

JUDICIAL APPOINTMENTS BOARD FOR SCOTLAND

THE OFFICE OF PART-TIME SHERIFF

Please note that although this paper was not produced by the Board it provides a good general illustration of the work of a Part-time Sheriff. It should not be understood as a definitive expression of the Board's views. Further information about the work and jurisdiction of a Part-time sheriff is also to be found in Part 1 of Macphail: Sheriff Court Practice (3rd Edition).

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Introduction

The office of part-time sheriff was created in 2000 under the provisions of the Bail, Judicial Appointments etc. (Scotland) Act 2000 and replaced that of temporary part-time sheriff which fell foul of the ECHR legislation.

Under the provisions of the Act (as amended by The Maximum Number of Part-time sheriffs (Scotland) Order 2006 (SSI 2006 No. 257)) a maximum of 80 part-time sheriffs may hold office at any one time.

Appointment

All part-time sheriffs are appointed by the Scottish Ministers. The First Minister must consult the Lord President of the Court of Session, Scotland's most senior Judge, before making his decision. Once appointed the terms of the legislation which created the office of part-time sheriff provided individual with security of tenure as they are appointed for five years (and may therefore be reappointed) or until they reach the age of 70. They may only be removed from office if so ordered by the Scottish Ministers on the recommendation of a tribunal which is to be set up for the purpose of investigating allegations on inability, neglect of duty or misbehaviour.

Qualifications and Experience

To qualify for appointment as part-time sheriff a person must be and have been an advocate or solicitor for at least 10 years. Because of the nature of the office, those appointed should be practitioners of standing, whether Queen's Counsel, advocates or solicitors with considerable court experience.

Initially, before sitting alone, a part-time sheriff will normally undergo five days of specific training plus five days sitting alongside an experienced sheriff.

As the jurisdiction of the part-time sheriff is vast, he or she must have a grasp of every aspect of law, both civil and criminal, as well as mastery of the rules of evidence. Each part-time sheriff requires to devote considerable time to maintaining an up-to-date knowledge and awareness of the relevant law, rules of evidence and procedure. Each part-time sheriff requires to read a substantial number of law reports and other relevant publications in order to keep abreast of the many changes that occur in the law. Part-time sheriffs require to be aware of the legislation of both the UK and Scottish Parliaments as well as the decided case law and jurisprudence of the Scottish courts and the European Court of Human Rights.

Each part-time sheriff requires to be versatile and to be able to deal with whatever type of case is put before him or her at short notice and to maintain a sound judicial temperament at all times. Many part-time sheriffs will require to deal with various different types of business during the course of each working day, whether in court or in chambers.

Primary Functions

Part-time sheriffs are utilized to assist in maintaining the throughput of business in the part-time sheriff courts. They are most commonly used to provide cover for permanent part-time sheriffs who may be away from business on annual or sick leave, attending judicial training and conferences, and for additional work which may from time to time arise in the court programme.

The primary function of the part-time sheriff is to act as a judge of the first instance. However, they do not exercise any appellate functions nor any of the administrative and *quasi*-judicial functions of a permanent sheriff. There are 49 sheriff courts situated throughout Scotland and each sheriff has the same powers and responsibilities within his or her court district. In the cities and larger towns a number of sheriffs work in the local sheriff court building. In some courts there may be only one resident sheriff whereas in the more remote areas, particularly those in the islands, the resident sheriff may sit in more than one court during the course of a working week. The part-time sheriff also acts as commissary judge dealing with the granting of confirmation of executors and administration of wills. Part-time sheriffs deal with making requests for extradition to Scotland and the sheriffs in Edinburgh deal with all applications from abroad for extradition of persons from Scotland.

Allocation of Work

The Scottish Court Service directs the deployment of part-time sheriffs in response to requests for assistance submitted by court staff. Part-time sheriffs may sit in any of the sheriff courts in Scotland, except in the court district where their main place of business is situated. However, as with the permanent judiciary, they would be expected to decline jurisdiction in any case where a conflict of interest arise.

Attendance at Court

The part-time sheriff will normally commence the court sitting at, or sometimes before, 10.00 am. In some areas pressure of business has resulted in courts now starting at 9.30 am. The court frequently sits later than 4 pm. Judicial business, however, extends well beyond the normal court sitting times.

Before going to sit in court the part-time sheriff will usually read and consider reports or other court papers in connection with that day's court business. These reports can be lengthy and complicated and many of them, such as social enquiry reports, psychiatric reports and community service assessments, require to be given careful consideration. Most part-time sheriffs consider such reports the day or, more usually, the night before the case calls in court. The part-time sheriff will often require, before sitting in court, to conduct interviews or preside at hearings in chambers in respect of various types of court business.

The sheriff court sits each day from Monday to Friday except in certain rural areas where the court will only sit for part of the week and the part-time sheriff will have to travel throughout Scotland. Human rights considerations require that on occasion courts sit on Saturdays and public holidays. This is in order to keep to a minimum the period of detention between arrest and court appearance.

Out of court the part-time sheriff has to undertake a substantial amount of written and chambers work. For example, civil judgments, interlocutory matters such as unopposed motions and undefended ordinary actions, warrants for arrestment or inhibition, preparation of stated cases and reports for criminal or civil appeals or children's referral cases, applications for special arrangements for vulnerable witnesses, consideration of applications for adoption and applications for freeing for adoption, undefended divorces based on affidavit evidence, administrative applications such as those relating to liquidations, bankruptcies, clubs, wills and succession, trustees and factors, etc and other matters of a *quasi* judicial or administrative nature. The part-time sheriff has to deal with consideration of breach reports of community disposals (such as probation) and applications for initiating criminal warrants.

Nature of Work

Criminal Proceedings

The criminal jurisdiction of the part-time sheriff is both summary (where the part-time sheriff sits alone) and solemn (where he or she sits with a jury).

In summary procedure the maximum penalty, except where lower penalties are prescribed by a particular statute, is 12 months' imprisonment and a fine of £10,000. There are, however, wide discretionary sentences including probation which may involve detailed conditions, deferring sentence involving conditions, community service, drug testing and treatment orders, extended sentences and supervised release orders, restriction of liberty orders, supervised attendance orders and the power to order compensation, in addition to other incidental orders including football banning orders, non-harassment orders, anti-social behaviour orders, disqualification orders, and forfeiture of vehicles or other property.

The part-time sheriff has concurrent jurisdiction with the High Court for solemn (jury) proceedings on indictment, with the exception of the crimes of murder, rape and treason. The maximum sentence of imprisonment available to the sheriff was increased from three years to five years with effect from 1 May 2004. This resulted in an increase in solemn business in many sheriff courts as cases that would formerly have been tried in the High Court are now indicted into the sheriff court. Jury trials taken in the sheriff court have included culpable homicide, attempted murder, assault to the danger of life, assault and robbery, attempted rape, computer fraud, corruption, death by dangerous driving, death of a child during a charity helicopter ride, possession of drugs with intent to supply and being concerned in the supply of drugs, insider dealing and child abuse. The part-time sheriff also has a power to remit to the High Court for sentence in any case in which a longer period of

imprisonment than five years is thought to be necessary. In addition, the same discretionary, non-custodial sentences available in summary procedure may be selected. There is no limit on the size of any fine which may be imposed.

An accused in Scotland has no right to elect to be tried by a jury. The *forum*, whether solemn or summary, is decided by the public prosecutor, the Lord Advocate, or his local representative, the Procurator Fiscal. This prosecutorial discretion, together with the increase in the maximum summary sentence, has had the consequence that cases that might previously have been prosecuted on indictment (or that would be tried by a jury in England and Wales) have been prosecuted before the part-time sheriff under summary procedure in Scotland. Also, one of the objectives of the Summary Justice Reform Programme, reflected in the Criminal Proceedings etc (Reform) (Scotland) Act 2007 is to ensure that the Sheriff Court only deals with more serious criminal cases at summary level and that has recently affected the prosecution of summary cases in the sheriff court.

The part-time sheriff is the competent authority in Scotland in relation to requests for enforcement of penalties from European Union States under section 223 of the Criminal Procedure (Scotland) Act 1995. The part-time sheriff also deals with criminal recovery proceedings under the Proceeds of Crime Act 2002. Some courts have specialist courts such as a drugs court with designated part-time sheriffs with additional powers, a domestic abuse court in Glasgow, and specialist youth courts have been tried.

The volume of appeals in criminal cases has increased markedly. In appeals against sentence the part-time sheriff is required to prepare a report for the Appeal Court, providing a sufficient record of all relevant circumstances and the reasons for the sentence. Appeals against conviction are however likely to involve a great deal more work than those against sentence. In summary cases the part-time sheriff has to draft a stated case and set out all the relevant findings-in-fact, together with a detailed note in support and explanation of them. In solemn cases he or she will have to prepare a report for the High Court giving the part-time sheriff's opinion on the case generally and on the grounds of appeal. The amount of work is considerable, has to be carried out within strict time limits, and must be undertaken even in an apparently hopeless appeal.

Civil Proceedings

The sheriff court has exclusive jurisdiction for all claims under £5,000. Beyond that limit, and subject to a small number of exceptions, the jurisdiction of the sheriff court and of the Court of Session is the same. Because solicitors as well as advocates have a right of audience in the sheriff court, solicitors can choose to raise the most complicated and important cases in the sheriff court and such cases are common in the sheriff court. There is no pecuniary limit. Important and complex cases, which might otherwise have been taken in the Court of Session, are taken in the Sheriff Court for reasons of cost, geographical convenience, and confidence in the judiciary.

The sheriff court deals with almost all family actions in Scotland. This involves the bulk of divorces, defended as well as undefended; disputes over the custody and maintenance of children; adoptions including contested adoptions, applications to free children for adoption and permanence orders; and the division of family property on separation or divorce. The length and complexity of such hearings has in recent times increased markedly. Cases involving residence and contact orders and freeing for adoption orders can often last for many days and involve difficult and anxious issues where both parties regularly adduce conflicting evidence from expert witnesses. In some courts there are specialist commercial courts and family courts with sheriffs serving in these courts for periods of time.

The part-time sheriff is expected to issue civil judgments with the least possible delay. For the reasons explained above, it can be very difficult to consider cases and prepare judgments in the course of the working day. As a result it is common for part-time sheriffs to undertake this task in private time.

For reasons of speed and minimisation of expense, civil cases in the sheriff court are divided into small claims, summary causes and ordinary causes. Small claims, which comprise claims with a value up to £3,000, are dealt with under special rules which encourage informality and some active intervention by the part-time sheriff. Summary causes, which comprise claims between £3,000 and £5,000, or claims for removal from heritable property of whatever value, have a more structured formality, but do not involve formal written pleadings or the attendance of a shorthand writer to note the evidence. All other cases are generally classed as ordinary causes. They have full, formal pleadings, and shorthand notes of evidence are taken. The part-time sheriff is however required in each defended ordinary cause to deliver a judgment in writing, setting out at length all the relevant facts which he or she has found proved and giving detailed reasons for the decision. In appeals against the part-time sheriff's decision in a small claim or a summary cause, the part-time sheriff must set out in the form of a stated case the facts which have been held proved, with his or her reasons for decision. There is increasing pressure for summary causes and small claims to be litigated without legal representation and for procedures to be sympathetic to party litigants. This requires the part-time sheriff to have particular skill and expertise, and knowledge of a wide range of law and to apply it from his or her own knowledge without the benefit of legal argument.

Appeals against the part-time sheriff's decision in civil cases may be heard by the sheriff principal or by the Inner House of the Court of Session. There is in general an appeal from the sheriff principal to the Court of Session. In matters appealed to the Court of Session, a further appeal may lie to the House of Lords. In certain circumstances the part-time sheriff may have to consider whether to refer a case pending before him to the European Court.

In civil cases a part-time sheriff is bound to follow decisions of the Inner House of the Court of Session which are in point, and also the decisions of the House of Lords in Scottish cases. Decisions of the Outer House of the Court of Session, of the House of Lords in English cases, and of the Court of Appeal in England, are of persuasive, but not binding, authority.

Children's Referrals

In Scotland children alleged to be in need of compulsory measures of supervision are referred by the Reporter to the Children's Panel and dealt with by a Children's Hearing. In many cases the Children's Hearing requires to remit the case to the part-time sheriff for proof, including, in particular, cases where there is a dispute as to whether the condition(s) upon which a child is to be referred is established. It is the part-time sheriff who has to decide on the evidence at proof whether what is alleged by the Reporter is established. These cases require to be given priority in the court programme and if the child is detained in a place of safety, strict time limits for hearing and disposing of the case apply. Many of these cases are extremely anxious involving serious allegations of physical or sexual abuse of children. Some involve allegations that a child has committed a serious crime, such as rape. Many cases are hotly contested and last for several days or longer, particularly when parties lead conflicting expert evidence. Such cases form an increasing part of a part-time sheriff's work. The part-time sheriff also has a substantial appellate jurisdiction in relation to decisions reached by Children's Hearings as to disposal of a child's case and such appeals have to be dealt with as priority business. Such cases can be very time-consuming and many involve consideration of ECHR arguments. Children's referral cases regularly involve vulnerable witnesses.

Summary Applications

There are more than 500 statutory appeals or other statutory applications, which are directed to be made to the part-time sheriff. In some of these applications the part-time sheriff's decision is final; in others a further appeal is available. The subjects are so miscellaneous that no summary can even be attempted. While some appeals and applications are by their nature infrequent, others are frequently made. The latter include appeals and applications relating to matters of licensing, gaming, public order, gun control, education, and adults with incapacity. Some appeals are of the nature of judicial review.

Fatal Accident Inquiries

Inquiries into sudden or suspicious deaths are conducted (a) if the deceased dies in the course of his or her employment or in custody or (b) if the Lord Advocate determines it is appropriate to hold an Inquiry in the public interest. These inquiries are normally selected because of particular public interest or importance and can be very lengthy. Such Inquiries have involved a rail disaster, death of children in dental surgeries under anaesthetic, death in the oil construction and repair industry, an RAF helicopter crash, death during fire fighting operations, and death as a result of septicaemia after admission to hospital. The part-time sheriff is required to make certain findings and is empowered to make recommendations to avoid a recurrence of the incident. Substantial public interest often attends such inquiries.

Recent developments

(i) The incorporation into the Law of Scotland of the European Convention of Human Rights (in terms of the Scotland Act 1998). Devolution issues, where it is argued on behalf of an accused person that the conduct of the prosecution breaches the European Convention of Human Rights, have become a regular feature of criminal procedure. These cases require the part-time sheriff to know the relevant European Jurisprudence. Likewise with points taken under the Human Rights Act 1998, which also now require to be dealt with.

(ii) Part-time sheriffs are required to adopt a more pro-active role. In civil and criminal cases, part-time sheriffs are expected to be involved in the management of cases. In civil cases, an Options Hearing is set where, under the Rules, the part-time sheriff is required to seek to secure the expeditious progress of the cause by ascertaining from the parties the matters in dispute and information about certain other matters regarding the case. In particular in Family and Commercial actions this is a very important part of the procedure and requires substantial preparation by the part-time sheriff in advance of the Options Hearing. In criminal courts, intermediate diets in summary cases and first diets in solemn cases also require an interventionist approach.

(iii) Child Welfare Hearings. These hearings have become an important part of actions involving residence and contact orders where the part-time sheriff, on an interim basis, requires to make orders considered appropriate having regard to the welfare of the child. The rules require the part-time sheriff to secure the expeditious resolution of disputes in relation to the child by ascertaining from the parties the matters in dispute and any information relevant to that dispute and allow the part-time sheriff to do anything which he or she thinks fit.

Sensitivity of Judgments

The range of decision-making by the part-time sheriff is very broad, and includes matters of considerable local or public interest. Particularly, but not exclusively, in the more remote areas, part-time sheriff court decisions can be of considerable local interest. Sensitivity and tact must often be applied by the part-time sheriff in dealing with matters involving public interest or concern. In such cases part-time sheriffs often now issue sentencing statements through the Scottish Judiciary's Public Information Officer. Fatal accident inquiries in particular often involve sensitive judgments, not only in relation to those closely involved but to the public at large. They also often raise matters of considerable technicality, upon which the part-time sheriff has to express views in writing. They often attract the attention of the national as well as the local media.

Fees and Expenses

In recognition of the range of duties they do undertake, part-time sheriff are paid a daily fee, which directly equates to one day of a permanent sheriff's salary. The current daily fee (effective from 1st April 2009) is £583. In addition normal travel and subsistence expenses are reimbursed.