

ACT OF SEDERUNT (SUMMARY CAUSE RULES) 2002 NO. 132

CHAPTER 18 RECOVERY OF EVIDENCE AND ATTENDANCE OF WITNESSES (Actions lodged before 4 April 2011)

- 18.1. [Diligence for recovery of documents](#)
- 18.2. [Optional procedure before executing commission and diligence](#)
- 18.3. [Applications for orders under section 1 of the Administration of Justice \(Scotland\) Act 1972](#)
- 18.4. [Confidentiality](#)
- 18.5. [Preservation and obtaining of evidence](#)
- 18.6. [Warrants for production of original documents from public records](#)
- 18.7. [Letter of request](#)
- 18.7A. [Taking of evidence in the European Community](#)
- 18.8. [Citation of witnesses](#)
- 18.9. [Citation of witnesses by party litigants](#)
- 18.10. [Witnesses failing to attend](#)

Diligence for recovery of documents

- 18.1.** (1) At any time after a summons has been served, a party may make an incidental application in writing to the sheriff to grant commission and diligence to recover documents.
- (2) A party who makes an application in accordance with paragraph (1) must list in the application the documents which he wishes to recover.
- (3) A copy of the incidental application made under paragraph (1) must be intimated by the applicant to-
- (a) every other party; and
 - (b) where necessary, the Advocate General for Scotland or the Lord Advocate (and if there is any doubt, both).
- (4) The Advocate General for Scotland and the Lord Advocate may appear at the hearing of any incidental application under paragraph (1).
- (5) The sheriff may grant commission and diligence to recover those documents in the list mentioned in paragraph (2) which he considers relevant to the action.

Optional procedure before executing commission and diligence

- 18.2.** (1) Any party who has obtained a commission and diligence for the recovery of documents may, at any time before executing it, serve by first class recorded delivery post on the person from whom the documents are sought to be recovered (or on his known solicitor or solicitors) an order with certificate attached in Form 24.
- (2) Documents recovered in response to an order under paragraph (1) must be sent to, and retained by, the sheriff clerk who shall, on receiving them, advise the parties that the documents are in his possession and may be examined within his office during normal business hours.

- (3) If the party who served the order is not satisfied that full production has been made under the specification, or that adequate reasons for non-production have been given, he may execute the commission and diligence in normal form, notwithstanding his adoption in the first instance of the foregoing procedure by order.
- (4) At the commission, the commissioner shall-
- (a) administer the appropriate oath or affirmation to any clerk and any shorthand writer appointed for the commission; and
 - (b) administer to the haver the oath in Form 20, or where the haver elects to affirm, the affirmation in Form 21.
- (5) Documents recovered under this rule may be tendered as evidence at any hearing or proof without further formality, and rules 18.4(2), (3) and (4) shall apply to such documents.

Applications for orders under section 1 of the Administration of Justice (Scotland) Act 1972

- 18.3.** (1) An application by a party for an order under section 1 of the Administration of Justice (Scotland) Act 1972, must be made by incidental application in writing.
- (2) At the time of lodging an incidental application under paragraph (1), a specification of-
- (a) the document or other property sought to be inspected, photographed, preserved, taken into custody, detained, produced, recovered, sampled or experimented with or upon, as the case may be; or
 - (b) the matter in respect of which information is sought as to the identity of a person who might be a witness or a defender,
- must be lodged in process.
- (3) A copy of the specification lodged under paragraph (2) and the incidental application made under paragraph (1) must be intimated by the applicant to-
- (a) every other party;
 - (b) any third party haver; and
 - (c) where necessary, the Advocate General for Scotland or the Lord Advocate (and if there is any doubt, both).
- (4) If the sheriff grants an incidental application under paragraph (1) in whole or in part, he may order the applicant to find such caution or give such other security as he thinks fit.
- (5) The Advocate General for Scotland and the Lord Advocate may appear at the hearing of any incidental application under paragraph (1).

Confidentiality

- 18.4.** (1) Confidentiality may be claimed for any evidence sought to be recovered under rule 18.2 or 18.3.
- (2) Where confidentiality is claimed under paragraph (1), the documents or property in respect of which confidentiality is claimed shall be enclosed in a separate, sealed packet.

(3) A sealed packet referred to in paragraph (2) shall not be opened except by authority of the sheriff obtained on the incidental application of the party who sought the commission and diligence or order.

(4) The incidental application made under paragraph (3) must be intimated by the applicant to the party or parties from whose possession the documents specified in the commission and diligence or order were obtained.

(5) Any party received intimation under paragraph (4) may appear at the hearing of the application.

Preservation and obtaining of evidence

18.5. (1) Evidence in danger of being lost may be taken to be retained until required and, if satisfied that it is desirable so to do, the sheriff may, upon the application of any party at any time, either take it himself or grant authority to a commissioner to take it.

(2) The interlocutor granting such a commission shall be sufficient authority for citing the witness to appear before the commission.

(3) The evidence of any witness who-

(a) is resident beyond the sheriffdom;

(b) although resident within the sheriffdom, resides at some place remote from the court in which the proof is to be held; or

(c) is by reason of illness, age, infirmity or other sufficient cause unable to attend the proof,

may be taken in the same manner as is provided in paragraph (1).

(4) On special cause shown, evidence may be taken from any witness or haver on a ground other than one mentioned in paragraph (1) or (3).

(5) Evidence taken under paragraph (1), (3) or (4) may be taken down by-

(a) the sheriff;

(b) the commissioner; or

(c) a clerk or shorthand writer nominated by the sheriff or commissioner,

and such evidence may be recorded in narrative form or by question and answer as the sheriff or commissioner shall direct and the extended notes of such evidence certified by such clerk or shorthand writer shall be the notes of such oral evidence.

(6) At the commission, the commissioner shall or where the sheriff takes evidence himself, the sheriff shall-

(a) administer the appropriate oath or affirmation to any clerk and any shorthand writer appointed for the commission; and

(b) administer to the witness the oath in Form 20, or where the witness elects to affirm, the affirmation in Form 21.

Warrants for production of original documents from public records

18.6. (1) If a party seeks to obtain from the keeper of any public record production of the original of any register or deed in his custody for the purposes of an action, he must apply to the sheriff by incidental application.

(2) Intimation of an incidental application under paragraph (1) must be

given to the keeper of the public record concerned at least seven days before the incidental application is lodged.

(3) In relation to a public record kept by the Keeper of the Registers of Scotland or the Keeper of the Records of Scotland-

(a) where it appears to the sheriff that it is necessary for the ends of justice that an incidental application under this rule should be granted, he must pronounce an interlocutor containing a certificate to that effect; and

(b) the party applying for production may apply by letter (enclosing a copy of the interlocutor duly certified by the sheriff clerk), addressed to the Deputy Principal Clerk of Session, for an order from the Court of Session authorising the Keeper of the Registers or the Keeper of the Records, as the case may be, to exhibit the original of any register or deed to the sheriff.

(4) The Deputy Principal Clerk of Session must submit the application sent to him under paragraph (3) to the Lord Ordinary in chambers who, if satisfied, shall grant a warrant for production or exhibition of the original register or deed sought.

(5) A certified copy of the warrant granted under paragraph (4) must be served on the keeper of the public record concerned.

(6) The expense of the production or exhibition of such an original register or deed must be met, in the first instance, by the party who applied by incidental application under paragraph (1).

Letter of request

18.7. (1) Subject to paragraph (7), this rule applies to an application for a letter of request to a court or tribunal outside Scotland to obtain evidence of the kind specified in paragraph (2), being evidence obtainable within the jurisdiction of that court or tribunal, for the purpose of an action depending before the sheriff.

(2) An application to which paragraph (1) applies may be made in relation to a request-

(a) for the examination of a witness;

(b) for the inspection, photographing, preservation, custody, detention, production or recovery of, or the taking of samples of, or the carrying out of any experiment on or with, a document or other property, as the case may be;

(c) for the medical examination of any person;

(d) for the taking and testing of samples of blood from any person;
or

(e) for any other order for obtaining evidence,

for which an order could be obtained from the sheriff.

(3) Such an application must be made by minute in Form 25 together with a proposed letter of request in Form 25a.

(4) It shall be a condition of granting a letter of request that any solicitor for the applicant, or a party litigant, as the case may be, is to be personally liable, in the first instance, for the whole expenses which may become due and payable in respect of the letter of request to the court or tribunal

obtaining the evidence and to any witness who may be examined for the purpose; and he must consign into court such sum in respect of such expenses as the sheriff thinks fit.

(5) Unless the court or tribunal to which a letter of request is addressed is a court or tribunal in a country or territory-

(a) where English is an official language; or

(b) in relation to which the sheriff clerk certifies that no translation is required,

then the applicant must, before the issue of the letter of request, lodge in process a translation of that letter and any interrogatories and cross-interrogatories into the official language of that court or tribunal.

(6) The letter of request when issued, any interrogatories and cross-interrogatories and the translations (if any) must be forwarded by the sheriff clerk to the Foreign and Commonwealth Office or to such person and in such manner as the sheriff may direct.

(7) This rule does not apply to any request for the taking of evidence under Council Regulation (EC) No. 1206/2001 of 28th May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

Taking of evidence in the European Community

18.7A. (1) This rule applies to any request-

(a) for the competent court of another Member State to take evidence under Article 1.1(a) of the Council Regulation; or

(b) that the court shall take evidence directly in another Member State under Article 1.1(b) of the Council Regulation.

(2) An application for a request under paragraph (1) shall be made by minute in Form 25B, together with the proposed request in form A or I (as the case may be) in the Annex to the Council Regulation.

(3) In this rule, "the Council Regulation" means Council Regulation (EC) No. 1206/2001 of 28th May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.

Citation of witnesses

18.8. (1) The citation of a witness or haver must be in Form 26 and the certificate of it must be in Form 26a.

(2) A party shall be responsible for securing the attendance of his witnesses or havers at a hearing and shall be personally liable for their expenses.

(3) The summons or the copy served on the defender shall be sufficient warrant for the citation of witnesses and havers.

(4) The period of notice given to witnesses or havers cited in terms of paragraph (3) must be not less than seven days.

(5) A witness or haver shall be cited-

(a) by registered post or the first class recorded delivery service by the solicitor for the party on whose behalf he is cited; or

(b) by a sheriff officer-

(i) personally;

- (ii) by a citation being left with a resident at the person's dwelling place or an employee at his place of business;
 - (iii) by depositing it in that person's dwelling place or place of business;
 - (iv) by affixing it to the door of that person's dwelling place or place of business; or
 - (v) by registered post or the first class recorded delivery service.
- (6) Where service is effected under paragraph (5) (b) (iii) or (iv), the sheriff officer shall, as soon as possible after such service, send by ordinary post to the address at which he thinks it most likely that the person may be found, a letter containing a copy of the citation.

Citation of witnesses by party litigants

- 18.9.** (1) Where a party to an action is a party litigant he shall-
- (a) not later than 28 days before the diet of proof apply to the sheriff by incidental application to fix caution for expenses in such sum as the sheriff considers reasonable having regard to the number of witnesses he proposes to cite and the period for which they may be required to attend court; and
 - (b) before instructing a solicitor or a sheriff officer to cite a witness, find caution in the sum fixed in accordance with paragraph (1).
- (2) A party litigant who does not intend to cite all the witnesses referred to in his application under paragraph 1(a), may apply by incidental application for variation of the amount of caution.

Witnesses failing to attend

- 18.10.** (1) A hearing must not be adjourned solely on account of the failure of a witness to appear unless the sheriff, on cause shown, so directs.
- (2) A witness or haver who fails without reasonable excuse to answer a citation after having been properly cited and offered his travelling expenses if he has asked for them may be ordered by the sheriff to pay a penalty not exceeding £250.
- (3) The sheriff may grant decree for payment of a penalty imposed under paragraph (2) above in favour of the party on whose behalf the witness or haver was cited.
- (4) The sheriff may grant warrant for the apprehension of the witness or haver and for bringing him to court.
- (5) A warrant mentioned in paragraph (4) shall be effective in any sheriffdom without endorsement and the expenses of it may be awarded against the witness or haver.