Sheriff cannot, at any rate by the phrase 'officers of Court', distinguish between the King's officers appointed by himself, as *shire-reeve* and those appointed by His Majesty or by any person whom the King has empowered to make such appointments". [32]

"Here we approach the true constitutional distinction between the Messenger-at-Arms and the Sheriff Officer. The Sheriff-officer came gradually to replace the Mair, a hereditary officiary attached to land within the jurisdiction, and the determination of the rights wherein fell to the Sheriff, as the King's local steward. It has for centuries been competent for the Sheriff, in virtue of his position as the Crown's local officer or baron-bailie, to appoint officers of Court … descriptively termed Sheriff-officers, [who] are in effect officers of our Sovereign Lord the King, and of his Court, within the jurisdiction of that Court. Outwith the jurisdiction they are not King's officers, for outside his own jurisdiction the Sheriff is himself no longer effectively the King's officer, and the moment the Sheriff-officer crosses the boundary, his commission, like the Sheriff's stops. The Messenger-at-Arms, however, being appointed, like the Sheriff-officer, by an officer of the King 'having power thereunto,' is nevertheless appointed by a Royal legate whose commission extends throughout the realm, and who, *inter*

[30] *Ibid.*, p. 10.
[31] *Ibid.*
[32] *Ibid.*, p. 33.

*alia*, for the very purpose of appointing officers who shall be the King's officers throughout the realm, has appointed an officer denominated a Messenger-at-Arms, who in virtue of his appointment and blazon of the Royal Arms - which likewise bears faith throughout the realm - is the King's commissioned officer wherever he may be in Scotland". [33]

**The European Context**

Dr. Wendy Kennett states that "Scottish sheriff officers are modelled on the French huissier". [34] Some of the medieval titles - *huissiers d'armes, sergents d'armes, huissiers à cheval, huissiers à verge* - are all suggestive of common origins. [35] Certainly, at the least, the practical tasks of professional forbears, constant travellers on official royal business, justify the profession in seeing family resemblances amongst officers across the whole of medieval Europe. A modern account has been given of the work of a messenger in the 16th century. "Charles Murray's work kept him constantly on the move", writes Margaret H.B. Sanderson, then describing the difficulties of travel in an age when many routes were simply well-worn tracks, reverting to bog in wet seasons, with no administrative authority responsible for their maintenance. Her portrait of a messenger-at-arms of the time is based upon the messenger's book carried by Charles Murray from 1570 to 1574; a fairly uncommon survival, as she notes. And particular hazards awaited such a one who was travelling with the purpose of taking usually unwelcome messages from the Queen to her lieges: "more than one messenger found himself imprisoned, some are known to have been killed, and many were assaulted in the course of their duties". [36]

An important parallel between the role of both the messenger-at-arms and the sheriff officer in Scotland and the huissier on the Continent lies in the traditional monopoly of these officers in the hand service of all court process. Unlike bailiffs within the Common Law jurisdictions, citation is part of the special province of judicial officers. The formerly exclusive responsibility of officers in executing citation originates in an important principle of Scots Law: "It is a principle with us, … that no one is bound to answer in a court of law except by the

[33] *Ibid.*, pp. 33 and 34.
[34] W.A. Kennett, *Regulation of Enforcement Agents in Europe: A Comparative Survey* (2001) (A European Commission funded Study), vol. 1, p. 46.
[35] Xavier Lesage, *L'Huissier: L'Histoire de la fonction d'Hussier de Justice* (1993), pp. 31, 33 and 38. *Vide* Chap. 1, "L'huissier sous l'Ancien Régime du XIIIe aux XVIIIe Siècle, pp. 13 - 137.
[36] Margaret H.B. Sanderson, *Mary Stewart's People: Life in Mary Stewart's Scotland* (1987), pp. 135 - 147.

command, directly or indirectly, of the Sovereign; and the logical accuracy which pervades all our legal forms is strikingly exemplified by the precision with which this principle is carried out in the minutest details. Not only must the command be authorised directly or indirectly by the Sovereign, but the lieges are not bound to recognise it unless conveyed to them by persons thereto specially empowered and accredited as officers of the court of the Sovereign, or those bearing his commission." [37]

In fact, Scotland has one of the world's oldest systems for combating the problems of evasion of service and absence at court. By statute of 1540, "the order of summoning of all persons in civil actions" was regulated, whereby an officer, if he could not apprehend the party personally, could leave the document with the servants of the house; or, if he could not get entrance, but gave six knocks on the door, might affix the copy on the gate or door. [38] It was this principle of citation *with certification*, that if the party failed to appear he should be *held as confessed*, that gave the origin to the concept of "judgment in absence". It is striking that such important characteristics of our legal system should owe their origins to so apparently narrow a subject as citation. [39]

The monopoly in citation was therefore a most important reflection of the shared origins of the messengers-at-arms and their counterparts in other European countries. Indeed, even the word *diligence*, with which messengers-at-arms are so associated, reflects the old Scottish alliance with France: the leading institutional writer comments that, while the term "probably had its origin in the word *diligentia* as used in Roman law, it would like so much else of our legal phraseology reach us through the French." [40] *Citation*, moreover, is the Scots term, not "process serving".

But the differences in development between the officers in Scotland and France are also notable. The French model is that whilst the huissier serves the courts in his capacity as a representative of public authority, the public office that he holds is his property, to the extent that, by his "right of presentation", he may propose his successor in office; and, providing the proposed successor meets the necessary standards of professional education, he will be

[37] Campbell, *op. cit.*, p. xviii.
[38] Campbell, *op. cit.*, p. 490.
[39] *Vide* Kames's *Historical Law Tracts*, 2nd ed. (1761), pp. 295 - 312.
[40] J. Graham Stewart, *Law of Diligence* (1898), p. 2.

accepted and appointed by the minister of justice. [41] In Scotland, however, no very clear concept of private property attaches to the status of the office. Applications for a commission as a messenger-at-arms are regulated by Part III of the Messengers-at-Arms and Sheriff Officers Rules 1991, in a procedure where, the qualifications for office having been met, it is the personal discretion of a Lord Ordinary in the Court of Session to recommend the candidate for appointment, and then the discretion of the Lord Lyon King of Arms to grant the commission, that are the deciding factors. However, a form of purchase of office does still take place, to the extent that all messengers-at-arms pay dues of admission and annual dues to the Lyon Court. Moreover, an analogy between Scotland and other countries in this respect has been commented upon: "By an accident of history - the sale of offices by the French state and other jurisdictions under French influence - enforcement agents in France, Belgium, Luxembourg and the Netherlands obtained a position of relative independence from the State. They are independent professionals (*profession libérale*) who are nevertheless appointed as judicial officers and must put legal obligation above client need. Scottish sheriff officers occupy an analogous position." [42]

**Qualifications for office**

"After due Trial and Examination taken by Us and Our Clerk of Court of the Literature, Qualifications and Good Conversation of Our Lovite" is the ancient style of wording by which all messengers-at-arms were admitted to office by the Lord Lyon King of Arms. However, it has only been since the introduction of the 1987 Act that statute has regulated the main qualification to be *tried;* namely that the applicant must be a sheriff officer. To this was added, by the Messengers-at-Arms and Sheriff Officers Rules 1991, Part II 4(1) the requirement that the sheriff officer must have been in practice for a period of not less than two years, and that, within five years before applying for appointment, he must have passed all examinations required by the Committee of Examiners appointed by the Society of Messengers-at-Arms and Sheriff Officers. [43] By section 6 of the same act of sederunt, educational standards are also in operation, proposals for which were not drafted until 1989. Prior to these regulations, the

[41] *Vide, L'Huissier de Justice,* (pub. Chambre Nationale des Huissiers de Justice) p.41.
[42] Kennett, *op. cit.*, p. 18.
[43] *Vide* Appendix 1.

situation referred to by Darling in 1840 still obtained: "no apprenticeship or other qualification, in point of professional education, is required on the part of the applicant". [44]

Certain attainments, however, had indeed been required from an applicant through the centuries. But these tended to involve accomplishments other than educational ones. The very first requirement for the office of a messenger recorded in the published injunctions of Alexander Brodie of Brodie, Lord Lyon from 1727 to 1759, was that "all messengers be provided of a sufficient horse ready to serve the King and his lieges". [45] That was even then a very old requirement, since the phrase that the messenger must "be always furnished with a sufficient ready horse whereupon to serve his Highness and Lieges" appeared in statute in 1587. [46] There was a similar requirement on those petitioning for a grant of arms, Lyon being able to "give arms to all persons craving the same, if they are able to maintain a horse with furniture for the King's service". [47]

The authority to examine, admit and control messengers appears to have lain with the Lord Lyon from at least early in the sixteenth century. That the Lyons of the early period admitted too many messengers and then failed to maintain discipline amongst them may, however, be inferred from the terms of the statute in which is to be found the earliest reference to their "trial', namely in the Officers of Arms Act of 1587. After ordaining that there should be only two hundred officers of arms in Scotland, the statute provided a system for examining the messengers already in office, to determine which of them should be retained. Lyon was not entrusted with the task of this examination, but rather "commissioners in the shires" were to carry out the trial and report to the Lords of Council and Session. The relevant section of this historic statute provides the earliest record of the regulation of a form of examination. Moreover, it also mentions a system of "recommendation" being made by the judges, the Lords of Council and Session, to Lyon relating to messengers' commissions. A formula to this effect was to be enacted again, exactly four hundred years later, in the 1987 Act. "And for the trial [of] which of the persons now occupying the office of messengery are worthy and meet to be retained in that office during their life times, Our Sovereign Lord ordains letters to be directed to the commissioners nominated by his Highness, in the shires [who] … shall return their

[44] J.J. Darling, *The Powers and Duties of Messengers-at-Arms* (1840), p.10.
[45] R. Thomson, *A Treatise on the Office of a Messenger* (1753), p. 20.
[46] Campbell, *op. cit.*, p. 494.
[47] A. Nisbet, *A System of Heraldry* (1722), part 4, p. 166.

advice to the Lords of Council and Session … [upon] which messengers within every shire … they think most honest, worthy and able to be retained in the office, during their life times". [48]

The 1587 Act cannot have been entirely successful in its aim of improving the quality of the messengers in office. The terms of a statute of 1592, relating to the admission and number of the officers of arms, show that disorder continued and Lyon was now charged not to admit any new messengers until the number of officers was reduced to two hundred. "In consideration of the great abuse of messengers and of officers of arms within this realm, which for the most part are not qualified for using of the said office, … by which abuse, the lieges of this realm are heavily troubled and oppressed: Therefore it is statute and ordained, that the said King of Arms, by advice of the Lords of Council and Session, deprive and discharge, all such officers and messengers of arms, as he shall find unworthy of the office, and take such surety of the remnant, for observation of their injunctions in time coming". [49]

As has been mentioned, the financial obligations on an applicant remain to this day, in that he must pay dues of entry on admission and annual dues and also satisfy the requirements for a bond of caution. However, in the era of Lord Lyon Brodie of Brodie, the call for payment was rather more blatant than today; and, since the sums required were not insignificant by the standards of the time, the ability to pay was the very primary qualification for office. Brodie's published regulations for admitting a messenger described that, "if any person intend to admit messenger, he must firstly apply to the Lyon Clerk or his Depute, who will, in the first place, ask him if he has my Lord Lyon's fees ready". [50]

Notwithstanding the lack of discipline amongst our professional predecessors of the sixteenth century, and the venal regime at the Lyon Court of old, the modern messenger-at-arms, proud of the traditions of his profession, would at least be able to derive some pleasure from the sentiments expressed in the opening paragraph of what appears to be the first book published on the subject of his duties, namely Robert Thomson's *A Treatise on the Office of a Messenger* (1753): "A Messenger-at-Arms, or Officer of Arms ... ought to be a Person of Discretion, Honesty and Credit and of sufficient Knowledge, Learning and Experience, for executing the said Office; the doing whereof to Purpose, is not so easy as is commonly

[48] *Vide* Campbell, *op. cit.*, p. 492 (modernized English).
[49] *Vide* Campbell, *op. cit.*, p. 494 (modernized English).
[50] Thomson, *op. cit.*, p.16.

imagined: For, besides a reasonable Stock of Prudence and Experience, it requires considerable Knowledge in Law, and the Art of forming Writs, that he may be the better enabled to do his Duty". [51]

This treatise, containing an interesting introduction to the history of the office and an extensive collection of forms, bears witness to the complexities involved in eighteenth century messengery and to the professional skill and education required of the messenger. The book appeared anonymously in 1753. However, it was by the same Robert Thomson, "writer in Edinburgh", who by a commission dated 9th December 1774 was admitted as a messenger. From the point of view of throwing some light on social as well as professional history, it may be noted that in 1923, when Francis J. Grant, then Lyon Clerk, gave evidence before Lord Ashmore's Departmental Committee on Messengers-at-Arms and Sheriff Officers, he remarked that the "office [of a messenger] has not now as high a social position as it had in the old days when messengers were lairds, notaries, sons of ministers and persons of similar rank." [52] And "many sheriff officers," he said, "are really illiterate men". [53] However in the 1930s it could be written that, "Fortunately it is now being appreciated that this ancient and distinguished office [of a messenger], and the right to wear its ancient insignia, is a privileged and historical appointment: the numbers and standing of messengers-at-arms are now increasing and the difficulties of readily obtaining their services, apprehended at the close of the last century, are soon unlikely to be a matter of concern to the lieges." [54]

In 1790, Thomson, under his own name, published a second edition now entitled, *The Duty and Office of a Messenger-at-Arms, with a copious introduction, containing plain and necessary directions for practice.* In his preface, he assured the reader that this was "not so much a new edition of the old one, as an entire new book". That it was intended primarily as a text book for the guidance of messengers in practice and of applicants for the office is made plain in the preface: "How far the author has succeeded in his design, to render it a safe and complete guide to the brethren of his profession, it does not become him to say. He flatters himself, that from the experience he has had, and the diligence with which he has for many years applied to the study and practice of his business, he was not altogether unqualified for

[51] Thomson, *op. cit.*, p. 1.
[52] Departmental Committee on Messengers-at-Arms and Sheriff Officers (Scotland, Notes of Proceedings at Inquiry, held on Monday, 18th June 1923, (typewritten), p. 10; hereafter cited as *Ashmore Evidence*.
[53] *Ibid.*, p. 11.
[54] Green's *Encyclopaedia, op. cit.*, s. 1425.

the task: and he can affirm with truth, that neither industry nor attention has been wanting in finishing the work". [55] To this, the second edition of his treatise, he added an appendix on the office of a notary public, "which was judged no improper addition to the Office of a Messenger, seeing that both offices are often united in the same person". [56]

**Trial and Examination**

Sir James Balfour Paul (Lord Lyon, 1890 - 1926) characterized his eighteenth century predecessors as "interesting themselves not at all in the duties of the office, which were performed by deputy … and only careful to draw in the fees, which were then payable directly to themselves. The appointments of the heralds and pursuivants were practically subjects of sale, and the competency of the holders was a matter of no consideration so long as they gave a good price for the privilege". [57] For example, the *Caledonian Mercury* in 1747 advertised, "That there is a pursuivant's Office to be sold … the Office includes in it that of a Messenger-at-Arms, which the Purchaser may exercise or not as he shall think meet." [58] Arnot stated in 1779 that "the office of Lord Lyon has, of late, been held as a sinecure, in so much that it has not been thought necessary that this officer should reside in, or ever visit the nation. The business, therefore, is entirely committed to deputies". [59] Although the Lyon Deputes were gentlemen of the law, they were not excepted from the censure passed on the absentee Lyons. In George Seton's work of 1863, whilst noting that some of the criticisms made of the Lyon Court had been unnecessarily severe, he admits, "it cannot be denied that, both before and after the year 1819, the practice of the Lyon Office exhibited numerous instances of 'heraldic anomalies' … Various writers have alluded to these official irregularities in pretty strong terms; … it has been asserted that 'ignorance of aught but the exaction of fees, displayed in a hundred capricious vagaries, is the ruling characteristic of the establishment, not one member of which, from the Lyon to the meanest cub, has ever produced a work or exhibited any skill in the sciences of Heraldry, Genealogy, or the cognate accomplishments'." [60]

[55] R. Thomson, *Duty and Office of a Messenger-at-Arms* (1790), p. vi.
[56] *Ibid.*, p. vii.
[57] J. Balfour Paul, *Heraldry in Relation to Scottish History and Art*, p. 88.
[58] *Scottish National Dictionary*, vi, p. 250.
[59] H. Arnot, *History of Edinburgh*, p. 493.
[60] Seton, *op. cit.*, p. 66.

Although standing accused of venality, the eighteenth century Lyon Court did make some attempts to ensure that candidates who passed the "Trial and Examination" should indeed be "apt, able and qualified to use and exercise the Office of Messengerie". [61] Thomson in his 1753 edition states of the applicant that, having paid the dues, "the Lyon, or his Depute, ought to examine him, and try if he be qualified for the Office of a Messenger; and if he be found so, then the Lyon, or his Deputes, administrates the Oath of Allegiance to the King". [62] The *Requisites for Admission to the Office of a Messenger-at-Arms,* which appear in the introduction of Thomson's 1790 edition, were issued by the Lyon Court around the time of the injunctions of 10th March 1772, by John Campbell-Hooke, Lyon King-of-Arms. Section 5 of the *Requisites* on the subject of the process of examination states: "The applicant must come to Edinburgh to be examined as to his knowledge and qualifications, and to be sworn into office; and all applicants are desired to take particular notice, that none can be admitted without a suitable knowledge of the business and duties of the office applied for; so that any person coming to Edinburgh without such knowledge, will have himself to blame for the expense and delay of his remaining in town, till properly instructed". [63]

Notwithstanding these attempts at a proper examination of the knowledge and qualifications of applicants, messengery in the eighteenth century was far from being a distinguished profession. In 1840 it was written that, "unquestionably ... the present messengers are greatly superior, in every respect, to those of the last century, of whose misdeeds the acts of Sederunt and decisions of the Supreme Court furnish a teeming record". [64] Only a few examples need be brought to illustrate the point. In 1738 there was issued the "act and sentence depriving and amerciating Alexander Ross, Messenger, for malversation in his office" for "claiming, taking security for, and discharging exorbitant sums". 1749 saw the depriving of Robert Drummond, "for taking a debtor out of the infirmary when disorded in his senses". In 1756 one James Gray was suspended for exacting fees from a person in custody; and an Alexander Macpherson was amerciated for the same offence in 1772. 1776 saw John Craig being deprived for concealing payment of a debt being made to him as a messenger, thereby subjecting the debtor to a second payment. In addition, there were numerous cases of

[61] Thomson, *op. cit.* (1753), p. 26.
[62] *Ibid.,* p. 20.
[63] Thomson, *op. cit.* (1790), p. 3; and Darling, *op. cit.*, p. 296.
[64] Darling, *op. cit.,* p. 10.

messengers being disciplined for falsifying executions or signing blank certificates of their executions. [65]

Moreover, any profession so closely associated with the terrors of a jail must have seemed a grim one. Erskine writes: "After a debtor is imprisoned, he ought not to be indulged the benefit of air, not even under a guard; for the creditors have an interest, that their debtors be kept under close confinement, that, by the *squalor carceris*, they may be brought to pay their debt." [66] Henry Grey Graham gives this amplification: "Even when ill they were deprived of the privilege of all fresh air, which the worst felons might breathe; for in the interests of impatient creditors, who paid 3d. a day for their maintenance in jail, they were expressly confined to the *squalor carceris*, to the misery, the dirt, of the noisome and pestilential room which formed their prison, denied every privilege which all other criminals enjoyed." [67]

As we shall see, the nineteenth century brought liberal reforms in the law of execution. We get a view of the profession in the early part of the century from A. Frazer's *Office of a Messenger* (1815). Under the heading "Form of Admitting a Person to the Office of a Messenger", he gives an account of the admission process, similar to that in the 1750s and perhaps for long before that: "The applicant must undergo an examination before the Lord Lyon, or his Depute, at Edinburgh, as to his knowledge and qualifications for exercising the office of a messenger". This examination was to follow the completion of other procedures including putting up an intimation in the office of the sheriff clerk of the shire in which the applicant proposed to reside, lodging a certificate with the Lyon Clerk that the applicant is "a person of fair and unblemished character", together with providing details of two persons of credit to act as cautioners. That the Lord Lyon, or his Depute, ever acted as examiner is unlikely. Darling (1840) states that, after application had been made to the Lyon Clerk, "the Clerk or his Depute examines the candidate as to his knowledge of the rules and business of a messenger". However, to this he adds the following footnote: "For some years passed, the Macer of Court, who happens to be a messenger-at-arms, has conducted the examinations". [68] With a system emerging of the Lyon Macer being generally responsible for instructing and examining candidates for admission, we begin to enter, if not quite upon the modern era, at

[65] A. Frazer, *Office of a Messenger* … (1815), appendix III.
[66] Erskine, *The Principles of the Law of Scotland*, (1756) 6th ed. (1783) p. 461.
[67] H.G. Graham, *Social Life of Scotland in the 18th Century*, (2nd ed.) p. 503.
[68] Darling, *op. cit.*, p. 11.

least the later days of the *ancien régime*. The Lyon Macers - always messengers-at-arms in Edinburgh - continued to be the usual choice for examiners until 1988, when the last examination diets were held under the old system.

The effects of the Scottish Law Commission's report of 1985, of the subsequent statute of 1987, and the subordinate legislation which followed it in the form of the Messengers-at-Arms and Sheriff Officers Rules 1991, did unquestionably establish the professional status of messengers-at-arms and sheriff officers in this respect: by making the Society of Messengers-at-Arms and Sheriff Officers responsible for the setting and maintaining of own professional standards, through a national examination system. Section 6 of the 1991 Rules provided that the Society was to appoint a Committee of Examiners to examine any person who sought to apply to become an officer of court. This committee, in consultation with the Society, was then responsible for determining the educational standard required of candidates; setting examination papers; and regulating and fixing fees for examinations. The effect of this was to remove the Lyon Court's and the various sheriffs principal's responsibilities from the procedure of examination of candidates seeking appointment to the offices. This was the start of a process of making the Society the unquestioned educational institute of the profession. The first diet of examination under the auspices of the Committee of Examiners was held in September 1989. Since then, training courses have been available for prospective entrants, and a continuing professional development scheme for existing members. However, although some officers are university graduates, the profession has never required - and still seems far from ever requiring - applicants to have a degree at all, let alone a law degree. [69]

**The 19th century**

The laws of diligence underwent substantial reform in the nineteenth century. The Personal Diligence Act 1838 (later re-named the Debtors (Scotland) Act 1838), established the form of procedure of poinding and warrant sale which, with comparatively few alterations, was to remain in force for 150 years. The state's attitude towards debtors gradually softened; the use of imprisonment as a general remedy for failure to pay debts was restricted by the Debtors (Scotland) Act 1880, to failure to pay taxes, rates, fines and aliment; the Wages Arrestment

[69] *Vide* Kennett, *op. cit.*, p. 59: "There does not appear to have been any particular demand for the raising of academic standards for entry to the profession or for more formal training."

Limitation (Scotland) Act 1870, enacted after many years of agitation, protected earnings of up to £1 from arrestment for debt.

It was also an age in which messengers-at-arms and sheriff officers got a pretty bad press. [70] The radical Glasgow journalist, Peter Mackenzie, seems almost to out-Dickens Dickens in the following description of a Glasgow firm of messengers-at-arms of the 1820s. This is his introduction to the tale of "The Bamboozled Messenger-at-Arms and his Lost Caption": "'Tis now fully a quarter of a century ago, since two keen *razors* - such we may call them - did execution in the office of the law in Glasgow, as sheriff officers and messengers-at-arms. … They undoubtedly had a large business of its kind secured to them by many questionable, and not altogether honourable influences. Their hearts were flinty as the rock. Pity the poor unfortunate devil that fell into their hands. They had nothing in the shape of humanity of compassion about them; their end, their sole business, was to squeeze everything out of their victims they could possibly get as accords of law, and fitting their own ledger. They were, of course, rapidly making money in this beagle-pounding line, which they pursued with steadfast and relentless aim; but a case occurred which arrested, split them up, and completely demolished them, greatly to the delight of honest scribes, as well as other honest men; and we may tell it now, the chief actors in it being long since removed. A most extraordinary case it was."

Alas, that we cannot tell more of the story. Suffice to say that righteous retribution was awaiting "Mr. Messenger Morgan": he "lost all his business - took to the whisky shop, whenever he could raise sixpence - had his eyes blackened, and his arm dislocated in street brawls; and finally he was lodged as a poor pauper in the Town's hospital. … 'Ah! Mr. Morgan, you see what Falsehood and Perjury, and base pleas against innocent people have done!' … What has since become of him we know not, though we rather think that he has been seized by that Grim Messenger-at-Arms whose Caption none in this world can evade, even for one single moment, on any pretence whatsoever." [71]

Peter Mackenzie & Co. printed in the year 1853 a pamphlet by George Anderson, Esq., entitled *Arrestment of Wages: An Exposure of its Impolicy and Injustice*. Fifteen years later,

[70] So too, it seems, did the huissiers in, for example, Belgium. Phrases about "blood-sucking vampires" are recorded in their history. Lesage, *op. cit.*, p. 272.
[71] Peter Mackenzie, *Reminiscences of Glasgow* (1865), vol. I, pp. 492 to 519.

George Anderson, a flax manufacturer, was to be elected a Member of Parliament for Glasgow. As Radical candidate he had made reform of the law of arrestment a feature of his platform and in 1870 he introduced the Bill that became the Wages Arrestment Limitation Act. [72] His work of "exposure" - originally published as letters in Mackenzie's *Reformer's Gazette* and the *North British Daily Mail*, had been not just about the shortcomings of the laws on debt but also the corruption of the sheriff officers' profession. "Those who look only on the surface of things, and feel no particular vocation to go deeper, probably consider 'wages arrestment' one of those admirable institutions which, being peculiarly Scotch, is peculiarly excellent. They may think it contains no worse provision than that of making the humblest in the land accountable for their just debts, and it may be supposed to be thus an enactment against dishonesty and a check upon debt. The fact is widely different. It exposes the whole working-classes to a huge system of dishonesty and fraud, by which every morsel they eat - every stitch they wear, is taxed and re-taxed, and taxed yet again, by unscrupulous shopmen, clubmen, and beagles". [73]

What concerns us is his suggestion that sheriff officers were an active part of this conspiracy. "It is no small aggravation of the various iniquities I have pointed out … that the law which ought to be most watchful and jealous in its protection of the ignorant and helpless, leaves open many doors for additional fraud, and thus becomes, in too many cases, a powerful engine of tyranny and extortion". [74] Here he points to the expenses of the process of small debt summonses. "In the Sheriff Court, however, if the citation has been personal, 6d. extra is charged for that (and I will afterwards show that it is a privilege well worth the money)". [75] He then continues, "in the majority of cases this charge is not required, for so great are the advantages to the creditor in obtaining decree against his debtor in absence, that every possible means is had recourse to for the purpose of lodging the summons in such a way that it may be a legal citation, with the smallest possible chance of its reaching the defendant. I have been told by officers themselves of this, and of the preference given by creditors to those officers who were most proficient in this branch of their art". [76]

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[72] *Report of the Committee on Diligence*, Scottish Home Department, June 1958, s. 74; hereafter cited as *McKechnie Report.*
[73] George Anderson, *Arrestment of Wages: An Exposure of its Impolicy and Injustice*, p. 4.
[74] *Ibid.*, p. 14.
[75] *Ibid.*.
[76] *Ibid.*, p. 15.

He then explains, "It is sufficient that the summons be lodged in a key-hole after three (*sic*) audible knocks at the door; and it is a very easy thing to arrange so that it may not remain long there; or the summons may be left at any lodging occupied by the defendant within six weeks, however well both creditor and officer may know his actual lodging; and so far is this abuse carried, that frequently the keeper of the forsaken lodging is the pursuer in the action - the very one who has so strong an interest in concealing it, is made its legal depository for defendant's information!" [77] "In fact, so many are the risks of carelessness or fraud which this loose citation leaves open, that in nearly half the arrestments that come before me, I hear the same complaint of want of summons. Many of these are doubtless false, but making every allowance for that, the numbers that remain undoubtedly true - the fact that pursuers have so great an interest in getting decree in absence, and that they have such means of watching and contriving towards that end - make it highly desirable that some change should be made in what constitutes a legal citation. … The hardship and inconvenience to pursuers and officers, through compelling personal citation, would not give rise to one-tenth of the injustice and fraud which the present loose mode does. By getting decree in absence, of course all question as to the correctness of books and accounts is avoided … and even the entire question of the defendant's liability, however doubtful previously, is at once established. Under this many huge frauds are perpetrated." [78]

Anderson explained that the remedy of "sisting the case", so that the court could consider the matter again, was of no practical use to many debtors. "It will, of course, be replied to all this, that the law itself provides a remedy … It can only be got before the expiry of the charge, which means the lapse of ten free days after depositing a copy of the judgment with the defendant, but this may be done as secretly as the summons". [79]

[77] *Ibid.*, pp. 15 and 16. A footnote is added: "Since this was published, a trial for forgery has taken place, the evidence in which not only corroborates this statement, but shows, in the strongest manner, the evils of the whole system of arrestment, and its utter destruction of honest principle in all concerned. The case is that of James Pettigrew. The pursuer induced the officer to lodge the summons in her hands instead of defendant's, that she might conceal it, and fraudulently obtain decree in absence. The officer dishonestly lent himself to the fraud, and returned a false execution of citation".

[78] *Ibid.*, p. 16.

[79] To which Anderson adds this footnote: "Soon after the statement appeared, a remarkable trial took place before the Glasgow Circuit Court, fully illustrating the above. Snedden, a dealer, and Findlater, an officer, were tried for conspiracy to defraud by returning false execution of a citation first, and afterwards of the charge. They were found guilty, and sentenced to a year's imprisonment. But it is so difficult to prove that a summons was not legally lodged, that the facility of escape makes the practice very frequent indeed." *Ibid.*, p. 17.

And so Anderson's "exposures" continued. "Frequently defendant receives the summons, and, in full dread of its consequences, goes off at once to his creditor, makes some settlement by compromise, and is told never to fret about the summons as it will not be pressed. He goes away in the innocent belief that the thing is settled and the summons cancelled, but the wily shopkeeper knows a trick worth two of that. He lets the case go on, gets decree in absence, and afterwards laughs at his private agreement, and arrests the same as if none had been made. This is very frequent. When the decree is obtained, the debtor is entirely at the mercy of his creditor, who may, and frequently does, put in an arrestment on every succeeding pay-day, till his demand, and all the accumulated expenses, are paid". [80]

In his concluding observations, Anderson wrote, "I wish, by way of epilogue, to address a few words to the 'vested interests', those various classes who think they will suffer by any change in the law. I begin with the sheriff-officers, as it is pretty certain to affect them seriously. Many of them, I doubt not, do their duty honestly and conscientiously, but they must bear with me when I say, it is not a very reputable duty, or one for which society is likely to be very grateful to them; besides, there are too many, - more, far than a healthy state of society would warrant or than it can conveniently support. They will probably not be all required very long, and it might be well for some of them to anticipate the change, by devoting their ability and energy to some more useful and beneficial pursuit than preying on the misfortunes of their fellow-men". [81]

Whilst public sympathy for sheriff officers was never high, they themselves were victims of some professional deprivation. In 1867 there was submitted "Unto the Honourable, The Commons of Great Britain in Parliament assembled, the Humble Petition of the Sheriff Officers in Lanarkshire". It is worthy of quotation, seeing that it "sheweth, That the duties discharged by the Petitioners are varied, onerous, and of great importance to the general public, and before appointment as Officers, your Petitioners were not only obliged to undergo examination as to education and other qualifications for their office, but had also to find unlimited security for the proper and faithful exercise thereof. That your Petitioners' labours and responsibilities have never been adequately remunerated. That while salaries and wages of all other classes have of late been steadily on the increase, there has been no corresponding

[80] *Ibid.*.
[81] *Ibid.*, p. 32.

addition to your Petitioners' Fees for the last half century at least, and a Bill for an Act is now in progress through Parliament … which will make it imperative to your Petitioners to execute Writs involving large and important interests, and that for Fees not greater than your Petitioners at present get in matters of comparatively small account. That your Petitioners looking to the foregoing facts, and to the farther fact that the expense of living is greatly increased, respectfully deem that their remuneration (if educated and responsible men are necessary for such Office as theirs) should correspondingly advance, and therefore respectfully - Pray that in any measure now contemplated regarding the Execution of Legal Writs in Scotland, connected with the Administration of the Law, due provision should be made for fair and reasonable Fees being paid to all Sheriff Officers". Eighty two officers, all with Glasgow addresses, subscribed to the petition.

This was hardly the first time that such a complaint had been made. John Gillespie, messenger-at-arms in Greenock, in 1852 published a treatise to which he added "Remarks as to sheriff-officers' table of fees". "It is the miserable payment of officers which keeps them at starvation point, takes away almost all hope of bettering their condition, and so often renders them the unscrupulous agents of designing men. The fees to officers for executing small debt matters, are less than would be accepted of by common porters for delivering letters. … With such a rate of payment it is no wonder that the office of a sheriff-officer is looked upon as a miserable occupation." [82]

Dr. Kennett's study gives a striking European comparison. "The nineteenth century was a time of financial decline and difficulty for French *huissiers*, who nevertheless seem to have been able to maintain a sufficient sense of value of their role to progress gradually towards a more organised and professional group. The tariff for their services remained unchanged for 122 years, partly because of their own inability to present a united front to those responsible for managing a change in the relevant legislation. The number of *huissiers* reduced from over 6000 in the early part of the 19th century to about 4500 at the start of the 20th century. Many office holders found that they were simply unable to earn a living." [83]

**Professional fees**

[82] John Gillespie, *The Powers and Duties of Sheriff Officers in Matters Civil and Criminal* (1852), appendix XII, p. 70.
[83] Kennett, *op. cit.* p. 36.

Erskine refers to some of the earliest information about the profession's emoluments. "Sheriffs were also entitled to the twentieth part of the sums contained in every decree, in name of sheriff-fee; and as it was the sheriff's office to carry into execution all sentences which were to be executed within the shire, whether pronounced by himself or by the Court of Session, (1537, c.58), he was entitled to his sheriff's fee for them all, (1491, c.30). When this became a task too burdensome for the sheriff himself, a custom was introduced, of directing letters of diligence, which issued from the signet-office against a debtor's person or estate, not to the sheriff, but to a messenger, (1537, c.58), who, because he was substituted in the sheriff's stead, and with his powers as to that particular matter, was styled in the letters 'Sheriff in that part,' and was under the character entitled to the sheriff-fee, (1503, c.66)". [84]

The earliest Act of Parliament regulating officers' fees - the statute referring to the officers of arms, i.e. the messengers, rather than the sheriff court officers - is the 1587 Officers of Arms Act, c.73. "Item, for the better and more sure serving of the King by officers of arms, it is statute and ordained … that the wage of any officer of arms on the day shall be one merk money, summer and winter". [85] The merk was current for 13 shillings and 4 pence in Scots money. The fees of officers in the sheriff courts in civil cases were regulated in the following way by an act of sederunt, 16th March 1748: "Item, for each mile the officer and his two witnesses travel from the place of his residence, there shall be paid a further sum of six shillings, [86] provided always that the whole sum paid the officer for himself and his two witnesses do not exceed half a crown for one day". By 1833, the table of fees in civil business for sheriff officers in Scotland [87] stated that, so far as poindings were concerned, the officer, for himself and party, was not have in one day more than fifteen shillings. Moreover, "these charges are to be in full of all incidents, and all other expenses, excepting stamps". The tables of fees charged by messengers in Edinburgh [88] showed that this table was much more remunerative. The apprehension and imprisonment of a debtor for a debt from £50 to £100 could reach a maximum fee of forty two shillings; the fee for arresting ships was two guineas; and if the appraised value in a poinding were £200, the combined fee for the messenger and his

[84] Erskine, *Institute of the Law of Scotland*, I, iv, 38. To this, the editor (1871) has added a note: "by judgment of the court, in the case of Monro, 4th November, 1738 … it is declared, 'that all messengers ought to be paid of their fee and expenses … by the creditor employer, and not by any exactions from the debtor'."
[85] *Vide* Campbell, *op. cit.*, pp. 493/4 (modernized English).
[86] *I.e.* Scots money, therefore sixpence sterling.
[87] Campbell, *op. cit.* pp. 583 to 587.
[88] *Ibid.* pp. 581 - 583.

two appraisers or witnesses would have been £3.7s.6d. This compared favourably with the lawyers' profession: in 1833, the daily maximum allowed to agents in the sheriff court, for a day of nine hours, was not to be charged at over two guineas. The 1839 table for the Glasgow Procurators gives a maximum fee of three guineas for a whole day employed out of Glasgow.

Returning to the sheriff officers' fees, the position in the year 1833 shows a correlation between the half a crown allowance for each hour after the first two hours that an officer and his party were detained at a poinding, compared with that same amount of two shillings and sixpence that was allowed to law agents for "attending proofs, examinations, visitations, inspections and perambulations" in small debt cases. An increase in officers' fees did not take place until 1919. It can be seen that the 1833 parity between the officers' detention fee and the agents' small debt appearance fee had been lost during the eighty years prior to the 1919 increase, when an extra 50% was allowed on all officers fees. In the 1908 Acts of Sederunt on fees, although officers were still only getting two shillings and sixpence for the detention time ("but not to exceed fifteen shillings per day of eight hours"), in fact, law agents were now paid twice as much as that for an hour in a small debt case. And of course the expression "officer and party" would include three men.

In time, however, the devising of official tables of fees for the work of messengers-at-arms and sheriff officers was to become a clear signal of their own growing professional status. Indeed, it was to Scotland that Philip Evans, secretary to the Certificated Bailiffs Association, was to look in 1999 for a helpful precedent to assist in the reform of bailiff law in England and Wales. [89] "This paper will explore current problems with particular reference to private bailiff fees, look at the work done by the Society of Messengers-at-Arms and Sheriff Officer to reform the enforcement fees for Scotland at the beginning of this decade and then harvest a set of principles for reform in England and Wales," he wrote.

Debtors who lived further away from the court had always been liable for greater costs in Scotland simply because of where their addresses were located. In 1975, records Philip Evans, the Lord Advocate indicated, "that he would like to see a Table which was not based on mileage and so was fairer to debtors who lived in the remoter parts of Scotland. The Society

[89] Philip Evans, "Bailiff Fees: Scotland's Blueprint for Reform", *Civil Justice Quarterly*, vol. 18, October 1999, pp. 343 to 361.

reflected on this and set up a working party. … Of paramount concern was the need for both the sheriff officer and the debtor to know what fee would be incurred at each stage in the procedure. To achieve this, the number of fees based on 'reasonable costs and expenses' were reduced to a minimum. As work progressed, the following four objectives evolved for the fees: (1) to maintain a viable private system of debt enforcement with a high standard of efficiency and modern methods; (2) to be attractive to creditors and encourage them to use the sheriff officers to the fullest; (3) to be equitable to debtors, wherever they reside; (4) to protect the interests of sheriff officers practising in city and provincial areas." [90] To reach conclusions in a scientific way, the Society commissioned and paid for all of the work of research. A survey was carried out of every fee received by every messenger-at-arms and sheriff officer in Scotland over an eight week period from April to June 1986. Based upon his researches, the writer recorded this conclusion about the approach of the members of the Society: "Early on they recognised that if their profession were to attract popular respect, they must show deep understanding, concern and even sympathy towards people who are experiencing acute financial difficulty. Towards the end of the project, the Society recognised that they should weight their recommendations in favour of those debtors least able to pay." [91] The Society's proposals on the reform of their professional fees were submitted in January 1989 and the recommendations were subject to discussion between the Society and the Lord President's officials. The new procedure for fees was implemented in 1990, by two acts of sederunt, one for the fees of messengers-at-arms, the other for sheriff officers. Philip Evans' article records both "the complexity of the task" of reform, and his view that "Lessons from Scotland" could be an important part of reforming bailiff law in England and Wales.

**The period 1900 - 1940**

In spite of the long pedigree of the profession, the viability of an independent body of officers of court was to be doubted on numerous occasions throughout the twentieth century. The scarcity of messengers-at-arms and sheriff officers in remote parts of Scotland had become a problem which required the consideration of the Committee on Sheriff Court Procedure, whose report formed the basis of the Sheriff Courts (Scotland) Act 1907. But although it found that the "great inconvenience" caused by the scarcity of messengers-at-arms was a real evil in

[90] *Ibid.*, pp. 349/50.
[91] *Ibid.*, p. 351.

the legal system, no action was taken. [92] In 1912, the Lord President of the Court of Session was to write of the "serious grievance" that this scarcity caused, and which had arisen because "the calling of a messenger-at-arms no longer pays". [93]

What had caused this? In 1912 the Lord President complained that there were only thirty four messengers-at-arms in Scotland, fifteen of those being in Edinburgh and Glasgow; whereas in 1800 there had been 262, well distributed over the country, with even small villages often having a resident messenger. [94] Part of the explanation lies in the creation in the previous century of police forces, and the withdrawal of instructions from messengers-at-arms and sheriff officers to execute criminal warrants. Even so late as the year 1886, in the annual report on the police in Scotland, reference was made to the practice "in some very important jurisdictions for the sheriff officers to take over the charge of criminal cases at a certain stage of the proceedings, and also to execute warrants of arrest where the accused has absconded …". [95] But more important were the effects of legislation in the 1880s. By the Debtors (Scotland) Act 1880 and the Civil Imprisonment (Scotland) Act 1882, civil imprisonment was virtually abolished in Scotland as a general creditor's diligence, thereby removing a considerable part of the messenger's business. For although diligence against the person of the debtor was, as Kames observed, introduced "after execution against land and long after execution against moveables", [96] imprisonment had been a part of the debt recovery system since time immemorial.

Of more consequence yet, however, was the effect of the Citation Amendment (Scotland) Act 1882. This allowed the service of summonses and citations to be made by post and for postal service to be executed by a solicitor as an alternative to a sheriff officer. As the McKechnie Report was to observe in 1958, "Since then most citation work has been done by the solicitor acting in the proceedings and so a great deal of work has been lost to messengers-at-arms and sheriff officers." [97] It was the suddenness of this change in the law, and the apparent lack of consultation, which precipitated the near collapse of the profession. "The Citation Amendment Act was passed in the last days of a Session, practically without the

[92] *McKechnie Report*, s. 222.
[93] *Whyte, Ridsdale & Co.*, 1912, S.C.1095. *Vide McKechnie Report*, s. 223.
[94] *Ashmore Evidence*, pp. 8 and 9.
[95] *McKechnie Report*, s. 25.
[96] Kames, *op. cit.*, p.331.
[97] *McKechnie Report*, s. 25.

knowledge of those immediately concerned and the messengers found themselves suddenly deprived of a large proportion of their living without having had an opportunity of being heard on the subject and without any compensation." [98] In 1923, it was observed that between 1880 and that year, the number of messengers had declined from 67 to 28, and the number of sheriff officers from 424 to 148. [99]

It was against this background that in 1922 a memorial was sent by the Society of Writers to H.M. Signet and twenty seven other legal societies to the Secretary of State for Scotland, calling attention to "the unsatisfactory position into which in many parts of Scotland the execution of diligence and the proper discharge of the duties of messengers-at-arms and sheriff officers had drifted," and seeking "an exhaustive inquiry". [100] On 6th June 1922, the sheriff officers carrying on business in Glasgow and West of Scotland wrote to the Secretary of State in the following terms: "It is the understanding of the sheriff officers that the question of introducing legislation to provide for the execution of charges, arrestments and other steps in diligence by means of registered letter is at present under your consideration. They further understand it has been suggested that warrants of poinding and sale should be made executable by members of the civil police, on their obtaining certain qualifications. It is respectfully submitted by the sheriff officers for your earnest consideration that such legislation would not only impose great hardship upon them by further restricting the scope and duties of their office, but would operate adversely in the matter of executing diligence." [101]

Whatever element of truth there might have been in the view that "the calling of messengers-at-arms and sheriff officers appears no longer to offer sufficient inducements to enter upon it", many of the existing officers had good businesses, built up over generations, with valued connections, as old as any in the legal profession. And the sheriff officers themselves did agree that it was the low level of fees that had been at the heart of the difficulty in providing a service in rural areas. The *esprit de corps* of the profession in the face of the threats of 1922 was the moving force in the foundation that year in Glasgow of a national association, later renamed in 1936 the Society of Messengers-at-Arms and Sheriff Officers.

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[98] Evidence of Francis J. Grant, Lyon Clerk, *Ashmore Evidence*, pp. 8 and 9.
[99] *Ashmore Evidence*, p. 7.
[100] *Report of the Departmental Committee on Messengers-at-Arms and Sheriff Officers* (1923), pp.21 - 23; hereafter *Ashmore Report*.
[101] *1922 and All That*, 75th Anniversary brochure of the Society of Messengers-at-Arms and Sheriff Officers, (1997); quotations from Society's Minute Books.

A memorial to the Lord Advocate was quickly prepared by the new association. Several items in the memorial illustrate the difficulties under which the officers had to operate. It was pointed out, for example, that the fees for sheriff officers, fixed in 1907, did not vary to any appreciable extent the scale of fees for some fifty years previously. Indeed, for messengers, the fees had not changed between 1840 and 1919. For some years prior to the 1919 increase, "sheriff officers and their families were in many cases, especially in rural districts, living under circumstances of financial restriction and hardship". In contrast, it was recorded that the rate of salaries payable by sheriff officers to their assistants had greatly increased since before the war. "This the sheriff officers do not complain of" - it being pointed out that "the increase in fees has enabled sheriff officers to raise the status of such assistants; whereas formerly the profession had fallen into considerable disrepute owing to the inability of employers to pay adequate wages." [102] The final point was, "Your Memorialists would further humbly submit that it should be taken into consideration in regard to the rate of their fees that the business of sheriff officers since the war is carried on with increasing difficulty owing to a weakening in respect for civil authority among certain classes." [103] This remark was based upon the uncomfortable experience of the profession in the Clydeside Rent Strikes of 1915 and 1916. [104] It was an era in which officers had become ever more associated in "folk memory" with the interests of the property owning class.

On 15th September 1922, the Secretary of State for Scotland appointed a Departmental Committee, under the chairmanship of Lord Ashmore, to study the whole question of messengers-at-arms and sheriff officers. The subject of investigation was primarily to establish the areas of the country where there was an insufficiency of messengers-at-arms and sheriff officers. The possible solutions to the problem of an insufficiency of officers were then recorded as: (1) Giving power to messengers-at-arms and sheriff officers indiscriminately as regards service of writs and carrying out of diligence on decrees of the Court of Session and the sheriff courts; (2) Employing members of police forces in the offices of messenger-at-arms and sheriff officer for the purpose of the service, execution, and carrying out of legal process or diligence; and (3) Transferring the powers and duties of messengers-at-arms and sheriff

[102] *Society Minutes*.
[103] *1922 and All That*.
[104] *Vide* Joseph Melling, *Rent Strikes: Peoples' Struggle for Housing in West Scotland 1890 - 1916*, (1983) pp. 59 - 103.

officers to officials of the sheriff court. The abandoning of hand service for more categories of legal process was also considered: and even whether power should be granted to law agents (solicitors) in regard to *personal* citation. And it was asked if there should be provision for appointment *ad hoc* by the sheriff of persons to serve particular writs or to do particular acts of diligence where no other means of personal service was readily available. [105]

The idea that power might be given to sheriff officers "indiscriminately" to serve writs and carry out diligence on decrees of the Court of Session and the sheriff courts - thereby removing any need for messengers-at-arms - was entirely opposed by the Lyon Clerk (who was to become, in due course, Sir Francis J. Grant, Lord Lyon King of Arms). In evidence he said, "I would much deprecate anything that would lead to the abolition or discontinuance of the office of the messenger, which is one of the oldest in the country". Moreover, whereas the procedure to qualify as a messenger-at-arms was a searching one, he said, "I do not think any sheriff officer is qualified to execute the diligence in the Court of Session. It is a complicated matter." And the representatives of the messengers-at-arms and sheriff officers themselves also agreed: as one of them put it, "The qualification of a messenger-at-arms requires special training and all sheriff officers are not competent to carry out diligence in the Court of Session." [106] As another representative of the profession on that occasion was at pains to point out, whereas the process of *delivering* a document was important, "the *preparation* of documents is more important." [107]

Briefly stated, the recommendations of the Ashmore Committee were that the employment of the ordinary officials of the sheriff court to discharge any of the duties of messengers-at-arms and sheriff officers would be inexpedient and impracticable; that, under the existing conditions, and in view of the financial considerations, the appointment of "special officials paid by Government" would not be advisable; that the Committee was against any extension of postal service to charges on decrees other than small debt decrees; that the right to serve arrestments by post should be confined to messengers-at-arms and sheriff officers, unless none was in practice within the sheriffdom; that the fees payable to messengers-at-arms ought to be revised, regulated, and fixed on new, in the light of the existing conditions; and that

[105] *Ashmore Report*, pp. 3 and 4.
[106] *Ashmore Evidence*, p.190; and see pp. 108 and 109.
[107] *Ashmore Evidence*, p.237.

sheriff officers *should* be able to execute Court of Session diligence in counties where there was no resident messenger-at-arms. [108]

In 1925 the Departmental Committee was asked to report again, specifically on the advisability to having sheriff officers in Scotland as civil servants. This proposition was redirected to the Departmental Committee because of the changes made in England and Wales by the County Courts Act 1924, whereby the Exchequer now collected all fees for service of writs and execution, and the bailiffs, process servers and clerical staff concerned with these duties were now to receive their remuneration from the Exchequer as civil servants. The association set to work on detailed, and bold, answers to the Scottish Office memorandum: "It is respectfully submitted that a change such as has been introduced in England with regard to the staffs of the county courts is not such as should be introduced with regard to the sheriff officers of Scotland. To encourage such a change would be to authorise the compulsory acquisition by the state of property of individual citizens and this, it is understood, will only be permitted in most exceptional circumstances and in exchange for full and adequate compensation." [109]

The members of the association's executive council in October 1925 heard from the president that, "so far as he could learn, the question of the appointment of official sheriff officers would not be entertained, and that the official report would be in circulation in a week or two." A few days before Christmas 1925, the president and secretary of the association quoted, with evident satisfaction, this extract from the Departmental Committee's report: "there is no sufficient reason or justification for superseding the existing system and setting up on a national basis a new system involving the establishment of Official Sheriff Officers for the whole country paid and pensioned by the State." [110] By 1926 it had become clear that the system of messengers-at-arms and sheriff officers as independent, fee paid, professionals would continue.

Important constitutional questions about officers were still being asked in the 1930s. In large part this was because of the reported case, *Stewart v. Reid*, (1st December 1933). [111]

[108] *Ashmore Report*, pp. 18 - 20.
[109] *1922 and All That*.
[110] *Ibid.*.
[111] The case is more fully cited as *James Reid and Others (the Executive Council of the Association of Messengers-at-Arms and Sheriff Officers for Scotland) and others, Objectors (Appellants)* S.C. 69 to 79.

An employee of a county council had presented a petition for admission as a sheriff officer for the carrying out of all business in which the county council was interested, and craving an appointment "restricted as above". The petition had been opposed by the Association, on the ground that the appointment craved would not be that of an officer of court. The sheriff substitute appointed the petitioner a sheriff officer, without limitation of his duties. The sheriff had stated, however, in a note to his interlocutor, that it was understood that the petitioner would devote his whole time to carrying out the duties of an officer, only as required by the county council, and that his commission would cease when he ceased to be in their service. The matter came before the Court of Session. The Association, as objectors, were unsuccessful; the court refused the appeal; Stewart's appointment was, on the face of it, a commission to act as a sheriff officer without improper restrictions upon it; an appeal against a purely discretionary act of administration by the sheriff who appointed the sheriff officer was held to be incompetent. However, the legal literature of the profession received through the Association's actions the important contributions of the three opinions of the judges upon the wider point at issue: the nature of the appointment of a sheriff officer.

The case was heard before the First Division of the Court on 7th and 8th November 1933. It was argued for the objectors, the Association of Messengers-at-Arms and Sheriff Officers, "on the merits: - A sheriff officer was a public officer of Court, acting in the King's name; the office could not be held by the salaried employee of a litigant. It was a very ancient office going back to pre-feudal times, its holder being then known as mair or sergeant. It was originally a more important office than that of a messenger-at-arms, who was appointed by the Lyon. But a messenger-at-arms must give his whole services to the lieges and must not be in the private employment of any individual. … A public official could not competently act in connexion with any litigation in which he or his employer had an interest. It was true that arrears of rates and taxes might be recovered under the warrant obtained and executed by the collector of the rating authority. But this was competent only in virtue of statutory authority. The result of the appointment made in the present case was that a public official would be under the control of his private employers, who were litigants in the Court where he carried on his duties; he would be their servant instead of being at the service of the lieges. Such an appointment was incompetent, and the appeal against it should accordingly be allowed". [112]

[112] *Ibid.*, p. 71.

It was argued for the petitioner, Stewart, "on the merits: - It was not disputed that a sheriff officer held a public office. But that did not preclude the appointment of an employee of a local authority, and such appointments had frequently been made in the past. The petitioner would have no greater interest in the litigation in which he executed a warrant than would any other sheriff officer in the litigation of the clients who employed him. Under Section 353 of the Burgh Police (Scotland) Act, 1892, the collector of a rating authority might execute warrants for arrears of rates. It was argued that the petitioner would not be at the disposal of all the lieges. But sheriff officers sometimes followed other employments, and they were not at all times free to act". [113]

Lord President Clyde made this important statement: "We are told that several town and county councils have sheriff officers attached to them in some way similar to that which the sheriff-substitute seems to have contemplated here; and we are assured that no abuse has arisen from such arrangements (whatever their exact nature may be), and that the practice is found to be convenient and economical. But it is a matter of the clearest principle that the person entrusted with the public office must be left to discharge its duties with the independence and impartiality which properly attach to it; and it is utterly inconsistent with the tenure of such an office that its holder should be in the pay of, and liable to dismissal from office by, any private employer". [114]

Lord Sands gave the next opinion. "The office of sheriff officer is an ancient one, the character and the duties of which are well defined. One of the characteristics of the office is that the sheriff officer is at the service, so far as the discharge of the duties of his office is concerned, of any of the lieges who desire to avail themselves of his services for a lawful purpose. The question which has been argued is whether it is competent for the Sheriff to appoint, to what purports to be the office of sheriff officer, a person who is to be bereft of this characteristics and to give his services to one employer only. I am of opinion that this question falls to be answered in the negative. The Sheriff may appoint to the office, but he cannot change the functions of the office. A person whose services are not at the disposal of the public does not satisfy the definition of sheriff officer, and the Sheriff has no power to appoint any other kind of officer to execute warrants. It may be that public bodies have found such an

[113] *Ibid.*, p. 72; See Appendices 1 and 2 for illustrations of "other employments".
[114] *Ibid.*, p. 73.

arrangement to be economical and convenient. But, as it seems to me, a principle of importance is involved in the maintenance of the character of the office of sheriff officer. The execution of warrants is sometimes an unpopular task, and there may be strong local feeling against the execution of a warrant which may be shared even by the sheriff officers in the county. It seems to me important to avoid any risk of the operation of this sentiment in any way interfering with or delaying the enforcement of the orders of the Court. Further, the circumstance that he is fulfilling a duty which he cannot refuse to execute may be a great protection to the sheriff officer, as it undoubtedly is to the policeman who is called upon to take unpopular action by way of arrest or otherwise. Reasonable persons, however strong their feelings, recognise that the officer is only engaged in the impersonal discharge of an official duty which he cannot refuse to perform, just as reasonable criminals recognise that the judge who sentences them is but fulfilling his duty, and accordingly bear no malice." [115]

However, the last judge to give his opinion, Lord Morison, came to an entirely different view: "It is quite competent for the Sheriff to appoint a special officer to execute any particular warrant. I have no doubt that the Sheriff is entitled to appoint as one of his officers an employee of the County Council, and to limit his functions to the enforcement of its warrants." [116] Lord Morison would hardly entertain the idea of officers, as such, as a coherent profession. As he said, "The objections to the appointment of Mr. Stewart taken by the Association of Messengers-at-Arms and Sheriff Officers seem to me to be of an entirely unsubstantial character. Their interest to present them is of the slenderest character." [117] If an arrangement tended to save public money, it was perhaps good enough. As the judge put it, "It was said further that his salary as a county official would cover his work as sheriff officer. This achieves, in my opinion, a justifiable economy." [118]

**The period 1941 - 1980**

In 1941 even traditionalists like Thomas Innes of Learney speculated on the possible advantages of making officers civil servants. "Much of the misconception [as to whether the post of a messenger-at-arms is, or is not, an office] presumably arises from the Messenger being

[115] *Ibid.*, pp. 74 and 75.
[116] *Ibid.*, pp. 78 and 79.
[117] *Ibid.*, p. 78.
[118] *Ibid.*.

remunerated by fees adjusted between him and the lieges who require the services of such an officer, but this is merely a survival of the practice which formerly obtained in respect of all Government officials … [However] under modern conditions, and in view of the difficulties which have had to be met in connexion with the often unpleasant but highly responsible duties of these officers, perhaps these officers ought to be not only - as at present - 'Officers of the Crown' … but salaried officials, and the fees for diligence part of the Revenue and be calculated in such a manner as to cover the service rendered, and even yield a reasonable profit to H.M. Treasury. Possibly the actual cost to litigants, of citation and diligence, would thereby be reduced." [119] This was one of the issues to be considered by the next Committee on Diligence, under the chairmanship of Sheriff H. McKechnie, appointed by the Secretary of State for Scotland in July 1956. Various legal societies were again recommending that officers should be combined into a salaried public service of "Court Officers", paid by public funds. [120]

But this Committee found that "we had no difficulty in reaching a unanimous decision not to recommend this change." [121] Here are the main arguments in favour of retaining the profession of independent, professional officers, as recorded in the McKechnie Report of 1958: "If a salaried service of court officers were introduced in Scotland with pensionable salaries rising to less than £11 a week such as are received by county court bailiffs, very few of the existing messengers-at-arms and sheriff officers would be prepared to accept appointment in the new service. At present most officers of court have a wide field of activities open to them … We understand that in the main centres the officers of court are very fully occupied and that their earnings are much more than any salaried state service would be able to offer. This point is most significant: a salaried service staffed initially with a high percentage of novices would almost certainly break down. There is the further possibility that the salary offered might not attract men competent, when trained, to execute effectively all the many forms of Scottish diligence. The other major obstacle has regard to control. Salaried officers of court would presumably work under the supervision of court officials. Control through the local authorities would, in our view, be neither desirable nor practicable … and would represent an innovation in principle. In Scotland the court is not required to become involved in the details of the execution of its decrees. Litigants always control the execution of their own diligence: under

[119] *Scottish Law Review*, *op. cit.*, p. 8.
[120] *McKechnie Report*, s. 196.
[121] *Ibid.*, s. 202.

a salaried service they would no longer be able to do so, or to penalise poor service by withdrawal of future business." [122]

The McKechnie Report seemed to have settled anxieties for the next decade. The 1970s, however, then saw some of the most animated controversies yet to be focused upon the profession. The writings of Professor Robert McCreadie of the University of Dundee give an excellent account of a radical view of the issues involved. He gave this review of the structure of the profession in practice: "There are approximately 110 practising sheriff officers in Scotland. One fifth of those work for one organisation, controlled by two Edinburgh sheriff officers … The firm of Gray & Donald and its five associated firms cover all the six Scottish Sheriffdoms. All but two of the sheriff officers listed in the Scottish Law Directory are members of the Society of Messengers-at-Arms and Sheriff Officers. One of the main aims of this Society, which has the Lord Lyon King of Arms as one of its Honorary Presidents, is to attempt to set certain standards for the profession. Gordon Macpherson comments: 'In the course of the last two years the Society has been involved in producing a full apprenticeship scheme. A full manual has been written … and the general scheme of length of training, type of qualifications required before one can become an apprentice, type of classes that would be required are under discussion. …' But membership of the Society is voluntary and it does not possess the control over its members and their activities exercised by, for example, the Law Society. It cannot prevent a member acting as a sheriff officer: only the Sheriff Principal can do so. The Society does have a Committee of Discipline, but it has never met. One effect of this lack of centralised control is that sheriff officers, faced with antiquated law, have to some extent evolved their own rules for enforcing decrees and conducting their businesses. [123]

Professor McCreadie's anxieties about officers operating as partnerships showed the continuance of a debate based upon different interpretations of the *Stewart -v- Reid* case. [124] "Sheriff officers are usually organised in partnerships under a firm name. This state of affairs was criticised by Sheriff Nigel Thomson in *Lawrence Jack Collections -v- Hamilton* (1976 …). He questioned whether it was desirable in the public interest, basing his objection on the fact that although sheriff officers are essentially officers of court, partnership allows them to operate

[122] *Ibid.*, s. 199 and s. 200.
[123] R. McCreadie, *SCOLAG*, Journal of The Scottish Legal Action Group, No. 6 (1976), p. 106.
[124] *Vide* G. Maher, *A Textbook of Diligence* (1981), pub. Society of Messengers-at-Arms and Sheriff Officers, pp. 13 and 14.

as large and sophisticated business concerns. … The sheriff officers within a firm may be partners, but a large number are not, and are in the position of employed assistants. According to Gordon Macpherson 'the general structure of any firm of sheriff officers at the moment is of a private enterprise employer, or partners, carrying on a partnership either by themselves or together with other sheriff officers as employees of that firm'. It is again typical of the confusion into which the law has fallen that, although this is clearly a long-established practice, it is at odds with the categorical opinion expressed forty years ago by Lord President Clyde that 'it is utterly inconsistent with the tenure of (the office of a sheriff officer) that its holder should be in the pay of, and liable to dismissal … by any private employer'. [125]

The involvement of officers in private debt collection was probably the most contentious issue of all. [126] Here are Professor McCreadie's comments: "Whether or not sheriff officers are authorised by creditors to collect the debt it is clear that they frequently do, merely because they are usually the only point of contact between debtor and creditor. That kind of debt-collection has caused little disquiet. This is not the case, however, with the part played by firms of sheriff officers in debt-collection *prior* to legal proceedings being initiated. It has for long been the practice of sheriff officers to act on behalf of creditors at the outset of the collection of a debt, but this practice has gradually become widespread and organised. The reasons are not difficult to discern. In *Lawrence Jack Collections -v- Hamilton*, above, Sheriff Nigel Thomson observed that one reason might be that 'debt collection and diligence are matters which have seldom been considered by the courts, since defenders are rarely in a position to … query the actings of debt collectors or sheriff officers. Another reason is no doubt the very large increase in credit sales and hire purchase.' One should perhaps also add that it is clearly advantageous to a sheriff officer to offer a debt collection service to creditors. The creditor who uses such a service is more than likely to entrust enforcement of any ensuing decree to that sheriff officer *qua* sheriff officer. Thus, apart from being profitable in itself, offering a debt collection service may well increase the profitability of official work. [127]

"The work of debt collection and decree enforcement is usually carried on from the same office, although it has become the practice in recent years to create some kind of

[125] McCreadie, *op. cit.*, p. 107.
[126] *Vide* Maher, *op. cit.*, pp. 15 - 25.
[127] McCreadie, *op. cit.*, p. 188. See Appendix 2 for an illustration of how long established was the officers' combination of unofficial with official business activities.

recognisable ‘split’. This is effected by the formation of a separate company or, with smaller operations, a partnership to deal with the debt collection aspects of the business. Sheriff officers are normally directors or partners in these enterprises. This movement to separate debt collection and court activities appears to have been caused mainly by the disquiet expressed by Sheriff Nigel Thomson about the debt-collecting activities of officers. As we shall see it is doubtful whether such a formality is sufficient to protect sheriff officers from the possible common law rule that public officials cannot competently act in connection with any litigation in which they have a personal interest.” [128]

“The first expression of concern about the debt-collecting operations of sheriff officers was publicly made by Sheriff Thomson in Hamilton Sheriff Court in July, 1972. The firm concerned was Jack Lewis & Son of Glasgow, an organisation which has been at the centre of the controversy. … Noting that over the years the practice had grown up of sheriff officers engaging in the lucrative business of debt collection, which was continually expanding with the growth of credit sales and hire purchase transactions he observed: ‘It may well be that the time is approaching when a complete separation of these functions should be made and sheriff officers should be disqualified from doing any work other than the exercise of their proper office. Otherwise the blurring of functions which these cases have disclosed may increase, with increasing loss of dignity to the law’. [129]

“He [Sheriff Thomson] concluded that ‘consideration for public policy’ compelled him to hold that it was incompetent for a sheriff officer to act as debt collector and sheriff officer in the same case. Sheriff Thomson’s voice has been a rather lonely one. There is no other modern authority for his opinion. … But it is difficult to conclude otherwise than that Sheriff Thomson’s interpretation is correct.” [130] In conclusion, wrote Professor McCreadie, “It is clear from the foregoing that the legality of debt collection by sheriff officers should be high on the agenda for discussion by the Scottish Law Commission’s Working Party on Diligence.” [131]

The decade of the 1970s saw an embargo being placed on poinding of certain basic household necessities as a result of the passing of the Law Reform (Diligence) (Scotland) Act

[128] *Ibid.*.
[129] *Ibid.*, pp. 108 - 109; the Sheriff’s quotation from *John Temple Ltd. -v- Logan,* (1973).
[130] *Ibid.*, p. 109.
[131] *Ibid.*, p. 110.

1973, a private members bill introduced by Gregor Mackenzie, M.P.. However, the agitation against poinding and the sheriff officers who carried out the law reached its climax with the introduction to the United Kingdom Parliament in 1980 of "A Bill to control the conduct of sheriff officers and to put an embargo on the use of warrant sales in Scotland". The bill had been brought in by Denis Canavan M.P. and 11 other Scottish Labour Members of Parliament. It was entirely unsuccessful. Its terms, however, deserve quotation: 1. No warrants of sale may henceforth be used, until such time as the Secretary of State for Scotland receives the approval of Parliament for alternative legislation to replace the existing law of diligence. 2. Within three months of this enactment, the Scottish Law Commission shall report to the Secretary of State for Scotland legislative proposals for an alternative to the existing law of diligence. 3. Sheriff officers shall henceforth be employees of the Sheriff Court for the area in which they operate. 4. A sheriff officer may not own, either in whole or in part, any company, agency or business involved in the collection of debts and may not benefit, either directly or indirectly, from any such business. 5. In the execution of a court order concerning the custody of a child, a sheriff officer must have the approval of the Social Work Department … 6. The Secretary of State shall lay before the House of Commons an order outlining a training scheme and a code of conduct for Sheriff Officers.

Meanwhile, however, the beleaguered profession in Scotland was realising that it was not without allies abroad. No other development in this period has proved of more significance for the Scottish profession than this: admission to membership of the U.I.H.J. at the Amsterdam congress of 1979. At the 57th Annual General Meeting of the Society of Messengers-at-Arms and Sheriff Officers on 1st December 1979, the President, Anne G. Halliday, said: "The Society has had a keen interest in Europe, instigated by our past Presidents, Mr. Gray and Mr. Donald, who opened the way for us in Europe, as a result of which, at the half yearly meeting in June this year, you decided that your President should represent you at the International Congress of the huissiers to be held in Amsterdam. … This was the most impressive congress … The status of the international union is highly esteemed and this was very evident by the calibre of official representation from the official courts of justice at business sessions … During informal meetings through leisure hours, it was apparent that our duties are common and our problems are universal. The huissiers are held in high respect by the legal profession and the State. The achievement of this status is partially due to the professional qualifications necessary for appointment. In this connection, our own efforts in producing our training manual and apprenticeship scheme will allow us to be in line with our European colleagues … The status

they hold and their standard of living is the standard this Society should attempt to attain. … In my opinion, our association with our international colleagues would enhance our standing in this country and broaden our view, as it is surely better to be informed and know the world-wide situation of our counterparts and benefit from them rather than remain ignorantly introverted." [132]

**The period 1981 - 2000**

For several years before the publication of its consultative memoranda in 1980, the Scottish Law Commission had been carrying out research into the whole field of diligence. In the 1976/77 session the Central Research Unit of the Scottish Office commenced work on the Law Commission's behalf. But the research project had begun before that and the Society of Messengers-at-Arms and Sheriff Officers was closely involved from the start. This acknowledgement appeared in the Law Commission's final *Report on Diligence and Debtor Protection*, published in 1985: "Prior to our assumption in 1977 of direct responsibility for preparing consultative memoranda on diligence, a Working Party had undertaken much work on the topic of diligence on our behalf. We would express our gratitude to the members of the Working Party and to those who submitted comments to them. After we had taken over responsibility for preparing the memoranda and reports, we continued to consult individual members of the former Working Party on particular problems. We benefited greatly from the expert advice of Mr. John G. Gray, S.S.C. and the late Mr. James Donald, Messenger-at-Arms and Sheriff Officer. We are especially grateful to Mr. John M. Bell, Messenger-at-Arms and Sheriff Officer, not only for the advice he furnished on particular topics but also for the help which he unstintedly gave to the Central Research Unit of the Scottish Office in preparing and implementing its programme of research into the nature, scale and social aspects of diligence." [133] "We are grateful to the Society of Messengers-at-Arms and Sheriff Officers, both office-bearers and individual members, for the statistical and other information which they provided to the Commission and for the assistance and advice which they gave to the researchers on our behalf. Without their help and co-operation, many of the research projects on diligence could not have been implemented." [134]

[132] *Society Minutes.*
[133] *Scot. Law Com. No. 95,* 1.9.
[134] *Ibid.,* 1.11.

Consideration of the historical importance of the Scottish Law Commission's work, however, belongs to the 1980s: the consultative memoranda of 1980, the final report of 1985, and the enactment of the Debtors (Scotland) Act 1987 are the key dates. An interesting account of how the debate was developing early in the decade was given by Professor Sir T.B. Smith, Q.C., formerly a commissioner with the Scottish Law Commission, who published an article in *The Scotsman* (19th June 1981), setting out "The case for reforming debt enforcement". "In recent years, the Scottish system of enforcing debts and court judgments have been subjected to much criticism which is by no means always objective or well informed", he began. "Since my long service on the Scottish Law Commission is now at an end, I may record that probably no aspect of the commission's work with which I was involved was considered with deeper concern than the law of diligence in an attempt to find solutions compatible with justice after assessing social, economic and legal factors." He referred to the October 1980 publication by the commission of its five consultative memoranda. "These proposals had not satisfied some critics, who claim that they do not go far enough and argue that warrant sales should be abolished. Much of the criticism, however, both of the existing system and of the commission's provisional proposals for reform, appears tendentious and misleading. The issues are obscured by assertions that warrant sales are 'medieval' (or 'Dickensian') and 'barbaric', and that, being allegedly 'unique to Scotland', they ought to be abolished."

He pointed out that, "in England and Wales, about a million warrants for execution against goods … are issued, without a means of inquiry, in the county courts every year. Many countries have recently revised their laws including England (in 1969), the U.S. (1979), France (1977) and also certain Canadian provinces and Australian states. None of them have abolished enforcement against goods, which is what poinding and warrant sale involve. Those who propagate the parochial myth of uniqueness and medieval barbarism are either ignorant or irresponsible." Moreover, he wrote, "Those who advocate abolition of warrant sales in all circumstances would deprive creditors in Scotland indiscriminately of rights of enforcement which - with due safeguards for cases of genuine hardship - are granted by civilised legal systems throughout the world. … Experienced and unscrupulous debtors could convert all money into moveable goods and flout with impunity every claim for payment, no matter how considerable the debtor's resources."

Professor Smith said that, since "Not all debtors are necessarily poor and deserving nor all the creditors affluent and oppressive"; and since the abolition of compulsory sales of goods

did not appear to be a practical option, the sort of reforms needed would be those "to temper the harshness of the existing procedure in appropriate cases". He then referred to the detailed scheme set forth by the Law Commission in their consultative memoranda for establishing a possible Scottish "Court Enforcement Office", a civil service regime. At the time of writing, comments were being invited on the proposals. He gave his own advice on the issue of "nationalization": his arguments were against the establishment of an enforcement office. The strongest part of his case was that an enforcement office would be extremely expensive. "It would have to be financed with taxpayers' money and if taxpayers are anxious that public money should be spent on such an agency, they should make representations to the Scottish Law Commission who would welcome views from any source on the provisional proposals in their consultative memoranda".

As the Commission observed in its final report, "In recent years, the procedures for enforcing the payment of debts have increasingly become the target of criticism in Scotland". [135] The effect of this criticism added a new political dimension. The Ashmore and McKechnie Committees had been prompted, largely by legal societies, to consider the abandonment of the traditional independent profession of officers because their services could sometimes not readily be had in remote areas. No such difficulty was presented to the Scottish Law Commission during its lengthy consultation: indeed, as the Commission recorded, "No complaints regarding the overall efficiency of the service presently provided by officers of court emerged on consultation" [136]

Instead, representations had been made that "the remuneration of officers of court by way of fees paid by creditors is allegedly inconsistent with their status as public officers …" [137] The Commission found, however, that "the majority of those consulted took the view that independent fee-paid contractors were likely to provide a more efficient and cost-effective service than state-salaried officers." [138] But yet more important for the continuation and development of the profession was the philosophical conclusion to which the Commission came: "Transfer of control of diligence to central government would be open to objection on the ground that the enforcement of court orders would be liable to be affected, or to appear to

[135] *Ibid.,* 2.5.
[136] *Ibid.,* 8.7.
[137] *Ibid.,* 8.4.
[138] *Ibid.,* 8.7.

be affected, by political considerations and would thus infringe the constitutional principle of the independence of the courts." [139] In short, the Law Commission Report gave an endorsement of the principle that citation and diligence should be executed by independent contractors, as fee-paid officers of court - not salaried officials of a government department. [140]

Here are some of its other conclusions in 1985 about the profession: "We see nothing wrong in the practice of messengers-at-arms and sheriff officers employing other messengers and sheriff officers to execute citation and diligence. We understand that some officers do not wish to assume the responsibility of partnership status and it would wrong to require them to do so." [141] Moreover, "While it has been suggested that the organisation of sheriff officers in firms is in some way undesirable, [142] there was no dissent on consultation from our view that the practice should be retained." [143]

"The main fields outside their official duties in which officers are regularly engaged appear to be debt collection; work as enquiry agents; and the service of statutory notices … where the officers are not acting in their official capacity. [144] … Given that officers are independent contractors, a complete prohibition of extra-official activities would be an unwarranted restriction on their business freedom and might affect the viability of some officers' businesses especially in rural areas." [145] The report noted that, "In the case of pre-decree debt collection, it appears that an officer is not expressly prohibited by law from demanding payment in the capacity of officer of court, but the Office of Fair Trading has refused to issue licences to officers entitling them to engage in debt collection using their official designations." [146] This was its considered view on officers engaging in debt collection: "We invited views as to whether officers should continue to be allowed to collect debts before decree, either as individuals or through debt collection agencies. Almost all of those who commented were of the opinion that officers of court should continue to be allowed to collect pre-decree debts. It seems to us that the disadvantages are more theoretical than real at the present time and are outweighed by the advantages." [147]

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[139] *Ibid.,* 8.8.
[140] *Ibid.,* 8.10.
[141] *Ibid.,* 8.59.
[142] A reference to *Lawrence Jack Collections -v- Hamilton,* 1976.
[143] *Scot. Law Com. No. 95,* 8.60.
[144] *Ibid.,* 8.105.
[145] *Ibid.,* 8.106.
[146] *Ibid.,* 8112; reference to Consumer Credit Act 1974, Parts III and X.
[147] *Ibid.,* 8117.

Chapter 8 of the Commission's report specifically addressed the questions of theory and practice connected with the organisation and control of messengers-at-arms and sheriff officers; and the Debtors (Scotland) Act 1987, Part V, legislated on the regulation of organisation, training, conduct and procedure of messengers-at-arms and sheriff officers. It has been said of Part V of the 1987 Act, that its effects "reorganised messengers-at-arms and sheriff officers into an established professional body, taking its place alongside the Law Society of Scotland and other official legal institutions in Scotland." [148] But, fair comment as that may be, the result was achieved at the expense of the messengers-at-arms being able to follow the model of professional independence. In France, for example, since the law of 2nd November 1945, the National Chamber of Huissiers and its members have been counted amongst the liberal professionals of their country, with the privileges of self-regulation and discipline associated with that status. However, the Scottish Law Commission recommended, "Sheriff officers should not become a self-regulating and self-disciplining service. The functions of appointment, supervision and control of sheriff officers should continue to be exercised by sheriffs principal and should not be transferred to a new central authority having such functions in respect of sheriff officers and messengers-at-arms." [149]

What sort of a future was therefore available for the only existing representative body of officers? The Law Commission wrote that they "briefly described above the extremely useful role presently played by the Society of Messengers-at-Arms and Sheriff Officers in representing officers of court and in other ways. In Consultative Memorandum No. 51 we suggested that all officers should be required by law to be members of the Society …" [150] "Our proposal evoked a mixed response from those consulted. On reconsideration we recommend that membership of the Society should not be compulsory. It is, we think, a fundamental principle that officers of court should be controlled by the courts. If membership of the Society were compulsory there would be inevitable conflicts between the Society and the disciplinary authorities over control of officers; compulsory membership of the Society is only compatible with a self-regulating service of officers of court." [151]

[148] A.M. Clark, Obituary of T.C. Gray, *The Double Tressure* (pub. Scottish Heraldry Society), 1992.
[149] *Scot. Law Com. No. 95*, 8.20.
[150] *Ibid.*, 8.149.
[151] *Ibid.*, 8.150.

One could not have imagined that the reformed procedures provided by the Debtors (Scotland) Act 1987 would so quickly and so sorely be tested to the limited. Moreover, the story of the introduction by the Conservative government of the community charge or poll tax, as it quickly became known, and the abolition of poinding will be seen to be inextricably linked. "For the Queen, Friday 15th May 1987 was a busy day," wrote Professor George L. Gretton in 2001. "Thirty four Public Bills were presented to her for signature … [including] the Debtors (Scotland) Bill and the Abolition of Domestic Rates (Scotland) Bill. Only those with second sight could have known that their fates were to be linked, and that much of the former was destined to founder in the storm caused by the latter … Whether Mrs. Thatcher's premiership was one casualty [of the poll tax] historians will decide. But that poinding was killed by the poll tax is more certain, albeit more remarkable." [152] In both cases agitators' verbal attacks were to be made upon the sheriff officers' profession. In both cases those attacks were politically successful. The irony is that the Society of Messengers-at-Arms and Sheriff Officers had warned the government in May 1986 that it had completely miscalculated the anticipated task of enforcing the number of warrants in the first place. [153]

On 4th March 1989, in the Glasgow City Halls, and at the All-Scottish March in opposition to the new form of local government tax, the Scottish Anti-Poll Tax Federation was formed. Its chairperson was Tommy Sheridan. [154] Leaflets were issued: Scottish Anti-Poll Tax Federation - "Poll Tax Busters - No Sheriffs Here", with advertised "hotlines" for those subject to sheriff officers' attention to telephone for advice. Under the heading, "The Sheriffs Are Coming - Ignore Them and Keep Them Out!", this was the advice on offer: "Over three hundred thousand initial summary warrants had been issued (as at 1st April, 1990) these have been followed by sheriffs (sic) letters in selected areas. These letters are your final four day notice prior to action! They are designed to scare you into visiting your local office to make an agreement to pay. OUR ADVICE IS TO IGNORE IT! STAND FIRM, WE ARE WINNING. DON'T MAKE THEIR DIRTY WORK EASY. THE FORCES AGAINST US ARE WEAK. 191 SHERIFFS HAVE TO COVER THE WHOLE OF SCOTLAND **WITH OVER ONE MILLION NON-PAYERS, THEIR TASK IS A HOPELESS ONE**. The 31st March demonstration in Glasgow was the largest gathering since the 1926 General Strike!

[152] G.L. Gretton, *Scots Law Times*, 2001 (News) 255. (Professor Gretton was a member of the Working Group to find an alternative to poinding and sale).
[153] R.A. Macpherson, *ibid.*, 289.
[154] *Vide* Tommy Sheridan and Joan McAlpine, *A Time to Rage* (1994).

THE HUGE PROBLEM FOR SHERIFFS IS THAT THEY HAVE TO FIND A COLLECTION METHOD. IT IS EASY FOR THEM TO SEND OUT THREATENING LETTERS BUT QUITE A DIFFERENT MATTER TO CARRY THE THREAT THROUGH. DON'T MAKE IT EASY BY VOLUNTEERING THE INFORMATION WITH REGARD TO YOUR WORKPLACE OR BANK. … DON'T ANSWER THE DOOR - DON'T LET THEM IN - TELL THEM WHERE TO GO! If you ignore them in this way, they are more than likely to leave you with an instruction that they will return at a given time and date. THIS IS THE INFORMATION WE NEED TO MOUNT AN EFFECTIVE DEFENCE OF YOUR PROPERTY. PHONE YOUR LOCAL ANTI-POLL TAX UNION IMMEDIATELY SO THAT WE CAN SET OUR PLANS IN MOTION. YOU HAVE TIME TO BUILD YOUR OWN STREET AND NEIGHBOURHOOD DEFENCE SQUADS. YOU WILL FIND MOST PEOPLE ONLY TOO WILLING TO STAND SHOULDER TO SHOULDER AND ENSURE THAT THE SHERIFFS WILL NOT PASS. … GIVE THE SHERIFF A WARNING - ERECT A SIGN OR PAINT A WALL, **NO SHERIFFS HERE, PROCEED WITH CAUTION.** Remember, every successful poinding, every agreement reached to pay will prolong the life of the poll tax and with it Thatcher's government."

The front page of the Glasgow *Evening Times* on 10th July 1990 carried the headline, "Sheriff officers children face hell in the playground - LIFE OF FEAR IN POLL TAX WAR". "A lengthy catalogue of threatening incidents was revealed when leaders of the Society of Messengers-at-Arms and Sheriff Officers broke their silence today. The incidents include - officers being set upon and chased to their car by groups of people - their car doors being kicked, windscreens smeared with grease and wiper blades wrenched off. - Sheriff officers' premises being occupied and staff put in a state of fear and alarm - officers being verbally abused and threatened by angry protesters, even when carrying out non-poll tax duties. Society President Raymond Stephenson said: "Everybody has the right to protest against something like the poll tax in a democracy. But I don't think it is right that they should single out sheriff officers to take it out on … one of our members said he was gravely concerned because his child was being picked on at school. … He said the message the Society was trying to put across to the public was that the sheriff officers were simply the authorised agents of the court, empowered to carry out an official function."

This was a message, however, that seemed to be falling on deaf ears: as the article stated, "poll tax demonstrators today brought chaos to the first press conference by Scotland's

sheriff officers. Demonstrators forced their way into a function room at the Kelvin Park Lorne Hotel as leaders of the Society of Sheriff Officers were making their closing remarks after complaining about harassment and attacks. Faced with a barrage of verbal abuse and chants the sheriff officers hurriedly left the room. That left Strathclyde Anti-Poll Tax Federation leader Tommy Sheridan to hold an impromptu press conference for the benefit of more than 30 journalists, photographers and TV crews." The editorial in the following day's edition of *The Scotsman* acknowledged that, "like it or not, the sheriff officers had been caught up in the political debate about the charge and are now the targets of abuse by some anti-poll tax campaigners. In that impossible situation, which prejudices their professional impartiality, they deserve some sympathy. The disruption of their press conference clearly illustrated the difficulty they face when attempting to do their job. Irrespective of the rights and wrongs of non-payment as a legitimate political protest, all of this presents a serious and growing problem for both the local authorities and the Government." Tommy Sheridan, however, was unrepentant about his choice of target: the *Scottish Daily Express* (11th July 1990) quoted the shouting Sheridan, "These people have been complaining about harassment. That's ironic, coming from men who are professionals when it comes to harassing people who cannot afford this tax. They make their living from angry people living in despair and poverty." He dismissed the sheriff officers as "animals". [155]

Tommy Sheridan was also amongst the anti-poll tax activists who caused the demonstration at the Balmoral Hotel in Edinburgh in the course of the Spring meeting of the U.I.H.J. in May 1993. Taking possession of the function room in which the civic reception for the Union was due to take place, their demonstration - a peaceful one - included constant chanting of the refrain, "No more warrant sales in Scotland!" In retrospect, it was a clear warning that a campaign against a highly controversial and widely unpopular fiscal measure by Mrs. Thatcher's government was developing into a campaign against the very principle of lawful execution.

On 1st July 1999, Her Majesty the Queen opened the new devolved Scottish Parliament in Edinburgh. Tommy Sheridan was now a member of it, and a party leader too, of the Scottish Socialist Party. On 24th September 1999 he introduced a Bill to the Scottish Parliament to

[155] Tommy Sheridan and Joan McAlpine, *op. cit.*, p. 148: "'These people are animals,' I shouted. 'How dare they try to justify breaking into the homes of the poor and stealing their possessions!'"

abolish the diligence of poinding and sale. His intention to do so was public knowledge since the month of August. On 2nd September the Minister for Justice had instructed the Scottish Law Commission, "To reconsider, as a matter of urgency, whether the conclusions, as set out in the Report on *Diligence and Debtor Protection* (1985) …, that the diligence of poinding and warrant sale should not be abolished remain valid." In 1985 the Scottish Law Commission had come to this conclusion: "In recent years, the diligence of poinding and warrant sale has become probably the most unpopular diligence in Scotland as well as being the most frequently used. It is tempting to conclude from this that the diligence can simply be abolished as a humanitarian reform equivalent to the virtual abolition of civil imprisonment and as the logical next step in the progressive development of the law. We think that this temptation should be resisted unless it can be demonstrated that an alternative mode of enforcement can be devised which would be as effective and more socially acceptable. Having considered the matter anxiously and at length, we believe that such an alternative cannot be devised." [156]

The Scottish Law Commission issued three publications under this 1999 reference: in October 1999, a *Memorandum to the Justice and Home Affairs Committee*; in November, its *Discussion Paper No. 110*; and in April 2000, a final *Report on Poinding and Warrant Sale*. The Law Commission's work showed how changed was the situation between 1985 and 1999: poinding was no longer the "most frequently used diligence" - the procedure of earnings arrestment, introduced by the 1987 Act, was currently much more often used. [157] But some things stayed the same. It answered thus the Minister's question about whether the 1985 decision to reform and retain poinding and sale remained valid: "… we conclude that total abolition of diligence and sale would breach the principle of avoiding legal isolationism. What that principle does suggest is that Scots law should retain the diligence subject to reform of any weaknesses in the present law." [158] Moreover, on the narrower issue of poinding in commercial premises the Law Commission's advice was unequivocal: "We are of the view that poinding and sale in non-residential premises is an effective diligence and we can identify no reason why creditors should be forced to use insolvency procedures to attach assets kept in those premises. [159] "For these reasons we take the view that no case has been made for abolishing poinding and sale in non-residential premises." [160]

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[156] *Scot. Law Com. No. 95*, 2145.
[157] Scottish Law Commission, *Discussion Paper No. 110*, Table D, p. 17.
[158] *Scot. Law Com. No. 177* (*Report on Poinding and Warrant Sale* (April 2000)) 2.46.
[159] *Ibid.*, 2.66.
[160] *Ibid.*, 2.68.

On 11th January 2000, representatives of the Society of Messengers-at-Arms and Sheriff Officers gave evidence before the Justice and Home Affairs Committee of the Scottish Parliament. Referring to the recently published works of the Scottish Law Commission, the Society made this statement: "In light of these and other reports, we maintain our view that the committee should recommend to the Parliament that the general principles of the bill to abolish poindings and warrant sales be rejected. … Scotland should not be out of step with the international community. Other legal systems provide for the attachment of moveable property. … The ability to attach moveable property is an essential component of any effective system regulating the rights of creditors and debtors. … It has to be recognised that without an effective sanction such as that provided by poinding procedure, more people would not pay their debts. The interests of vulnerable members of society should, and could, be protected without the abolition of poindings or warrant sales procedure. The Parliament could substantially reduce the number of summary warrant poindings that are carried out by extending the protection that local authority debtors currently receive under the 1987 Act and by implementing procedures that were identified by the Law Commission." The Society quoted with approval this statement from the Scottish Law Commission: "The method adopted by modern legal systems to protect debtors from the harsh consequences of attachment and sale of articles of moveable property is invariably by providing exemptions from that form of enforcement rather than by its abolition." [161]

However, in spite of this advice, in the Abolition of Poindings and Warrant Sales Bill's Stage 1 Debate (27th April 2000), Jim Wallace, the Minister for Justice, said "Like him [Tommy Sheridan], we want to consign poindings and warrant sales to the history books." [162] Poindings and warrant sales must go; efforts should be concentrated on finding a workable but humane alternative. He gave this commitment, in an attempt to persuade Parliament to await an Executive bill to abolish poinding, rather than proceed with the present member's bill: "… before the end of parliamentary year 2001-02 we will introduce legislation to abolish the present system of poinding and warrant sale and replace it with a modern and humane alternative. … The key elements of the reform will be protection of the vulnerable debtor - those who genuinely cannot pay - and vigorous pursuit of those who can pay but are reluctant

[161] Scottish Parliament, Justice and Home Affairs Committee *Official Report*, col. 565/6.
[162] Scottish Parliament *Official Report*, vol. 6, no. 2, col. 166.

to do so … . We also intend to establish a working group to give effect to those principles. It would be a working group primarily of this Parliament, with a wide membership. I hope that Mr. Sheridan would agree to be a member of that group." [163]

In fact, the second question in the Minister's reference to the Scottish Law Commission in September 1999 had already been, "To consider whether there are alternative measures that might replace and be no less effective … while still protecting the legitimate interests of creditors … and the interests of debtors." To this, the Scottish Law Commission's comment might have been taken as a pretty clear answer: "We take it to be evident, and we hope it is agreed on all sides, that none of the other diligences (as distinct from insolvency proceedings) could perform the realisation, identification and deterrence roles of poinding and sale." [164]

So should our "alternative" be a diligence with the main features of poinding, but with a new name? The Law Commission had already made this comment: "Legislation could change the procedure (though … the scope for that may well be limited) and call it by another name. That however might be justifiably criticised as not creating an alternative but rather as mere cosmetic surgery." [165] Indeed, the final *Report* expressed this point as follows: "We recognise that the word 'poinding' and even more the phrase 'warrant sale' have highly emotive connotations, and that there may be some symbolic value in changing the name of the diligence while retaining its substantive provisions. However we would stress the limited nature of this change. It is not one we recommend." [166]

The Parliament, however, was in no mood to approve the Minister's proposed amendment, which would have put the Scottish Executive in charge of the abolition process, rather than Tommy Sheridan's bill. The Executive faced the clearest prospect of a rebellion by its Labour and Liberal members. The Executive had to withdraw its amendment, and the general principles of the bill were approved on 27th April 2000 by 79 votes for, 15 against, and 30 abstentions. At Stage 2, the Scottish Executive fixed upon the date of 31st December 2002 as the day by which poinding would have stopped. In the Stage 3 Debate, on 6th December 2000, Tommy Sheridan and the bill's co-sponsor, John McAllion, argued in favour of abolition

[163] *Ibid.*, col. 168/9.
[164] Scottish Law Commission, *Discussion Paper No. 110*, 3.13.
[165] *Ibid.*, 3.12.
[166] *Scot. Law Com. No. 177*, 2.51.

coming much sooner. Their amendments were unsuccessful. However, the bill was carried by the Parliament that day, without a division: the abolition of poinding was unanimously approved. The Act received Royal assent on 17th January 2001.

At least one commentator published a warning about the logical effect of this abolition - assented to before neither the Executive nor the Parliament had any idea of what to put in place of poinding: "what they have abolished is the *only* legal measure ordinary creditors have to attach a debtor's moveable property in either the debtor's or the creditor's own custody. More simply, it is the only way to make any of the debtor's corporeal moveable property, not safely in the hands of third parties, available to ordinary creditors, without having to bankrupt the debtor first. We are not talking about basic household items: they are already exempt. But we are talking about every other class of moveable property - in every sort of premises." [167]

Although organisations like the Law Society of Scotland and the Society of Messengers-at-Arms and Sheriff Officers had spoken against the general principles of the bill, the parliamentary committees had found the evidence of other parties more persuasive. "The main case for the Bill was made by Mr. Sheridan himself, whose principal objection to poindings and warrant sales was a moral one, namely that they were based on 'fear and intimidation' and exacerbated problems of multiple debt. He expressed the hope that the Parliament 'would have the vision and the political courage to take us into a new century without this 16th century practice". [168]

In fact, the Justice and Home Affairs Committee gave particular emphasis to testimony that had been given to the Social Inclusion, Housing and Voluntary Sector Committee, which heard evidence from people who had lived with problems of multiple debt and the threat of poinding. "One such witness, Kait Laughlin, gave a powerful and moving account of the distress caused to her family: 'My mother is 78 years old next week and has lived with the fear of warrant sales all her life. She still jumps when letters come through the door. When I asked her whether she would come through to speak to the Committee, … she said that she was too ashamed … that is the effect that it has on people'." [169] The same witness from the

[167] R.A. Macpherson, *Scots Law Times*, 2001 (News), 289.
[168] Justice and Home Affairs Committee, *Stage 1 Report on the Abolition of Poindings and Warrant Sales Bill*, s. 20.
[169] *Ibid.*, s. 21.

Communities Against Poverty Network had given her evidence on 17th November 1999; she was quoted also in the Social Inclusion, Housing and Voluntary Sector Committee's final report: "Kait Laughlin spoke of her own distress as a child, seeing her parents forced to borrow from illegal money lenders. She felt that 'poindings and warrant sales are a form of legalised loan sharking'. To those who argued that poindings and warrant sales worked, she said: 'They work because they terrify people; they terrify, intimidate, bully and harass people because they are poor'." [170]

Tommy Sheridan made the opening speech in the Abolition of Poindings and Warrant Sales Bill: Stage 1 Debate on 27th April 2000. "This Bill is part of a long journey", he said. "For 300 years, those with power have had access to legal terror. Poindings and warrant sales have been establishment tools of intimidation and fear - tools wielded by the unaccountable and often ruthless sheriff officers to punish the poor for the crime of being poor." [171] He contrasted the evidence of such organisations as Communities Against Poverty Network and scores of others, as forming "a moving testimony to the reality of poindings and warrant sales as they affect the poor - as opposed to the marble-mouthed pontifications of those in privileged positions of economic security". [172] He continued, "Colleagues, this is the first members bill and it is the first test of the sovereignty of the parliamentary committees, which have listened to all sides. They have listened to the privileged elites and to the legal establishment: the Law Society of Scotland, the Scottish Law Commission, the Society of Messengers-at-Arms and Sheriff Officers, which represents Scotland's sheriff officers. I have often referred to them as Rottweilers in suits, but I must qualify that statement: many Rottweilers are often better behaved. How pathetic, then, that the Minister for Justice relies upon a report by the privileged and exclusive Law Commission rather than the studied reports of the parliamentary committees."

Referring to the Society of Messengers-at-Arms and Sheriff Officers, he said: "That unaccountable bunch of bullies presented evidence to the Justice and Home Affairs Committee to the effect that the removal of poindings and warrant sales would not lead to sheriff officers being financially disadvantaged, saying: 'Generally, we do not derive our income wholly from poinding and warrant sale'." The gloss he put on that quotation from the official report was

[170] Section 26.
[171] Scottish Parliament *Official Report*, vol. 6, no. 2, col. 162.
[172] *Ibid.*, col. 163.

misleading and, indeed, in error. But he continued with this seeming act of exposure of venality: "In the minutes of its annual general meeting last year, however, the Society of Messengers-at-Arms and Sheriff Officers admits that its members' very livelihoods are at stake". [173]

On the basis of his "revelation", the convener of the Justice and Home Affairs Committee, Roseanna Cunningham, M.S.P. (also Justice spokesman of the Scottish National Party[174]) then entered into a correspondence with the Society of Messengers-at-Arms and Sheriff Officers. The letters were hardly free of traces of acrimony. On 4th May 2000 she wrote: "I am writing to you in connection with allegations made by Tommy Sheridan M.S.P. during the recent Stage 1 debate in the Parliament on the above Bill. As you will be aware, Mr. Sheridan referred directly, in his speech opening the debate, to the minutes of your society's A.G.M. last year, which apparently made clear that the Society's attitude towards the Bill were at odds with certain remarks you had made in evidence to the Justice and Home Affairs Committee. As I am sure you will appreciate, that is a serious allegation … . I regard it as essential to the proper functioning of the Parliament's committee system that witnesses to the evidence are open and truthful about the views of those they represent. Where it becomes apparent that a particular witness cannot be relied upon to meet this standard, committees may need to have recourse to the powers they have under the Parliament's standing orders to put witnesses on oath." The letter was published on the Parliament's website.

This received a robust response from the Society, dated 16th May. "We are shocked at the terms of your last paragraph. We represent an honourable Scottish profession. We are numbered amongst the officers of arms, the officers of court and the officers of law of this country. Messengers-at-Arms are officers of the High Court of Parliament itself. We bear the ensign of public authority. The daily workings of the civil courts depend upon the faith of our executions. *Why are we being menaced with oaths?*".

One month later, the convener replied that: "She took, strong exception to your suggestion that I was 'menacing you with oaths'. What I said in my letter of 4th May intended

[173] *Ibid.*, col. 164.
[174] The leader of the S.N.P., Alex Salmond, in an article in the *News of the World* (22nd August 1999), gave an early commitment, for himself and party, on the issue: "Warrant sales should have been banned years ago"; and of the Sheridan Bill he said, "I'll back it. So will the S.N.P.". (*Impecunias*, issue 37 (August 2000), p. 1).

to make clear the consequence that might follow if the apparent discrepancy between your evidence and the true position of your Society turned out to be a real one." "Having said that", however, she continued, "I am now prepared to accept, in view of what you say in the remainder of your letter, your assurance that you had no intention to mislead my committee".

The Society did not let the correspondence rest here. The Society pointed out that Tommy Sheridan's claim for his bill in his Financial Memorandum - that there were "no costs expected" for any sector of the community if poinding and sale were abolished without any sort of a replacement - "was beyond the line of possibility". As the Society's representative wrote to the Convener on 11th August 2000, "why should it be held a 'serious allegation' if Mr. Sheridan suggests an apparent discrepancy, but not one if I do? … I think it would become harder for a Convener, 'acting in the general and non-partisan interests of the Committee, and of the Parliament more generally' to refute an accusation of partiality if suggestions from only one side of the argument are treated as 'serious'." The correspondence concluded on 19th September 2000 when the Convener wrote, "I am sorry that we continue to differ on whether I should have challenged Mr. Sheridan about the statements made in the Financial Memorandum to his Bill about its estimated costs. While I note what you say in your latest letter, I remain unconvinced."

Her Justice and Home Affairs Committee, in its *Stage 1 Report on the Abolition of Poindings and Warrant Sales Bill*, had already acknowledged that "This Bill does not attempt to tackle all the problems of diligence which have become apparent from the evidence that we have heard. … [However] this Bill is a model of what a member's Bill should be - short, tightly focused and not too ambitious in the extent of the changes it proposes to existing statutory provisions. We support the principle behind the bill." [175] The Committee's report pre-dated the publication of the final response awaited from the Scottish Law Commission. Of this, the committee wrote, "We welcome the steps that the Minister for Justice has already taken, and look forward to the Scottish Law Commission's Report. But the development of policy cannot simply be left to the Commission, which has already shown itself to be overly inclined towards caution." [176]

[175] Justice and Home Affairs Committee, *op. cit.*, s. 47.
[176] *Ibid.*, s. 48.

Sheriff officers were again playing a part in high drama. "Dramatic" may perhaps seem an extreme term: but how else could one described the hostile caricatures of stage sheriff officers that had so far peopled this theatre of war of words? That was how the following contemporaneous expressions of dismay at the way Parliament was dealing with the bill were introduced in a published article by a sheriff officer. "'A family issued with a warrant sale will see their home forcefully pillaged by a mob of lackeys', wrote Alex Neil M.S.P. of the Scottish National Party in one article. [177] Warrant sales are 'Legalised robbery' - poindings, 'establishment tools of intimidation and fear - tools wielded by the unaccountable and often ruthless sheriff officers to punish the poor for the crime of being poor', says Tommy Sheridan. Anyone with a care for the truth would recognise this deprecation of the law and its officers - the sound-bites of 'barbarisms' and 'bully boys' - as patent absurdities: the terms of the Debtors (Scotland) Act 1987 leave no doubt that Scotland is a country in which the concepts of debtor protection and accountability of officers of court are very firmly established. The actors have not held the mirror to nature …

"I was in the balcony of the Parliament on 27th April, 2000 to listen to the Stage 1 Debate on the bill. To a simple server of summonses and enforcer of warrants of court, you can imagine my surprise when the prodigious scholarship of the Scottish Law Commission itself was called into question by Tommy Sheridan because - oh enormity! - the Commission acknowledged that it had so much as spoken with *me*! Here is the punch line, as delivered by the matinée idol: 'The Law Commission's Report is not an independent set of suggestions to

[177] *Credit Today* (October 1999), p. 15. In this article Alex Neil made a number of errors. He claimed that, "the newly formed Scottish Parliament succeeded in doing in three weeks what [the] Labour [Party] have been promising to do for 100 years." In spite of repeated claims in the Parliament that in the 19th century the Labour party in Scotland "committed itself to abolishing poindings and warrant sales", in fact what the programme of the Scottish Labour Party, inaugurated on 25th August 1888, included was a commitment to a "Homestead Law to protect furniture and tools to the value of £20 from seizure for debt" - a very different thing to total abolition (*Vide* David Lowe, *Souvenirs of Scottish Labour* (1919) p. 4). Next, he stated, "There is no escaping the truth that warrant sales are barbaric procedures and violate basic human rights as laid down in the European Convention of Human Rights. Article 1 of the First Protocol (Protection of Property) states that: 'Every natural or legal person is entitled to the peaceful enjoyment of his possession. …' " In October 1999 the Scottish Law Commission disposed of these grounds for objection to poinding (Scottish Law Commission, *Memorandum … to the Justice and Home Affairs Committee* … , s. 35). Finally, he suggested that Scotland's "inhumane" and "ineffective" procedure should be contrasted with the "effective" Scandinavian methods. It was one of his recurring themes that the "Scandinavian model" supported the case for abolishing execution against corporeal moveable property. Dr. Wendy Kennett (*Credit Today* (November 1999) p. 16) described Alex Neil's references to other jurisdictions as "partial and misleading". Acknowledging the considerable protection of debtors in Scandinavia, she stated that "All European legal systems allow seizure of property as a means of enforcement". In this same edition, John Marston, Sheriffs' officer in Birmingham, made this offer (p. 17): "If Mr. Neil could bear to sit down with an English Sheriffs' Officer, then I would be very pleased to have an exchange of views, and share my national and international experience." It is doubted if the Scottish National Party availed itself of the opportunity to carry out such further research.

improve the debt recovery system; it is a tainted report designed to defend the privileged elite of sheriff officers.' I waited in vain for the parliamentarians' laughter at this little turn of unpleasantry. Instead, spouts of sheriff officers as 'Rottweilers in suits', and 'unaccountable bunch of bullies' were heard in apparently serious silence by the audience. When the Minister for Justice gave his speech, it was one of protest: but only one protesting the 'much common ground on this issue' between the Executive and Mr. Sheridan.

"On 8th June, Jim Wallace made good his promise in the Stage 1 Debate that there should be a 'working party' set up to hunt for the elusive 'alternative measures that might replace and be no less effective … while still protecting the legitimate interest of creditors in the recovery of legally constituted debt and the interests of debtors'. He has confirmed that 'a complete set of measures covering all types of property' must be available to the diligence system. Yet having committed himself to abolishing poinding, he may find difficulties … 'He must recognise it is the Parliament's settled will to abolish these inhumane practices … any alternative must bear no semblance to poindings and warrant sales' (Alex Neil).

"One year on, this is where we sheriff officers stand. Having performed our duty in giving Parliament the benefit of our informed advice on the issue of poinding - which we have done, both to stress that the abolition of execution against moveable property as a category is a complete nonsense; but also that sheriff officers welcome Parliament's interest in addressing the important social question of the competing social rights of creditors and debtors - we find we are not invited to play any part in the Minister for Justice's 'working party'. Cast in the role of villains of the piece - the 'Greedy Rottweilers' of the political pantomime - it is perhaps little wonder that no speaking parts would come to us. Let me remind you that Tommy Sheridan, on 27th April, won this astonishing *homage* from a minister of the Crown in Parliament: 'The Executive is entirely opposed to the present system … which, without doubt, is truly archaic, inhumane and deeply, deeply offensive.' How could we, who argued conceptually in favour of poinding as a proper means of ensuring that legal debts are paid - and seen to be required to be paid in this society - have so lost the plot?" [178]

The Working Group, to find a "workable and humane alternative to poinding and warrant sale" was indeed set up, its chairman being Angus MacKay M.S.P., then Minister for

[178] R.A. Macpherson, *Impecunias, op. cit.*.

Finance and Local Government (formerly the Deputy Minister for Justice). Tommy Sheridan M.S.P. and Christine Grahame M.S.P., the Scottish National Party's representative on the Committee, were soon being quoted in the newspapers about this: "Tommy Sheridan was joined by the S.N.P. in walking out of a cross-party Committee charged with finding an alternative means of debt collection. Claiming that the remit meant approving 'warrant sales by any other name', … he said that defining the Committee's 'sole remit' as looking at alternative means of 'attachment of moveable assets' was an unacceptable straight jacket. 'Whatever way you look at this, it is poindings and warrant sales by another name,' said Mr. Sheridan. … Ms. Grahame agreed: 'What the Lab-Lib Government are trying to do is reintroduce the discredited system of poindings and warrant sales under another name. That is not what the Justice Committee recommended, and not what the Scottish Parliament voted for'." [179] One did not doubt that Tommy Sheridan had a clear definition of what "poind" meant: his book stated that "Poind is a Scots word meaning to identify and value goods for a future sale." [180]

The situation was chaotic. And into the catalogue of misfortunes that beset the profession came the following, rather unexpected, one: even the profession's undoubted monopoly in the *personal service* of Court of Session documents would be, in this respect, ended. [181] In September 2000, without consultation with the Society of Messengers-at-Arms and Sheriff Officers, an Act of Sederunt was made to alter the procedures for Applications under section1 of the Administration of Justice (Scotland) Act 1972 - these being the provisional and protective measures for seizing evidence. Hitherto, the petition and order of the Court had always been served personally by a messenger-at-arms, usually in the presence of the advocate appointed as Commissioner under the order. However, the new rule was that "The order of the Court shall be served by the Commissioner in person". [182]

Notwithstanding the change, messengers-at-arms have generally still been invited to participate by the Commissioner, as persons "he considers necessary to assist him to execute the order". [183] But this does not disguise the fact that the messenger's *locus* is lost; indeed, his

[179] *The Herald*, 6th October 2000.
[180] Tommy Sheridan and Joan McAlpine, *op. cit.*, p. 140.
[181] Anciently, it was only summonses of treason that could not be served by a messenger; a herald or pursuivant, bearing a coat of arms, was required instead. J. Balfour Paul, *op. cit.*, p. 89.
[182] Act of Sederunt (Rules of the Court of Session Amendment No. 4) (Applications under s.1 of the Administration of Justice (Scotland) Act 1972) 2000, s. 64.8.
[183] *Ibid.*, s. 64.11 (3) (a).

continuing involvement reinforces the impression that no practical benefit is gained by this restriction upon the messenger's authority to serve such orders. The explanation given for the move was that the European Convention on Human Rights had so increased the Court's awareness of the rights to confidentiality of the party being served with the order that it was necessary for the Commissioner, as a legally qualified person, to serve the order and explain its terms himself. Some messengers-at-arms have taken this as an insult to a profession whose competence properly to understand, to explain and to preserve confidences had never before, as the profession had believed, been doubted by the judges.

Such a development was a mere detail; in December 2000 officers were concerned with the prospect of bigger problems. Here is one officer's summary of the situation caused by the abolition of poinding: "If the Scottish courts and their officers are now facing the indignity of being unable to resolve routine debt cases, Scottish society must look out for the hazards of private justice. See what is already happening. On this very day of writing, a Christmas fax has arrived with Scottish businesses. Across the seemingly cheerful page chases Santa Claus, in a sleigh drawn by three reindeer. It is from English debt collectors. This is their message: 'When is the best time to visit a Debtor? When he's got money of course! Your Debtor is spending yours on his family … So who's going to have a Merry Xmas?'. The same company has previously told its Scottish readers of the answer to their problems: 'Are you owed money? Is your debtor laughing? Has the legal system handcuffed you? Is the Bailiff a pussy cat? Would you like the last laugh?'. No wonder such companies see a business opportunity in Scotland, when removing the officers of court from many debt recovery situations has become the Scottish Socialists' crusade. Amongst the judicial officers of the world, the intemperate words of some M.S.P.s against our internationally respected and publicly accountable enforcement system make Scotland a laughing stock." [184]

**The period 2001 - 2003**

The New Millennium continued its trend of turning things upside down in Scotland. The Working Group submitted its report, *Striking the Balance: A New Approach to Debt Management*, to the Minister for Justice in July 2001. The final report was not the only document it published. In its *Comparative Study of Foreign Legal Systems*, (another area that

[184] R.A. Macpherson, *Scottish Parliament Law Review*, Issues 10 and 11, (December 2000), p. 11.

had already been covered before by the Law Commission), the group revisited the issue of whether warrant sales were, as some have put it, a peculiarly "Scottish evil"; or whether the attachment and sale of corporeal moveable property forms a feature of other countries' enforcement procedures. The following are extracts from annex A, summary of principal research results, based upon comparative studies of Western Australia, England and Wales, France and Sweden: "All the countries provide for goods necessary for at least basic living to be exempted from any enforcement against moveable property. These are not more favourable to the debtor than the Scottish exemptions," and "Enforcement against corporeal moveable property is considered to be socially acceptable in all countries." In short, the general principles of poinding were, belatedly, now being approved. As one commentator put it, *Striking the Balance* was "a report importing some sanity into the debate." [185]

But some were questioning the practical use of a report from a working party whose membership had excluded our profession. "Not one of the authors of the report has front-line experience of collecting debts from recalcitrant individuals", wrote a sheriff officer. The report, he said, "fails to answer the practical question of how to collect debts … . It makes little comment on costs, but acknowledges that [the] introduction and operation of the new caring processes will be expensive. Who then is to pay?" He concluded, "In its composition and mindset, the working party's report is reminiscent of the deliberations which led to, in my opinion, the greatest disaster of public policy in Scotland in the second half of the 20th century - the community charge. … Debt collection professionals were ignored then with disastrous results … . The result, I forecast, will be a legislative muddle born as a sop to political correctness, and the people it purports to protect will be those who will suffer most." [186]

In fairness to Tommy Sheridan, he did have an alternative remedy for creditors in mind, such as did bear no "semblance" to poinding: "the remedy of disclosure". Tommy Sheridan was instrumental in the setting up of an alternative working group, "The Improving Debt Recovery Working Group", which in December 2000 published a report, *Improving Debt Recovery in Scotland*. "No-one can doubt that the Scottish Parliament does not wish to see the introduction of poindings and warrant sales by any other name. Introducing a form of diligence that involves the forcible entry into a debtor's home to attach debt to moveable

[185] Philip Evans, *Credit Today* (September 2002) p. 19.
[186] Adam Lewis, *Credit Today* (August 2001) p. 19.

property would frustrate Parliament's will. Accordingly, a humane alternative solution must be found. … A two-fold solution to these problems could be considered as follows. Firstly, creating a limited system of 'disclosure' by third parties to creditors in certain circumstances would overcome the inability of creditors to utilise bank and earnings arrestment. … Secondly, there is no reason, in principle, why local authorities should not be entitled to apply to the Secretary of State for Social Security for a maximum benefit deduction … against non-means tested benefits". [187]

The report acknowledged that the chapter entitled, "A Replacement For Poindings and Warrant Sales - The Remedy of Disclosure", was based upon a paper by Mike Dailly, Principal Solicitor to the Govan Law Centre, and a close adviser of Tommy Sheridan on the issue. The bill that he had helped to draft, of course, was intended to abolish poinding in all circumstances, both in commercial premises, as well as in dwellinghouses. It was characteristic of the degree of confusion on this point that tended to favour the abolitionists' cause, that this was the first line in his chapter: "Is there a need for a general diligence *against household moveable property* in Scotland?" [188]

The consultation period on *Striking the Balance* ended on 17th October 2001. In December the Scottish Executive published on its website a *Summary Analysis of Written Responses to Consultation*, based upon 91 replies. (The response rate, at approximately 10%, was described as relatively low.) The Executive stated the main findings, as follows: "The recommendations in the report were, as a whole, extremely well received and supported by those who responded. … all agreed with the guiding principles … that improved advice and information for debtors at an early stage is the key to achieving better outcomes in resolving debt cases." The Summary continued that, "There was also significant support for the group's conclusion that there was no alternative to providing for some means of last-resort enforcement against valuable but non-essential property"; yet it admited that the "main objections were in relation to the recommended final stage", - a forced sale of goods. "Dissent … was low", the Executive wrote, "mostly under 10%". But 8% of consultees who responded would not even accept "*that some form of sanction is necessary*". Moreover almost a quarter (24%) were against the working group's view "*that, excluding the possibility of civil imprisonment, the only alternative is to provide for some means of enforcement against valuable but non-essential*

[187] *Improving Debt Recovery in Scotland* (December 2000), pp. 30 and 31.
[188] *Ibid.*, p. 28 (my italics).

*property*". The Executive stated that "No new alternative proposals were put forward" by the report's critics.

On 7th May 2002 Jim Wallace introduced to the Scottish Parliament the long-awaited Debt Arrangement and Attachment Bill. It received wide support, the Society of Messengers-at-Arms and Sheriff Officers, for example, stating that it supported the Executive's basic approach: balancing new rights for individual debtors better to arrange their affairs, but also keeping in place a swift and effective diligence - now called "attachment" - against the corporeal moveables of debtors in commercial premises, and furthermore, retaining a remedy against appropriate property in dwellinghouses - by "exceptional attachment orders" - subject to new controls by the courts.

It was becoming evident that Scotland would not, after all, become a country without any form of execution against moveable property - which had seemed the logical inference of the abolition of poinding. Given all that had been said, the Executive now seemed to have surprisingly little difficulty in putting through a bill to establish its "new" diligence of attachment. The proposed new diligence had a very distinct "semblance" to poinding.

The Bill progressed as follows: the Social Justice Committee, as lead committee, took evidence in the following months; that Committee's report was published on 13th September; the Stage 1 debate before the whole Parliament took place on 19th September, when the general principles of the Bill were approved by a convincing majority; the Social Justice's Committee's consideration of the Bill at Stage 2 was completed on 30th October and the final amendments were made at the Stage 3 debate, before the whole Parliament, which took place on 13th November. On the motion of the Minister for Justice that the Debt Arrangement and Attachment (Scotland) Bill be passed, there voted 82 For, Against 4 (Dennis Canavan, Trish Godman, John McAllion and Tommy Sheridan), with 28 Abstentions (all S.N.P. members). The Bill, having passed its final stage, received Royal Assent on 17th December and the Act came into force on 30th December 2002 - one day before the Sheridan Act, which it repealed, would have taken effect. On that same day, the rules and forms were also brought into force by subordinate legislation. [189] The Scottish Executive by that date had also published the debt

[189] Act of Sederunt (Debt Arrangement and Attachment (Scotland) Act 2002) 2002.

advice and information package, required for immediate use in terms of Section 10 (3)(b) of the Act.

The Debt Arrangement Scheme, however, cannot operate until the Scottish Ministers, by regulations, make the further provision for the debt payment programmes, as authorised by s.7 of the new Act. No date by which this part of the new system will be introduced has yet been announced. In view of all of this, how ironic - bitterly so - that commentators have posed the question, has Scotland devised a more draconian system? Some have wondered if the procedure of the new alternative "is harsher than poinding and warrant sales". [190] Tommy Sheridan sees that he has been thwarted; he will not let the matter rest. The Scottish Socialist Party Manifesto, launched on 1st April for the May election for the second term of the Scottish Parliament, includes this commitment: "Abolish the 'son of warrant sales', the new debt recovery system introduced by the executive which perpetuates the same old, discredited debt recovery scheme under a new name." [191] Moreover, an officer of court has published in the Scottish legal press, based upon a detailed exposition of some of the terms of the Debt Arrangement and Attachment Act 2002, contrasted with the repealed sections of the Debtors (Scotland) Act 1987 and with the proposed reforms for poinding recommended by the Scottish Law Commission, a view that supports this contention: the new law of attachment is, in some important respects, a *less* "workable" and a *less* "humane" form of execution than was poinding. [192]

That officer now suggests that such a misdirection occurred because it was politically inexpedient to take sufficient notice of, and give credence to, the expertise - always willingly available to the Scottish Parliament and Executive from the Society of Messengers-at-Arms and Sheriff Officers and, indeed also, from the U.I.H.J. - of the profession with the most relevant experience of the practicalities of civil enforcement: our own.

Meanwhile, on 17th July 2002, a remarkable announcement was published on the website of Intrum Justitia, describing itself as Europe's leading Receivables Management Services Group and listed on the Stockholm stock exchange. The company said that it had, that day, "signed an agreement to acquire Stirling Park, one of Scotland's primary revenue

[190] Philip Evans, *Credit Today* (September 2002) p. 19.
[191] *The Herald*, 2nd April 2003.
[192] R.A. Macpherson, *Scots Law Times*, 2003 (News) 93.

collection management businesses." It was further explained that "Stirling Park specialises in high volume debt recovery for Local Government in Scotland … the company has a 27% share of the Scottish local authorities market, with a turnover of 3.75 million pounds in 2001. It is currently handling over 55 million pounds of debt … has 108 employees in its 6 offices, with headquarters in Glasgow." In fact, Stirling Park is a firm of messengers-at-arms and sheriff officers. On 10th May 2002 the firm had incorporated itself as a limited liability partnership, a corporate designation created by the Limited Liability Partnership Act 2000. The Messengers-at-Arms and Sheriff Officers Rules 1991 had not been updated to take account of such a statute in the year 2000; the rules therefore did not prohibit such a structure, as they only refer to a company as defined in Section 735 of the Companies Act 1985. The rules do state, however, "An officer of court may not (a) form a company within the meaning of Section 735(1) of the Companies Act 1985 for the purpose of exercising any of his official functions; or (b) exercise any of his official functions as an employee of a company within the meaning of Section 735(1) of the Companies Act 1985." [193]

Of course, any unforeseen consequences of the creation of limited liability partnerships would cause much controversy in the profession. By a curious coincidence, the very day before Intrum Justitia made its acquisition in Scotland, the following comment was sent by an officer to the Scottish Executive, in time for the deadline on submissions to its publication *Enforcement of Civil Obligations in Scotland: A Consultation Document*: "The profession is founded upon the personal obligation - formally entered into - of each officer to the Queen, in the administration of justice. In the past, every new sheriff officer (in Glasgow at least) was issued with a set of rules, one of which was that 'No sheriff officer shall … be entitled to engage himself to or being in the employment of, any person or firm, other than that of a sheriff officer or messenger-at-arms.' An arrangement whereby a messenger who was also a sheriff officer entered into a contract of employment with a person who held neither office was held by the court to be a *pactum illicitum*, so long ago as 1832". [194]

The Society of Messengers-at-Arms and Sheriff Officers's comments on the same point also addressed a danger to the profession that, although having been recognised, was not then known to be of such immediate importance. "Control of Sheriff Officers - Recognition of

[193] Messengers-at-Arms and Sheriff Officers Rules 1991 s. 14(5).
[194] R.A. Macpherson, *Scots Law Times*, 2002 (News) 16.

Status of Firm: The provisions for the monitoring and supervision of officers are framed in such a way that they relate to officers as individuals. Historically, it was the case that many offices acted as self-employed individuals. In the present day that is reversed, with most officers of court being employees of firms. The only recognition in legislation that identifies the existence of partnerships of officers is the requirement for a firm to obtain a bond of caution and professional indemnity policy. …

"Disciplinary provisions currently only apply to officers of court. There is no current requirement for a partner in a firm of Sheriff Officers to be qualified as a Sheriff Officer. In theory, a firm of Sheriff Officers could have no qualified Sheriff Officers as partners. Other professions have restrictions on unqualified persons being partners in firms. Solicitors, for instance, have a prohibition against the sharing of fees with unqualified persons and regulations on the designation of unqualified persons on nameplates or business stationery.

"If firms are to be recognised it follows that, at the very least, majority control of the firm should be held by commissioned officers. If there are partners who do not hold commissions as Sheriff Officers, they as members of the firm should also be liable to disciplinary proceedings. As loss of commission would not apply to an unqualified partner a new sanction should be introduced to bar someone acting as a principal in a firm of Sheriff Officers, if applicable on a finding of misconduct. There should be a prohibition on firms trading where there are no partners holding a commission in that firm."

Such was the interest in the situation with Interum Justitia within the U.I.H.J. that the published agenda for the meeting of the Permanent Council in Paris on 12th December 2002 was interrupted, to receive a report on these developments in Scotland from Sandy Walker. But not a single Scottish judge or other authority has, to date, given any public comment that might call the propriety of the acquisition of the business of messengers-at-arms and sheriff officers by an international debt collection company into question. In the meantime, the great majority of the sheriff officers employed with Stirling Park L.L.P. have resigned their membership of the Society of Messengers-at-Arms and Sheriff Officers, thereby joining that now significant number of officers of court who are not members of the Society. Another very large firm, no less than 42 of whose officers are not members of the Society, has a managing partner who himself is not a sheriff officer.

It is perhaps curious that sheriffs principal should tolerate a situation that might seem at odds with their previous statements about a sheriff principal's "primary concern" about the ways in which sheriff officers organise themselves or compete for business: "to ensure that those to whom he grants commissions carry out the paramount duty which they owe to him as officers of court. He could not close his eyes to developments which could lead to any impairment of that duty. A concentration of all sheriff officer work in a few hands … could seriously damage the traditional loyalty owed by a sheriff officer to the sheriff principal who granted his commission … a general free for all should not be allowed to develop." [195] Furthermore, in an unreported case, a sheriff principal in November 2002 stated that he held an officer's "culpability to be greater partly because he was senior partner … at all material times and had overall responsibility for its activities". [196] What could have been done if that "senior partner" had not been an officer of the sheriff? The fact remains, a sheriff principal has no apparent authority over any "senior partner" or other holder of a corporate interest in such a business, who is not himself a sheriff officer.

It has been a busy period of events connected with the profession. In December 2002 a case at Glasgow sheriff court was also turning upon the significance of the 1933 case of *Stewart -v- Reid*. In this present case, the sheriff made the following observation about sheriff officers acting as pursuers' agents: "while of course in no sense full-time employees of the pursuers, [they] must … be regarded as having become so closely identified with the interests of the pursuers as to jeopardise the independent nature of the office of sheriff officer. I therefore take the view that in no circumstances can a sheriff officer, whether a firm or an individual, be the lay representative or the drafter of a summons for a pursuer." [197]

The sheriff in 2002 was quoting Lord Sands from *Stewart -v- Reid*, as follows: "We are a law-abiding people. But it does sometimes happen that there is a sharp collision between local opinion and the action of the rating authority in some matter … One has certainly heard whispers of local resistance to the payment of rates arising out of such a collision, and there have been such collisions in England and Ireland. Deforcement is a grave criminal offence. In this view it appears to me most undesirable that the officer charged with the sometimes

[195] Macpherson, Petitioner, *Scots Law Times*, 1989 (Sh.Ct.) 54 to 55 (quoted in *Enforcement of Civil Obligations in Scotland: A Consultation Document* (3.98)).
[196] Judgment by Sheriff Principal Edward F. Bowen, Q.C., *Ronald McKenzie -v- Adam Lewis and Ian Wylie* (s.21).
[197] *Ross & Liddell, Ltd. -v- J. Haggerty and J. Campbell*, (23 December 2002).

unpleasant duty of enforcing the authority of the law should be a salaried official of the rate-collecting authority. While to have one's household goods seized and sold up by an officer of the law may be regarded as Kismet, to have them seized and sold by an employee of the creditor may perhaps be regarded as tyranny. We live in somewhat anxious times, and nothing ought, I think, to be done to weaken the impression of the absolutely impersonal attitude of the law and its ministers." The sheriff then observed, "I think the remarks of Lord Sands are as valid today as they were in the nineteen thirties, perhaps even more so, having regard to recent protests about the community charge and the like." Here was a timely reminder of how inextricable are the links between the history of the Scottish profession and its continuing controversies.

If officers are not to have a right of audience to represent creditors in court when making applications for warrants for "exceptional attachment orders" (the new form of poinding in dwellinghouses); if the traditional involvement of officers in the unofficial agency service of collecting debts is to be seen as incompatible with their official status; if officers are no longer to have the resources of staff and technology to compete with big collection companies for contracts to collect arrears of local government taxes - the usefulness of the officer's profession must be severely restricted. Indeed, it was with dismay that some officers watched a B.B.C. Scotland documentary about the recovery process for the very sorts of local government charges which traditionally have been passed to officers for collection. The programme seemed to welcome a new trend: to use debt collection companies instead. It perhaps even appeared to be presenting as a benign development the use of retired policemen as collection agents, not sheriff officers. [198]

There is a system in place to make messengers-at-arms and sheriff officers accountable to public authority; no such similar controls apply over debt collectors. It would have been a gross injustice to the Scottish officers to have given any impression that, either by a somehow oppressive use of the law, or an inadequate use of technology, debtors were likely to enjoy a fairer service at the hands of debt collection companies. Philip Evans noted that, in 1997, when he was employed by the Court Service in England and Wales, he visited Scotland to observe the operation of three large firms of messengers-at-arms and sheriff officers. "From my personal observations, I have the impression that the methods adopted by sheriff officers

[198] B.B.C. Frontline Scotland, *Out of the Red*, 6th November 2001.

in Scotland to collect under the summary warrant procedure have more in common with the sophisticated approach used by Telecollection Agencies in England and Wales than those used by sheriffs' officers and private bailiffs. Every effort is made to get to know the debtor, to encourage payment and to make payment as easy as possible. The debtors seem to be afforded greater dignity. I believe this refined approach stems from the greater powers enjoyed by Scottish sheriff officers and because they do not have to proceed to traditional enforcement action to be remunerated for their work." [199]

**Conclusion**

Dr. Kennett's observations on Scotland in 2001 have been prescient: Sheriff officers may "share many of the characteristics of huissiers de justice and are the subject of relatively detailed and good quality regulation. It nevertheless seems fair to suggest that they have less resistance to market forces. The professional association is not particularly strong and has not always been able to mobilise its members to resist external pressures and incentives." [200]

If the Scottish Executive legislates in accordance with its published suggestions, some of the best features of an old and valuable profession may be lost. As well as seeing the passing of the Debt Arrangement and Attachment Act, the month of November 2002 saw the publication by Scottish Executive Social Research of *Enforcement of Civil Obligations in Scotland: Analysis of Consultation Responses*. The discussion document had invited responses in support of the Scottish Executive's plan to reorganise the "Structure of the Enforcement Officer Profession". [201] Sixty eight responses were received. Should there be a new *Scottish Civil Enforcement Commission*? *Should the Commission carry out any other functions?*; and *Should there be a single class of enforcement officers?* The respondents answered "yes", by a large majority. These questions invited positive responses to the loss of the titles of messenger-at-arms and sheriff officer; to the change of the unified profession's designation to "Enforcement Officer"; to a transfer of responsibility for officers of court from the courts to a body under the Scottish Executive's authority. The text of the analysis of consultation responses, whilst telling that "the majority of respondents agree that there are practical and transparent reasons for one class of Enforcement Officers, with responsibility for their conduct

[199] Philip Evans, *Civil Justice Quarterly*, vol. 18, p. 354.
[200] Kennett, *op. cit.*, pp.23 and 24.
[201] *Enforcement of Civil Obligations in Scotland: A Consultation Document*, (April 2002), pp. 5 to 29.

resting with the Scottish Civil Enforcement Commission", [202] added that "Opposition to a single class of enforcement officers is in a minority and comes principally from the enforcement officers and their representatives". [203]

The justification for the Scottish Executive's reforms of the profession is said to lie in the findings of the Minister for Justice's Working Party. This was, it has been seen, a committee from the membership of which our profession was excluded. Its recommendation was, "to carry out an early and thorough review of this office [of officer of court] and bring forward proposals for significant reform. This should include title, organisational structure and accountability … also … whether the separate roles currently undertaken by sheriff officers, in relation to debt collection and enforcement of court decisions, are compatible and should be performed by the same people." [204]

But what facts could justify the ending of the messengers' long history? Everyone agrees that "we were very concerned that public confidence in officers of court has been undermined by past events." [205] Here, however, is as close as the Working Party appears to have got to an analysis of our profession's predicament: "We are aware of allegations about unprofessional conduct of sheriff officers made during the debate on the Abolition of Poindings and Warrant Sales Bill. Some of our members' own knowledge suggested that there was an element of truth to the anecdotal evidence in this regard: but in other cases members had heard that debtors had found officers to be helpful and supportive. We note that there are a very low number of formal complaints made using the official complaints procedure; and we are well aware that people will tend to feel ill-disposed towards those charged with carrying out a procedure which is bound to be unwelcome. Whatever the factual position may be, the key point is that the significance of the onerous duties carried out by a court enforcement officer demands that all activities undertaken on the authority of the court must be conducted in a thoroughly professional, responsible and accountable manner. Past criticisms arising from the historical circumstances surrounding the poinding and sale procedure have brought the important role of court enforcement into question: we must not allow that state of affairs to persist." [206]

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[202] *Enforcement of Civil Obligations in Scotland: Analysis of Consultation Responses* (November 2002), s. 3.20.
[203] *Ibid.*, s. 3.21.
[204] *Striking the Balance: A New Approach to Debt Management* (July 2001), 121.
[205] *Ibid.*, 120.
[206] *Ibid.*, 56 and 57.

If the judicial control of the profession, as presently constituted, had been fully maintained, it could be argued, some of these current difficulties would not have arisen; the need for radical reform would not now be apparent to some politicians; the danger of losing our profession's historical character would not now be looming. However, the effect of "past criticisms" has been to create, in fact, a destabilizing crisis of confidence within the profession itself. In such an atmosphere - where *some* official redress and reform was urgently needed - the fear of a misguiding of reform is very real.

I have made known my anxieties about the present situation. These were my comments to the April 2000 Scottish Executive Consultation Document: "I am deeply apprehensive about any arrangements that the Scottish Executive might propose that could further diminish the judicial character of the officers of court. Although this consultation document has been written with particular reference at very many points to the Scottish Law Commission No. 95, in fact no reference at all is made to the fact that the Scottish Law Commission emphatically rejected the very proposal which the Scottish Executive now presents at section 3.110 of this consultation paper. … I quote section 8.8 of the Scottish Law Commission No. 95: 'Another way of restructuring the present system of officers of court would be to transfer the functions of appointment, discipline and control from the courts to an executive branch of government. We have proposed in Consultative Memorandum No. 51 that such a change should not take place and on consultation there was unanimous approval of our proposal. Diligence … is in all material respects a judicial proceeding and not an administrative or executive function. Officers of court also execute citation which is undoubtedly a step in judicial proceedings. Transfer of control of diligence to central government would be open to objection on the ground that the enforcement of court orders would be liable to affected, or to appear to be affected, by political considerations, and would thus infringe the constitutional principle of the independence of the courts.'

"The Scottish Law Commission's comment in Memorandum No. 51 at para. 2.3 is to the point: 'There may be constitutional arguments against a transfer of control of enforcement from the courts to the government. … The Scottish courts have in the past regarded control of sheriff officers by central or local government as a dangerous encroachment on the independence of the courts.' But instead of discussing what constitutional principles are involved by carrying out so radical a reform as that proposed at section 3.110 of the

consultation document, the paper gives the impression that the Executive has already formed the view that a Scottish Civil Enforcement Commission 'would be in the public interest'." [207]

Moreover, Lord Sands' perception of the distinction in people's minds between *Kismet* and *Tyranny* is, as Sheriff Kearney so recently observed, as valid today as ever. In January 2003, I too had published a comment on this theme, prompted by the Scottish Executive's suggestions that a new Scottish Civil Enforcement Commission might not only control the "enforcement officer" profession, but also control the admission to and operation of the national statutory Debt Arrangement Scheme (as constituted by the Debt Arrangement and Attachment (Scotland) Act 2002, s. 1). "If the new commission - either as a body within the executive or one for which the executive is responsible - is to be charged with controlling not only the personnel who enforce court warrants, but also the day to day operation of the National Statutory Debt Arrangement Scheme … [there] could be a perception of a conflict of interest on the part of the Scottish Executive, given that ministers represent the interests of the largest creditors who come before the courts. In the midst of the poll tax troubles that were visited upon this profession by the government, at least we could say that we were independent officers of the courts, bound to uphold the law. It would not have helped our position then, I fancy, if we had been dependent as officers upon the powers of appointment, regulation and discipline, vested in a Minister of Justice, or his delegates. The perception might have been that we were the officers of the executive, not of the courts." [208]

Of the Society of Messengers-at-Arms and Sheriff Officers, Dr. Kennett wrote in 2001: "The fortunes of the Society have fluctuated, but it remains a weak institution in relation to the national professional institutions in France, Belgium and the Netherlands. Although sheriff officers enjoy considerably more independence in the performance of their tasks than English bailiffs (and sheriffs' officers), they do not have the same level of independence as huissiers." [209] Her conclusion about Scotland, based upon the comparative study of European enforcement procedures, was that "Scotland has an enforcement system with evident historical links to the French system, but a somewhat weaker professional identity. It has not been possible to study the historical development of the Scottish system within the scope of this

[207] R.A. Macpherson, *Scots Law Times*, 2003 (News) 16.
[208] *Ibid.*, 17.
[209] Kennett, *op. cit.*, p. 46.

study. Possibly there is some influence of English law and practice …". [210] It is sometimes thought that basic English attitudes are hostile to the officer's function being seen as any proper part of a branch of the "legal profession". "The assumption that enforcement is an occupation more akin to tradesmen such as the caterers and cleaners contracted by courts, rather than professionals like solicitors and barristers, is widespread." [211] It has been said that "Bailiff action in England and Wales is viewed as a shadowy occupation, faintly disreputable at best and not something which is ever likely to be in political vogue - unless it is to curb further the activities of bailiffs!" [212]

Whilst a commentator could point to Scotland as, in an important respect, a "blueprint for reform" in England and Wales, now the situation has been turned around. On 1st February 2003 the Certificated Bailiffs Association (of England and Wales) changed its name to The Enforcement Services Association. The president wrote that this was because, "it is inevitable that 'certificated bailiffs' will be replaced by 'licensed enforcement agents'"; the Association was taking early action because it "intends to be at the forefront of the Government's initiative for regulation of the enforcement industry". [213] So one suspects that the title of "Enforcement Officer" - instead of messenger-at-arms and sheriff officer - found its inspiration outwith the jurisdiction of the Scottish legal system. Although never complacent about Scots law's reputation amongst United Kingdom experts, it nonetheless seems fair to suggest that one used to have some cause for national pride in our diligence system and the officers who operated it. Yet poinding as a form of diligence, reformed so recently as in 1987, was denounced in Parliament by a Minister of the Crown as "truly archaic, inhumane and deeply offensive"; [214] and now the Scottish officers may be set to lose their names, their very history.

Dr. Kennett wondered if "there may be purely domestic factors which have affected attitudes within and towards the profession." [215] It is hoped that this case-study on Scotland now provides a needed account of an important aspect of the United Kingdom's history, so far as the huissier's profession is concerned. It has served its purpose if it allows the international

[210] Kennett, *op. cit.*, p. 58.
[211] *Civil Enforcement. Org.UK* (pub. The Sheriffs of England and Wales) May 2001.
[212] Philip Evans, *Civil Justice Quarterly*, p. 357.
[213] *Info.*, The Bulletin of The Enforcement Services Association, Feb./March 2003, p. 2.
[214] Jackie Baillie, Deputy Minister for Communities, Scottish Parliament *Official Report*, vol. 6, no. 2, col. 188.
[215] Kennett, *op. cit.*, p. 58.

profession to understand how part of its "judicial area" within a European jurisdiction may be in danger of being lost.

Roderick Macpherson,
Messenger-at-Arms in Glasgow.

## APPENDIX 1

This advertisement appeared in the columns of the front page of the *Evening Citizen* newspaper on 19th January 1900. It was part of a sustained campaign of advertising. At the beginning of the 1890s this firm had simply claimed that they were messengers-at-arms and sheriff officers who gave "immediate and careful attention to business entrusted to our care". By the end of the decade, however, many newspaper readers would have seen the firm's more expansive claims. The last entry in the advertisement refers to John Younger, a solicitor. He shared premises with his brother Alex. M. Younger (messenger-at-arms, 1890 - 1902). It was the latter, however, who carried on business under the name or firm of Younger & Younger. He certainly was the only owner of the business at the time of his death in 1902.

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| YOUNGER & Younger, Debt Recovery Department, 158 Bath Street, Glasgow, with offices also in Edinburgh, Dundee, Aberdeen, Dublin and Belfast, and agents everywhere; the recovery of wholesale and retail traders' accounts, lodging bills, and outstanding claims of every description undertaken; all matters, large or small, carefully attended to. |
| YOUNGER & Younger. – The debt recovery department of our offices require no annual subscription, have no binding conditions, prompt settlements and moderate charges, and the services which can only be rendered under personal supervision with a large, efficient, staff, are the special features of our business. |
| YOUNGER & Younger. – Aliments paid over or collected confidentially. – 158 Bath Street. |
| YOUNGER & Younger. – Town or country representatives will be pleased to wait on any trader or other person who cannot conveniently call: during the last ten years we have recovered many claims that have been in the hands of other collectors and we are continually in receipt of unsolicited expressions of satisfaction from parties employing us. Telegrams, "Messengers". Telephone 488. |
| YOUNGER & Younger, Private Detectives, 158 Bath Street, Glasgow, at Edinburgh and elsewhere, with correspondents throughout the United Kingdom and abroad; private investigations, domestic, commercial or financial, requiring tact, discretion and secrecy undertaken; no failures where success possible. The congratulations we have received from business firms and others in England, Scotland, and Ireland, who have recently entrusted us with important matters, are in themselves evidence of the appreciation of the services rendered by our private inquiry department. Telegrams, "Messengers". Telephone 488. |
| MERCHANTS and Others, – If you suspect any of your employees in any way consult us and have matters carefully investigated and your doubts and fears set at rest. – Younger & Younger, 158 Bath Street. |
| DIVORCE and Other Evidence Collected. – Before commencing proceedings, consult Younger & Younger, and they will obtain for you all available and reliable evidence required; terms within reach of all. |
| FOR the convenience of parties who cannot call during the day our offices are open till 8 o'clock evening; satisfaction and strictest confidence guaranteed. – Younger & Younger, 158 Bath Street. |
| YOUNGER & Younger, Private Detectives, 158 Bath Street, Glasgow, have at command large staff of experienced assistants for engagements during the day or at night; all inquiries conducted to an end without creating suspicion or entailing unnecessary expense. |
| YOUNGER & Younger, Private Detectives, 158 Bath Street, Glasgow; Edinburgh, Dundee, Aberdeen, Dublin, Belfast, &c. |
| YOUNGER & Younger – Business Transfer Department. – Sales effected speedily and quietly; partnerships negotiated; businesses transferred into limited companies; private arrangements with creditors carried through. – Head offices, 158 Bath Street. |
| MARRIAGES, actions raised or defended, agreements, wills, courts attended. – Younger, solicitor, 158 Bath Street, Glasgow; evenings 6-8. |

# APPENDIX 2

The following obituary of David S. Leslie (1869-1939), Haddington (sheriff officer, 1893) published in the *Haddingtonshire Courier* (3rd November 1939) gives an example of the combination of different occupations that was once a feature of the profession. His interest in furniture makes it relevant to note that he was the son of a cabinetmaker. [216]

"Mr. D.S. Leslie … carried on an extensive business as auctioneer, [217] antique dealer, and sheriff officer until his retiral. Mr. Leslie was recognised as an authority on antique furniture, his judgment being greatly relied upon by many customers from all parts of the world, who visited his premises to make purchases. On many occasions customers so far afield as America relied upon his judgment and skill, and he sent many pieces of valuable furniture abroad without the purchasers having seen them until they arrived. His patrons included Her Majesty the Queen, Lord Derby, Captain Fitzroy (the Speaker of the House of Commons), and many others. Mr. Leslie was manager of the Haddington Employment Exchange [218] until a little over two years ago, having held that position for twenty two years".

[216] It is perhaps also worth noting that inquiries into the family backgrounds of two other officers appointed in the 1890s (A.N. Rutherford and R.W. Wilson, both Glasgow) show that their fathers were of the same trade.

[217] The combination of the functions of sheriff officer and auctioneer were prohibited in 1991. "An officer of court may not be an auctioneer with his own auction room." (Messengers-at-Arms and Sheriff Officers Rules 1991, s. 15 (3) (a)).

[218] In the 19th century, sheriff officers also sometimes acted as inspectors of the Poor (*Poor Law Magazine for Scotland*, vol. 1 (1858-59), p. 542).