



# Bankruptcy and Diligence etc. (Scotland) Act 2007

2007 asp 3

## PART 4

### LAND ATTACHMENT AND RESIDUAL ATTACHMENT

#### CHAPTER 1

##### ABOLITION OF ADJUDICATION FOR DEBT

#### **79 Abolition of adjudication for debt**

- (1) The diligence of adjudication for debt is abolished and any enactment or rule of law enabling an action of adjudication for debt to be raised ceases to have effect.
- (2) Subsection (1) above does not affect an action of adjudication for debt—
  - (a) raised before; and
  - (b) in which decree of adjudication is granted no later than 6 months after, the day this section comes into force.

#### **80 Renaming of the Register of Inhibitions and Adjudications**

- (1) The Register of Inhibitions and Adjudications is renamed the Register of Inhibitions.
- (2) Any reference in an enactment to—
  - (a) the Register of Inhibitions and Adjudications;
  - (b) the General Register of Inhibitions; or
  - (c) the Register of Adjudications,is to be construed as a reference to the Register of Inhibitions.

## CHAPTER 2

### ATTACHMENT OF LAND

#### *Land attachment*

#### **81 Land attachment**

- (1) There is to be a form of diligence over land to be known as land attachment.
- (2) Land attachment is competent to enforce payment of a debt but only if—
  - (a) the debt is constituted by a decree or document of debt;
  - (b) the debtor has been charged to pay the debt;
  - (c) the period for payment specified in the charge has expired without payment being made; and
  - (d) where the debtor is an individual, the creditor has, no earlier than 12 weeks before registering the notice of land attachment, provided the debtor with a debt advice and information package.
- (3) A land attachment is, subject to sections 83(6) and 121(1) of this Act, created at the beginning of the day which falls immediately after the expiry of the period of 28 days beginning with the day or, as the case may be, the last day on which a notice of land attachment in relation to the land is registered.
- (4) During the period of 28 days referred to in subsection (3) above, the notice has effect as if it were an inhibition—
  - (a) registered against the debtor in the Register of Inhibitions; and
  - (b) restricted to the land described in the notice.
- (5) A land attachment—
  - (a) confers on the creditor a subordinate real right over the land described in the notice (in this Chapter, the “attached land”); and
  - (b) secures the sum (in this Chapter, the “sum recoverable by the land attachment”) mentioned in subsection (6) below.
- (6) That sum is—
  - (a) the sum for the payment of which the charge was served, together with any interest accruing after such service and before the attachment ceases to have effect; and
  - (b) all expenses which are chargeable against the debtor by virtue of the attachment.
- (7) The Scottish Ministers may, by regulations—
  - (a) substitute for the period of 28 days referred to in subsection (3) above such other period; and
  - (b) make such amendment of enactments (including this Act) in consequence of such a substitution,
 as they think fit.
- (8) In this Act, “debt advice and information package” means the debt advice and information package referred to in section 10(5) of the Debt Arrangement and Attachment (Scotland) Act 2002 (asp 17) (in this Act, the “2002 Act”).

## **82 Attachable land**

- (1) In this Chapter, “land” means—
  - (a) land (including buildings and other structures and land covered with water) owned by the debtor; and
  - (b) a long lease of land in relation to which the debtor is the tenant.
- (2) It is not competent to create a land attachment over—
  - (a) land—
    - (i) to which a title has never been registered; or
    - (ii) to which the debtor does not have a registered title;
  - (b) a proper liferent in relation to which the debtor is the liferenter; or
  - (c) a long lease which is not assignable.
- (3) Subsection (2)(c) above does not apply to a lease which is assignable only with the consent of the landlord, whether or not it is a condition of the lease that consent must not be withheld unreasonably.

## **83 Notice of land attachment**

- (1) A notice of land attachment must—
  - (a) be in (or as nearly as may be in) the form prescribed by Act of Sederunt;
  - (b) describe the land to be attached; and
  - (c) be registered in both—
    - (i) the property register in which title to the land is registered (in this Chapter, the “appropriate property register”); and
    - (ii) the Register of Inhibitions.
- (2) It is not competent to register a notice of land attachment unless the sum which the debtor has been charged to pay exceeds the sum mentioned in subsection (3) below.
- (3) That sum is—
  - (a) £3,000; or
  - (b) such other sum as may be prescribed by the Scottish Ministers by regulations.
- (4) It is competent to register a single notice of land attachment in relation to two or more sums which, under separate warrants for diligence in execution, the debtor has been charged to pay.
- (5) The judicial officer must, on or as soon as is reasonably practicable after the day or, as the case may be, the last day on which the notice of land attachment is registered, serve a copy of the notice on—
  - (a) the debtor;
  - (b) any person who owns the land (whether solely or in common with the debtor); and
  - (c) any tenant under a long lease of the land.
- (6) If, before the expiry of the period of 28 days referred to in section 81(3) of this Act, the creditor does not register a certificate of service on the debtor, the notice of land attachment is, and is deemed always to have been, void.
- (7) Subsection (1) above applies to a certificate of service as it applies to a notice of land attachment.

*Consequences of land attachment***84 Debts secured by land attachment not rendered heritable**

The creation of a land attachment does not convert any moveable debt, in relation to the enforcement of which the notice of land attachment was registered, into a heritable one.

**85 Restriction on priority of ranking of certain securities**

After section 13 of the Conveyancing and Feudal Reform (Scotland) Act 1970 (c. 35), insert—

**“13A Effect of subsequent land attachment on ranking of standard securities**

(1) This section applies where—

- (a) a notice of land attachment, relating to land (or any part of it) which is subject to an existing standard security duly recorded, is registered in accordance with section 83(1)(c) of the Bankruptcy and Diligence etc. (Scotland) Act 2007 (asp 3);
- (b) a copy of that notice is served on the creditor in that existing standard security; and
- (c) a land attachment is subsequently created on the expiry of the period of 28 days mentioned in section 81(3) of that Act.

(2) Section 13(1) of this Act shall apply in relation to the effect on the preference in ranking of that existing standard security from the day on which the period referred to in subsection (1)(c) above expires.”.

**86 Lease granted after registration of notice of land attachment**

(1) This section applies where—

- (a) a notice of land attachment is registered;
- (b) during the period of 28 days mentioned in section 81(3) of this Act—
  - (i) the debtor; or
  - (ii) a tenant of the debtor,
 grants a lease of land (or a part of it) specified in the notice; and
- (c) a land attachment is, on the expiry of that period, created.

(2) Subject to section 163(2) to (4) of this Act (restriction on reduction of leases granted in breach of inhibition), any such lease is reducible at the instance of the creditor.

(3) In subsection (1)(b) above, “tenant” includes any subtenant of the tenant and “lease” includes a sublease.

**87 Assignment of title deeds etc.**

(1) A land attachment assigns to the creditor the title deeds, including searches and all unregistered conveyances, affecting the attached land or any part of it.

(2) The creditor is, in the event of a sale of the attached land (or part of it) in pursuance of a warrant under section 97(2) of this Act, entitled to—

- (a) deliver the title deeds (so far as in the creditor’s possession and subject to the rights of any person holding prior rights to their possession) to the purchaser; and
- (b) assign to the purchaser any right the creditor has to have the title deeds made forthcoming.

## **88 Acquisition of right to execute land attachment**

- (1) This section applies where—
  - (a) a person acquires a right as mentioned in section 88(1) (acquisition of right to decree, document, order or determination authorising diligence) of the Debtors (Scotland) Act 1987 (c. 18) (in this Act, the “1987 Act”); and
  - (b) a notice of land attachment has, before that acquisition, been registered in pursuance of that right.
- (2) The person acquiring the right may, by registering a notice such as is mentioned in subsection (3) below, take or continue to take any steps necessary to enforce the debt by land attachment as if the appropriate clerk had, under section 88(4) of the 1987 Act, granted warrant authorising the person to do so.
- (3) The notice referred to in subsection (2) above must—
  - (a) be in (or as nearly as may be in) the form prescribed by Act of Sederunt; and
  - (b) be registered in—
    - (i) the appropriate property register; and
    - (ii) the Register of Inhibitions.
- (4) References in this Chapter to a “creditor” include, unless the context otherwise requires, references to a person who registers a notice under subsection (2) above.

## **89 Effect of debtor’s death before land attachment created**

- (1) This section applies where—
  - (a) a debtor, in relation to whose land a creditor has taken steps to commence or execute a land attachment, dies; and
  - (b) a land attachment has not, before the date of death of the debtor, been created.
- (2) Any steps taken as mentioned in subsection (1)(a) above cease to have effect and any charge relating to the debt is, from the date of death of the debtor, void.
- (3) Nothing in subsection (2) above stops the creditor from subsequently proceeding to raise against any executor or other representative of the debtor an action to constitute the debt.
- (4) Any warrant for diligence in an extract of a decree in such an action authorises land attachment.

## **90 Effect of debtor’s death after land attachment created**

- (1) For the avoidance of doubt, where a debtor, whose land is subject to a land attachment, dies, the land attachment continues to have effect in relation to the attached land.
- (2) The Court of Session may, by Act of Sederunt, provide for the operation of this Chapter in a case to which this section applies and may, in particular—

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- (a) modify the provisions about service of notices of applications for warrant for sale and foreclosure; and
- (b) confer power on the sheriff to dispense with or modify procedures under this Chapter.

## **91 Caveat by purchaser under missives**

- (1) This section applies where—
  - (a) a person has entered into a contract to purchase land from a debtor; and
  - (b) ownership has not been transferred to that person.
- (2) The person may, for the purpose of receiving intimation of any application, under section 92(1) of this Act, for a warrant for sale of the land, register in the Register of Inhibitions a notice in (or as nearly as may be in) the form prescribed by Act of Sederunt.

### *Preparations for sale of attached land*

## **92 Application for warrant to sell attached land**

- (1) Where—
  - (a) a land attachment is in effect;
  - (b) the period of 6 months, beginning with the day or, as the case may be, the last day on which the notice of land attachment is registered, has expired;
  - (c) the sum recoverable by the land attachment exceeds the sum mentioned in subsection (3) below (in this Chapter, the “prescribed sum”); and
  - (d) the sum recoverable has not been paid,
 the creditor may, subject to subsection (2) below, apply to the sheriff for a warrant for sale of the attached land or such part of it as may be specified in the application.
- (2) The Scottish Ministers may by regulations provide that where attached land, or any part of it, is—
  - (a) a dwellinghouse; or
  - (b) a dwellinghouse of such description or class as may be specified in the regulations,
 an application under subsection (1) above may be made only in relation to such part of the attached land which is not a dwellinghouse or, as the case may be, such a dwellinghouse.
- (3) The prescribed sum is—
  - (a) £3,000; or
  - (b) such other sum as may be prescribed by the Scottish Ministers by regulations.
- (4) An application under subsection (1) above must—
  - (a) be in (or as nearly as may be in) the form prescribed by Act of Sederunt;
  - (b) specify—
    - (i) the attached land (or part of it) in relation to which the warrant for sale is sought; and
    - (ii) a solicitor who is willing to execute any warrant for sale granted; and
  - (c) be accompanied by—

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- (i) a report on a search in the appropriate property register in respect of the land specified in the application;
  - (ii) a report on a search in the Register of Inhibitions in respect of the debtor and any person who owns the attached land in common with the debtor;
  - (iii) a copy of the notice of land attachment;
  - (iv) a copy of the certificate of service of that notice on the debtor;
  - (v) a declaration signed by the solicitor mentioned in paragraph (b)(ii) above; and
  - (vi) any other document prescribed by Act of Sederunt.
- (5) An application under subsection (1) above must be intimated to—
- (a) the debtor;
  - (b) if the report mentioned in subsection (4)(c)(ii) above discloses that a notice has been registered under section 91 of this Act, the person at whose instance the notice was registered;
  - (c) any person holding any security or diligence ranking prior to or *pari passu* with the land attachment;
  - (d) any occupier of the land;
  - (e) any person who owns the land in common with the debtor; and
  - (f) any other person belonging to a class of persons prescribed by the Scottish Ministers by regulations.
- (6) A person who receives intimation under subsection (5) above may, before the expiry of the period of 14 days beginning with the day on which intimation is made, lodge objections to the application.
- (7) The Scottish Ministers may, by regulations, make further provision about the reports on searches mentioned in subsection (4)(c)(i) and (ii) above which are to accompany an application under subsection (1) above.
- (8) Where provision is made by virtue of this Chapter or by any other enactment permitting the application under subsection (1) above to be an electronic communication—
- (a) the requirement in paragraph (c) of subsection (4) above that the application be accompanied by the documents mentioned in that paragraph is satisfied by the provision of electronic communications; and
  - (b) the requirement that the declaration mentioned in sub-paragraph (v) of that paragraph be signed is satisfied by a certified electronic signature.
- (9) In this section, “sheriff” means a sheriff of the sheriffdom in which the attached land or any part of it is situated.

### **93 Notice to local authority of application for warrant for sale**

- (1) Where a creditor (other than a local authority) applies under section 92(1) of this Act for a warrant for sale of attached land which comprises or includes a dwellinghouse, the creditor must give notice of that fact to the local authority in whose area the dwellinghouse is situated.
- (2) A notice under subsection (1) above must be given in the form and manner prescribed under section 11(3) of the Homelessness etc. (Scotland) Act 2003 (asp 10).

#### **94 Preliminary hearing on application for warrant to sell**

- (1) The sheriff must, on receiving an application under section 92(1) of this Act and after expiry of the period mentioned in subsection (6) of that section—
  - (a) hold a hearing; and
  - (b) give the persons mentioned in subsection (5) of that section the opportunity of making representations.
- (2) The creditor must attend the hearing whether or not the application is opposed.
- (3) The sheriff must, if satisfied that the application is in order, make an order—
  - (a) fixing a date for a hearing on the application under section 97 of this Act;
  - (b) requiring the creditor to intimate that date to the persons mentioned in section 92(5) of this Act;
  - (c) appointing a chartered surveyor or other suitably qualified person to report on the open market value of the land specified in the application (that surveyor or other person, and their report, being referred to in this Chapter as the “valuer” and the “valuation report” respectively); and
  - (d) where any security or diligence is held in relation to the land specified in the application and the creditor has been unable to ascertain the amount of the sums secured by that other security or diligence, requiring the holder of that security or diligence to disclose to the creditor—
    - (i) the amount of the sums secured; and
    - (ii) where the security holder is obliged to pay any other sums which would be secured by that security to the debtor, the amount of such sums.

#### **95 Valuation report**

- (1) The valuer appointed under section 94(3)(c) of this Act—
  - (a) may take all steps which are reasonably necessary (including inspecting the attached land) to produce a valuation report; and
  - (b) must send a copy of the report to—
    - (i) the creditor; and
    - (ii) the persons mentioned in section 92(5) of this Act.
- (2) The debtor and any other person in occupation of attached land must allow the valuer to inspect the land and carry out any other steps which are necessary to produce the valuation report.
- (3) The creditor is liable for the valuer’s reasonable remuneration and outlays incurred in exercising functions under this section.
- (4) Such remuneration and outlays are expenses incurred by the creditor in executing the land attachment.

#### **96 Creditor’s duties prior to full hearing on application for warrant for sale**

- (1) The creditor must, no later than 7 clear days before the date fixed for the hearing under section 97 of this Act, lodge—
  - (a) the valuation report;



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- (b) a continuation of the report on the search in the appropriate property register mentioned in section 92(4)(c)(i) of this Act;
  - (c) a continuation of the report on the search in the Register of Inhibitions mentioned in section 92(4)(c)(ii) of this Act; and
  - (d) a note specifying the amount outstanding under any security or diligence over the land specified in the application.
- (2) Where a report lodged under subsection (1)(b) or (c) above reveals a deed registered since the date of the report mentioned in section 92(4)(c)(i) of this Act or, as the case may be, a notice under section 91 of this Act registered since the date of the report mentioned in section 92(4)(c)(ii) of this Act, the sheriff—
- (a) must make an order requiring—
    - (i) the application; and
    - (ii) the date fixed for the hearing,to be intimated to the person who registered that deed or, as the case may be, that notice; and
  - (b) may, if it appears necessary to do so, make an order—
    - (i) postponing the hearing to a later date; and
    - (ii) requiring the creditor to intimate that date to that person and to the persons mentioned in section 92(5) of this Act.
- (3) Where the sheriff makes an order under subsection (2)(b)(i) above postponing the hearing, the sheriff may make such ancillary orders as the sheriff thinks fit including, without prejudice to that generality, an order requiring fresh continuations of the reports on searches mentioned in subsection (1)(b) and (c) above to be lodged.
- (4) Subsection (6) of section 92 of this Act applies to a person who receives intimation under subsection (2) above as it applies to a person who receives intimation under subsection (5) of that section.
- (5) The Scottish Ministers may, by regulations, make further provision about the continuations of the reports on searches mentioned in subsection (1)(b) and (c) above which are to be lodged under that subsection.

## **97 Full hearing on application for warrant for sale**

- (1) At the hearing on an application under section 92(1) of this Act, the sheriff must not make any order without first giving any person who has lodged objections under section 92(6) of this Act an opportunity to be heard.
- (2) Subject to subsections (3) and (5) below and to sections 98, 99 and 102 of this Act, the sheriff may, if satisfied that the application is in order, make an order—
- (a) subject to subsection (4) below, granting a warrant for sale of the attached land; and
  - (b) authorising the solicitor specified in the application (or such other solicitor the sheriff specifies) to execute that warrant (in this Chapter, that solicitor being referred to as the “appointed person”).
- (3) The sheriff may, if satisfied that granting a warrant for sale would be unduly harsh to the debtor or any other person having an interest—
- (a) make an order under subsection (2) above but suspend its effect for a period not exceeding 1 year beginning with the date on which the order is made; or

- (b) make an order refusing to grant such a warrant.
- (4) The sheriff—
  - (a) must specify in the warrant granted the period within which the attached land is to be sold; and
  - (b) may grant warrant—
    - (i) to sell only part of the attached land;
    - (ii) to sell the attached land by lots.
- (5) The sheriff must make an order refusing the application for a warrant for sale if satisfied that any of the grounds mentioned in subsection (6) below apply.
- (6) The grounds referred to in subsection (5) above are that—
  - (a) the land attachment is invalid;
  - (b) the land attachment has ceased to have effect;
  - (c) the attached land (or any part of it) is not capable of being sold;
  - (d) the sum recoverable by the land attachment does not exceed the prescribed sum;
  - (e) a warrant for sale of the attached land (or any part of it) has been granted to another creditor of the debtor;
  - (f) a heritable creditor of the debtor is exercising that creditor’s right to sell the attached land (or any part of it) under the security;
  - (g) if the attached land (or any part of it) were sold, the likely net proceeds of the sale would not exceed the sum mentioned in subsection (7) below.
- (7) The sum referred to in subsection (6)(g) above is the aggregate of—
  - (a) the expenses of the land attachment chargeable against the debtor; and
  - (b) whichever is the lesser of—
    - (i) the sum of £1,000; and
    - (ii) the sum equal to 10 per cent of the sum mentioned in section 81(6)(a) of this Act or so much of that sum as is outstanding,
 or such other sum or percentage as may be prescribed by the Scottish Ministers by regulations.
- (8) In subsection (6)(g) above, “likely net proceeds” means the sum likely to be raised by the sale of the attached land less any sums that would be due to a creditor holding a security or diligence over the attached land which ranks prior to or *pari passu* with the land attachment.

## **98 Application for warrant for sale of sole or main residence**

- (1) This section applies where—
  - (a) the creditor applies under section 92(1) of this Act for a warrant for sale of attached land which comprises or includes a dwellinghouse; and
  - (b) that dwellinghouse is the sole or main residence of—
    - (i) the debtor;
    - (ii) where the owner of the dwellinghouse is not the debtor, that owner; or
    - (iii) any person mentioned in subsection (2) below.
- (2) Those persons are—
  - (a) a non-entitled spouse of the debtor or the owner;

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- (b) a person living together with the debtor or the owner as husband and wife;
  - (c) a civil partner of the debtor or the owner;
  - (d) a person living together with the debtor in a relationship which has the characteristics of the relationship between a husband and wife except that the person and the debtor or the owner are of the same sex;
  - (e) a person to whom subsection (3) below applies.
- (3) This subsection applies to a person where—
- (a) the debtor or the owner does not reside in the dwellinghouse;
  - (b) a child of the debtor or the owner, who is also a child of the person, does so reside; and
  - (c) the person has lived together with the debtor or the owner as is mentioned in paragraph (b) or (d) of subsection (2) above throughout the period of 6 months ending with the day on which the debtor or the owner ceased to so reside.
- (4) Before making, under section 97(2) of this Act, an order granting a warrant for sale, the sheriff must have regard to the matters mentioned in subsection (5) below.
- (5) Subject to subsection (6) below, those matters are—
- (a) the nature of and reasons for the debt secured by the land attachment;
  - (b) the debtor’s ability to pay, if the effect of the warrant for sale were suspended by an order under subsection (7) below, the debt outstanding (including any interest and expenses chargeable against the debtor);
  - (c) any action taken by the creditor to assist the debtor in paying that debt;
  - (d) the ability of those occupying the dwellinghouse as their sole or main residence to secure reasonable alternative accommodation.
- (6) The Scottish Ministers may by regulations modify subsection (5) above to—
- (a) add to;
  - (b) remove from; or
  - (c) vary,
- the matters mentioned there.
- (7) Where the sheriff makes, under section 97(2) of this Act, an order granting a warrant for sale, the sheriff may suspend the effect of the warrant for a period not exceeding 1 year beginning with the day on which the order is made.
- (8) For the purposes of subsection (1) above, a dwellinghouse may be a sole or main residence irrespective of whether it is used, to any extent, by the debtor or a person mentioned in subsection (2) above for the purposes of any profession, trade or business.
- (9) In this section—
- “child” means—
    - (a) a child under the age of 16 years; and
    - (b) includes—
      - (i) a stepchild; and
      - (ii) any child brought up or treated by any person to whom subsection (3) above applies or by the debtor or the owner as a child of that person, of the debtor or of the owner;
  - “dwellinghouse” includes any yard, garden, outbuilding or other pertinents; and

“non-entitled spouse” is to be construed in accordance with section 1(1) of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (c. 59).

**99 Protection of purchaser under contract where creditor applies for warrant for sale**

- (1) This section applies where—
  - (a) the creditor applies under section 92(1) of this Act for a warrant for sale of attached land; and
  - (b) a person, at whose instance a notice was, by virtue of section 91 of this Act, registered (in this section, a “prospective purchaser”), has lodged objections to the application.
- (2) At the hearing under section 97(1) of this Act, the sheriff may, if satisfied as to the matters mentioned in subsection (3) below, make an order—
  - (a) sisting the application;
  - (b) requiring the prospective purchaser to pay the price under the contract to the creditor; and
  - (c) making such other incidental or consequential provision as the sheriff thinks fit.
- (3) The matters are that—
  - (a) the prospective purchaser did not, in entering into the contract for the purchase of the land, seek to defeat the rights of creditors of the debtor; and
  - (b) both the prospective purchaser and the debtor will proceed with the purchase under the contract without undue delay.
- (4) Section 116 of this Act applies to the proceeds of sale paid to the creditor in pursuance of an order under subsection (2) above as it applies to a sale in pursuance of a warrant for sale subject to the modification that references to the “appointed person” are references to the “creditor”.

**100 Protection of purchaser under contract where warrant for sale granted**

- (1) This section applies where—
  - (a) a warrant for sale has been granted under section 97(2) of this Act; and
  - (b) a person (in this section, the “prospective purchaser”) had, before the notice of land attachment was registered, entered into a contract to purchase attached land from the debtor.
- (2) The sheriff may, on the application of the prospective purchaser and if satisfied as to the matters mentioned in section 99(3) of this Act, make an order—
  - (a) suspending the warrant for sale for a period not exceeding 1 year from the day on which the order is made;
  - (b) requiring the prospective purchaser to pay the price under the contract to the appointed person; and
  - (c) making such other incidental or consequential provision as the sheriff thinks fit.
- (3) Section 116 of this Act applies to the proceeds of sale paid to the appointed person in pursuance of an order under subsection (2) above as it applies to a sale in pursuance of a warrant for sale.

## **101 Provision supplementary to sections 99 and 100**

- (1) This section applies where an order is made under section 99(2) or 100(2) of this Act.
- (2) The sheriff may, on the application of the creditor or the appointed person, as the case may be, if satisfied as to the matters mentioned in subsection (3) below, revoke the order under section 99(2) or, as the case may be, section 100(2) of this Act.
- (3) The matters are that—
  - (a) the prospective purchaser and the debtor entered into the contract for the purchase of the land in order to defeat the rights of creditors of the debtor; or
  - (b) there has been undue delay in completing the purchase.

## **102 Warrant for sale of attached land owned in common**

- (1) This section applies where attached land specified in an application under section 92(1) of this Act is a pro indiviso share owned in common by the debtor and a third party.
- (2) Subject to subsection (3) below, the sheriff may, under section 97(2) of this Act, make an order granting a warrant for sale of the land specified in the application.
- (3) The sheriff must specify in the order whether the warrant—
  - (a) authorises—
    - (i) division of the land owned in common; and
    - (ii) sale of the part, specified in the warrant, which, after such division, would belong to the debtor as sole owner (in this section, the “debtor’s part”); or
  - (b) sale of the land owned in common and, subject to subsection (5) below, division of the proceeds.
- (4) Where the warrant authorises division of the land owned in common—
  - (a) with effect from the day on which the order granting the warrant is made—
    - (i) the debtor’s part is subject to the land attachment; and
    - (ii) the remaining land is disburdened of the land attachment; and
  - (b) this Chapter applies as if the warrant for sale granted were a warrant for sale of the debtor’s part only.
- (5) Where the warrant authorises sale of the land owned in common and division of the proceeds, the appointed person must—
  - (a) subject to the rights of any creditor of the third party holding a security over the third party’s pro indiviso share of the land, pay to the third party the share of the proceeds of sale due to that person; and
  - (b) deal, under section 116 of this Act, with the share of the proceeds that is attributable to the debtor’s share in the land as if those proceeds were proceeds from the sale of land owned by the debtor as sole owner.
- (6) Where land to which this section applies is divided and sold, or sold, in pursuance of a warrant for sale, the third party who, immediately before that warrant is granted, owned the land in common with the debtor may purchase the debtor’s part or, as the case may be, the land.
- (7) Where the third party purchases land which is sold under a warrant authorising sale and division of the proceeds—

- (a) the third party need pay to the appointed person only the share of the price attributable to the debtor's share in the land; and
- (b) subsection (5)(a) above does not apply.

### **103 Intimation of sheriff's decision at full hearing**

- (1) Where a warrant for sale is granted under section 97(2) of this Act, the creditor must, as soon as is reasonably practicable, send a copy of the warrant to—
  - (a) the debtor; and
  - (b) the appointed person.
- (2) Where a warrant for sale is refused under section 97(3)(b) or (5) of this Act, the sheriff clerk must, as soon as is reasonably practicable, send a copy of the order to the debtor and to any other person appearing to the sheriff clerk to have an interest.

### **104 Supplementary orders as respects sale**

- (1) The sheriff may, either when making an order granting a warrant for sale or subsequently, make such order as appears to the sheriff to be appropriate in connection with the sale of the attached land.
- (2) In particular, the sheriff may, on the application of the appointed person—
  - (a) extend the period specified in the warrant granted under section 97(2) of this Act within which the land is to be sold;
  - (b) remove that appointed person and appoint another solicitor as the appointed person; and
  - (c) on the application of the creditor, the debtor or any other person appearing to the sheriff to have an interest—
    - (i) in a case where the appointed person has died, appoint another solicitor as the appointed person;
    - (ii) in a case where the appointed person is unable to carry out the appointed person's functions due to ill health or incapacity, remove that person and appoint another solicitor as appointed person;
    - (iii) in any other case, on cause shown, so remove and appoint.
- (3) An order made under this section after the grant of a warrant for sale must be intimated by the creditor—
  - (a) in such form and manner;
  - (b) before the expiry of such period; and
  - (c) to the debtor and such other persons,
 as the sheriff may direct.

### **105 Effect of certain refusals of application for warrant for sale under section 97(5)**

Where, under section 97(5) of this Act, an order is made refusing an application for a warrant for sale by virtue of a ground mentioned in paragraph (d), (e), (f) or (g) of subsection (6) of that section—

- (a) the land attachment does not, by reason only of that refusal, cease to have effect; and
- (b) it is competent for the creditor to make a further application under section 92(1) of this Act.

## **106 Termination of debtor's right to occupy land**

- (1) Where an order is made granting a warrant for sale, the creditor may, by notice served on—
  - (a) the debtor; and
  - (b) any other person having a right, derived from the debtor, to occupy the land to which the warrant relates,terminate, with effect from such day as the creditor specifies in the notice (being a day not less than 7 days after the date of service), any right of the debtor (or other person) to occupy that land.
- (2) A notice under subsection (1) above must be—
  - (a) in (or as nearly as may be in) the form prescribed by Act of Sederunt; and
  - (b) served on the debtor or, as the case may be, other person.
- (3) Any right of a person (other than the debtor) to occupy land which, before a notice of land attachment relating to the land was registered, would have been binding on a singular successor of the debtor is not affected by subsection (1) above.
- (4) A certificate, in (or as nearly as may be in) the form prescribed by Act of Sederunt, of service of a notice such as is mentioned in subsection (1) above may be registered.

## **107 Consequences of giving notice under section 106(1)**

- (1) From the date on which the creditor gives notice under section 106(1) of this Act until the land attachment ceases to have effect the creditor (in place of the debtor) has the rights and obligations of a heritable creditor in lawful possession of the land.
- (2) Without prejudice to the generality of subsection (1) above, those rights and obligations—
  - (a) include any rights and obligations under any lease, or under any permission or right of occupancy, granted in respect of the land, including the right to receive rent from any tenant;
  - (b) do not include the power to grant a lease.
- (3) Subsection (2)(a) above applies only as respects rent payable on or after the date on which the creditor intimates in writing to the tenant that the notice has been given.
- (4) A creditor who has given notice under section 106(1) of this Act—
  - (a) may apply to the sheriff for an order—
    - (i) authorising the carrying out of works of reconstruction, alteration or improvement if they are works reasonably required to maintain the market value of the land; and
    - (ii) to recover from the debtor any expenses and outlays reasonably incurred in so doing;
  - (b) may bring an action of ejection against the debtor; and
  - (c) has title to bring any action of removing, intrusion or ejection which the debtor might competently have brought in respect of the land.
- (5) Any—
  - (a) expenses or outlays incurred as mentioned in subsection (4)(a)(ii) above; and
  - (b) expenses of any action of removing, intrusion or ejection brought by virtue of subsection (4)(b) or (c) above,

are expenses incurred in executing the land attachment.

- (6) The reference in subsection (3) above to intimation in writing includes a reference to intimation by electronic communication.

### *The sale*

#### **108 Appointed person**

- (1) The appointed person—
- (a) is an officer of the court; and
  - (b) must act independently of the creditor, the debtor and any other interested person.
- (2) Before exercising any functions conferred by virtue of this Chapter, the appointed person must lodge a bond of caution for such amount as may be prescribed by Act of Sederunt.
- (3) The appointed person may apply to the sheriff who granted the warrant for sale under section 97(2) of this Act for directions as to how to exercise any of that person's functions.
- (4) In executing a warrant for sale granted under section 97(2) of this Act, the appointed person must—
- (a) exercise the functions conferred—
    - (i) by this Chapter; and
    - (ii) by the Scottish Ministers under subsection (8) below; and
  - (b) comply with any directions made under subsection (3) above.
- (5) The appointed person is liable to the creditor, the debtor, any person who owns the attached land in common with the debtor and any secured creditor for any patrimonial loss caused as a result of the appointed person's negligence in executing the warrant for sale.
- (6) The creditor is liable for the appointed person's reasonable remuneration and outlays incurred in exercising functions conferred by virtue of this Chapter.
- (7) Such remuneration and outlays are expenses incurred by the creditor in executing the land attachment.
- (8) The Scottish Ministers may, by regulations—
- (a) confer functions on;
  - (b) remove functions from; or
  - (c) otherwise modify the functions of,
- appointed persons.

#### **109 Method of sale**

- (1) The land in relation to which a warrant for sale is granted under section 97(2) of this Act must be sold in execution of that warrant by the appointed person.
- (2) The land may, unless the sheriff otherwise directs, be sold by private bargain or at auction.



- (3) The appointed person must consult the creditor before determining which of the methods of sale mentioned in subsection (2) above is to be used.
- (4) The appointed person must—
  - (a) advertise the sale of the attached land; and
  - (b) ensure that the price at which the land is sold is the best that can reasonably be obtained.

#### **110 Legal incapacity or disability of debtor not to affect title of purchaser**

Any legal incapacity or disability of a debtor has no effect on the title passed to a purchaser of attached land which has been sold in execution of a warrant for sale.

#### **111 Title of purchaser not to be affected by certain irregularities**

- (1) Where a disposition bearing to be granted in execution of a warrant for sale is registered in the appropriate property register, the validity of that disposition is not, if the conditions mentioned in subsection (2) below are satisfied, challengeable on the ground—
  - (a) that the land attachment was irregularly executed; or
  - (b) that, before the date of settlement of the sale, the land attachment had ceased to have effect.
- (2) The conditions are that—
  - (a) the purchaser acted in good faith in relation to the purchase of the land; and
  - (b) the appointed person grants a certificate, in (or as nearly as may be in) the form prescribed by Act of Sederunt, to the purchaser confirming that the land attachment was regularly executed.
- (3) In subsection (2)(a) above, a purchaser is deemed to have acted in good faith where, immediately before the date of settlement, the purchaser was not aware and could not reasonably have become aware that the land attachment was irregularly executed or, as the case may be, that it had, before that date, ceased to have effect.

#### **112 Effect of registration of disposition on securities**

Where a disposition of attached land is granted in execution of a warrant for sale to a purchaser, then, on the registration of the disposition, the land is disburdened of—

- (a) the land attachment; and
- (b) any—
  - (i) heritable security; or
  - (ii) diligence,ranking *pari passu* with, or after, the land attachment.

#### **113 Report of sale**

- (1) Where attached land is sold in execution of a warrant for sale, the appointed person must, before the expiry of the period of 28 days beginning with the day on which the sale price is paid, lodge with the sheriff clerk for the court which granted the warrant a report of the sale.

- (2) A report lodged under subsection (1) above must—
- (a) be in (or as nearly as may be in) the form prescribed by Act of Sederunt; and
  - (b) contain—
    - (i) a description of the land (or part) sold and the sale price;
    - (ii) a description of any land which is unsold and the price at which it was last offered for sale (or, if offered for sale at auction, the reserve price);
    - (iii) a statement of the expenses incurred by the creditor in executing the land attachment;
    - (iv) a statement of the amount due under any security or diligence ranking on the proceeds of sale prior to, or *pari passu* with, the land attachment;
    - (v) a statement of the amount due under any security or diligence ranking on the proceeds of sale after the land attachment;
    - (vi) a note of the amount of any surplus of the sale proceeds payable to the debtor; and
    - (vii) a note of any balance of the debt due by the debtor to the creditor.
- (3) If the appointed person—
- (a) without reasonable excuse makes a report of sale after the expiry of the period mentioned in subsection (1) above; or
  - (b) wilfully refuses to make, or delays making, a report after the expiry of that period,

the sheriff may make an order providing that the appointed person is not entitled to payment from the creditor of the reasonable remuneration and outlays incurred in executing the warrant for sale or so much of such remuneration and outlays as the sheriff specifies.

#### **114      Audit of report of sale**

- (1) Where a report is lodged under section 113(1) of this Act, the sheriff must remit it to the auditor of court for the auditor to report on it within such time as the sheriff may specify.
- (2) The auditor must—
- (a) tax the expenses of the land attachment chargeable against the debtor;
  - (b) certify the balance due to or by the debtor following the sale; and
  - (c) submit a report to the sheriff.
- (3) The auditor is not entitled to charge a fee in respect of the report submitted under subsection (2)(c) above.
- (4) The report of sale and the auditor's report must be retained by the sheriff clerk for such period as may be prescribed by Act of Sederunt and during that period must be available for inspection by any interested person on payment of such fee as may be prescribed in an order made under section 2 of the Courts of Law Fees (Scotland) Act 1895 (c. 14).

## **115 Sheriff's consideration of report**

- (1) Where the auditor has submitted a report to the sheriff under section 114(2)(c) of this Act, the sheriff may, after considering that report and the report on sale lodged under section 113(1) of this Act—
  - (a) make an order approving the report of sale subject to such amendments (if any) made—
    - (i) following a hearing under subsection (2) below, by the sheriff; or
    - (ii) by the auditor,as may be specified in the order;
  - (b) if the sheriff is satisfied that there has been a substantial irregularity in the land attachment, make an order—
    - (i) declaring the land attachment to be void; and
    - (ii) making such consequential order as appears to the sheriff to be necessary in the circumstances.
- (2) The sheriff may not make an order under subsection (1) above without first giving all interested persons an opportunity to be heard.
- (3) The sheriff clerk must intimate the order of the sheriff under subsection (1) above to the debtor and any other person appearing to the sheriff clerk to have an interest.
- (4) Any order under subsection (1)(b) above does not affect the title of any person to land sold in execution of the warrant for sale to which the report relates.

## **116 Proceeds of sale**

- (1) Where attached land is sold in execution of a warrant for sale, the proceeds of the sale must be disbursed by the appointed person in the following order—
  - (a) subject to subsection (2) below, any expenses due to the creditor by virtue of section 114(2)(a) of this Act;
  - (b) any sums due to any other creditor holding a security or diligence over the land which ranks prior to the land attachment;
  - (c) any sums due to—
    - (i) the attaching creditor in respect of the sum recoverable by the land attachment (other than any such expenses as are mentioned in paragraph (a) above); and
    - (ii) any creditor under a security or diligence which ranks *pari passu* with the land attachment;
  - (d) any sums due to any other creditor under any security or diligence which ranks after the land attachment; and
  - (e) subject to section 37(8C)(b) of the 1985 Act, any balance due to the debtor.
- (2) Subject to section 113(3) of this Act, the appointed person may deduct and retain from the sum mentioned in subsection (1)(a) above such remuneration and outlays incurred by the appointed person in executing the warrant for sale.
- (3) Where there is a balance due to the debtor, the appointed person must pay it to the debtor or any person authorised to give a receipt for the balance on the debtor's behalf.
- (4) Where, by virtue of subsection (1) above, a creditor receives the sums due to the creditor under a security or diligence, that creditor must grant a discharge of that security or diligence.

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- (5) If the appointed person is unable to obtain from—
- (a) the debtor; or
  - (b) any creditor of the debtor;
- a receipt or discharge in respect of the disbursement of the proceeds of sale, the appointed person may consign the amount due in the sheriff court for the person having right to it.
- (6) Any such consignment discharges the obligation to pay the amount due; and a certificate of the sheriff clerk is sufficient evidence of the discharge.

### *Foreclosure*

## **117 Foreclosure**

- (1) This section applies where the appointed person—
- (a) has exposed to sale the land specified in the warrant for sale; and
  - (b) has—
    - (i) failed to find a purchaser; or
    - (ii) succeeded in selling only part of the land, and that at a price which is less than the sum secured by the land attachment and by any security or diligence ranking prior to, or *pari passu* with, the land attachment.
- (2) The appointed person may apply, in (or as nearly as may be in) the form prescribed by Act of Sederunt, to the sheriff who granted the warrant for sale for a decree of foreclosure.
- (3) The application under subsection (2) above must be accompanied by—
- (a) a statement setting out the whole amount secured—
    - (i) by the land attachment; and
    - (ii) by any other security or diligence ranking prior to or *pari passu* with the land attachment; and
  - (b) where part of the land has been sold, a report on that sale under section 113(1) of this Act.
- (4) A copy of an application under subsection (2) above must be served by a judicial officer on—
- (a) the debtor;
  - (b) where the debtor does not own the land, the owner;
  - (c) any occupier of the land specified in the warrant for sale;
  - (d) any creditor in a heritable security affecting the land, as disclosed in a report of a search in the appropriate property register brought down to a date no later than 3 clear days before the day on which the application is made; and
  - (e) any other person having a land attachment or other diligence over the land.
- (5) The sheriff, after affording any person on whom a copy of the application was served under subsection (4) above an opportunity to make representations, may—
- (a) grant the decree of foreclosure applied for;
  - (b) sist the application for a period not exceeding 3 months to allow the debtor to pay the sum recoverable by the land attachment; or

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- (c) appoint a valuer to fix a reserve price at which the land (or remaining part of that land) must be—
  - (i) auctioned; or
  - (ii) advertised for sale and if unsold auctioned.
- (6) The debtor may—
  - (a) bid and purchase at any auction under subsection (5)(c)(i) or (ii) above; or
  - (b) purchase at the price advertised under subsection (5)(c)(ii) above.
- (7) Where an order has been made under subsection (5)(c) above and the appointed person—
  - (a) produces an auctioneer’s certificate that the land in question has been duly exposed to sale at the reserve price but is unsold; or
  - (b) certifies in (or as nearly as may be in) the form prescribed by Act of Sederunt that the land has been advertised at the reserve price but is unsold,the sheriff may, without further intimation, grant decree of foreclosure.
- (8) A decree of foreclosure granted under this section must—
  - (a) be in (or as nearly as may be in) the form prescribed by Act of Sederunt;
  - (b) describe the land in relation to which it is granted; and
  - (c) contain a declaration of the price at which, on registration of an extract of the decree, the creditor is deemed to have acquired the land.
- (9) Where provision is made by virtue of this Chapter or by any other enactment permitting the application under subsection (2) above to be an electronic communication, the requirement in subsection (3) above that the application be accompanied by the statement and report mentioned in that subsection is satisfied by the provision of electronic communications.

## **118 Registration of decree of foreclosure**

- (1) On registration of an extract of the decree of foreclosure in the appropriate property register—
  - (a) any right to discharge the land attachment by payment is extinguished;
  - (b) the creditor has right to, and is vested in, the land as if an irredeemable disposition of the land, granted in favour of the creditor by the debtor, had been delivered to the creditor and, on the date of registration of the extract of the decree, duly registered;
  - (c) the land is disburdened of the land attachment and of any security or diligence ranking after the land attachment; and
  - (d) the creditor has the like right as the debtor to redeem or as the case may be to discharge by payment any security or diligence ranking prior to, or *pari passu* with, the land attachment.
- (2) Notwithstanding the registration of an extract of a decree of foreclosure, any personal obligation of the debtor under any security remains in full force and effect in so far as not extinguished by the price for which the creditor is deemed to have acquired the land and the price for which any part of the land has been sold.
- (3) Title acquired by virtue of a decree of foreclosure under this section is not challengeable on the ground of any irregularity in the proceedings for, or in any diligence which preceded, foreclosure.

- (4) Notwithstanding subsection (3) above, nothing in this section affects the competency of any claim for damages in respect of such proceedings or diligence as are mentioned in that subsection.

*Payments to account and expenses*

**119 Ascription**

- (1) This section applies where any sums are—
- (a) recovered by a land attachment; or
  - (b) paid to account of the sum recoverable by the land attachment while it is in effect.
- (2) Such sums must be ascribed to the following in the order in which they are mentioned—
- (a) the expenses which are chargeable against the debtor incurred in the land attachment;
  - (b) any interest which has accrued, at the day or, as the case may be, the last day on which the notice of land attachment was registered, on the sum for payment of which the charge was served;
  - (c) any sum for payment of which that charge was served together with such interest as has accrued after the day mentioned in paragraph (b) above.

**120 Expenses of land attachment**

- (1) The expenses incurred by the creditor in executing a land attachment are chargeable against the debtor.
- (2) Expenses which, in accordance with subsection (1) above, are chargeable against the debtor are recoverable from the debtor by the land attachment but not by any other legal process.
- (3) Where any expenses such as are mentioned in subsection (2) above have not been recovered by the time the land attachment is completed, or otherwise ceases to have effect, they cease to be so recoverable.
- (4) In subsection (2) above, the reference to expenses does not include a reference to the expenses of service of a charge.
- (5) The sheriff may, if satisfied that the debtor has objected on frivolous grounds to—
  - (a) an application for a warrant for sale; or
  - (b) an application for a decree of foreclosure,
 award expenses, not exceeding such amount as may be prescribed by the Scottish Ministers by regulations, against the debtor.

*Termination, discharge etc. of land attachment*

**121 Termination by payment etc.**

- (1) If the full sum for payment of which the charge was served is, before the expiry of the period of 28 days mentioned in section 81(3) of this Act, either paid or tendered

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to the creditor, to a judicial officer or to any other person who has authority to receive payment on behalf of the creditor—

- (a) the land attachment is not created; and
- (b) the notice of land attachment ceases to have effect.

(2) Subject to subsection (3) below, if the full sum recoverable by a land attachment is either paid or tendered to—

- (a) any of the persons mentioned in subsection (1) above; or
- (b) the appointed person,

the land attachment ceases to have effect.

(3) Subsection (2) above does not apply unless the sum is paid before—

- (a) where a warrant for sale of the attached land (or part of it) is granted, a contract of sale of the attached land is concluded; or
- (b) an extract of a decree of foreclosure in relation to the attached land (or part of it) is registered.

## **122 Discharge**

(1) This section applies where—

- (a) under section 121(1)(b) of this Act, a notice of land attachment ceases to have effect; or
- (b) under subsection (2) of that section, a land attachment ceases to have effect.

(2) The creditor must discharge—

- (a) the notice of land attachment; or
- (b) the land attachment,

provided that the expenses of discharge are paid or tendered to any of the persons mentioned in section 121(1) of this Act.

(3) It is competent to register any such discharge.

## **123 Recall and restriction of land attachment**

(1) The debtor or any other person having an interest may apply to the sheriff for an order

- (a) recalling a land attachment; or
- (b) restricting such an attachment.

(2) An application under subsection (1) above must—

- (a) be in (or as nearly as may be in) the form prescribed by Act of Sederunt; and
- (b) be intimated to the creditor.

(3) The sheriff must, if satisfied—

- (a) that the land attachment—
  - (i) is invalid;
  - (ii) has been executed incompetently or irregularly; or
  - (iii) has ceased to have effect; or
- (b) that the creditor is, under section 122(2)(b) of this Act, obliged to discharge it,

make an order declaring that to be the case and recalling the land attachment.

- (4) The sheriff may, if satisfied that a land attachment is valid but—
  - (a) having regard to the sum recoverable by the land attachment, that significantly more land is attached than need be; and
  - (b) that it is reasonable to do so,
 make an order restricting the effect of the land attachment to part only of the land to which it relates.
- (5) An order of recall or restriction must be in (or as nearly as may be in) the form prescribed by Act of Sederunt.
- (6) It is competent for a person who obtains an order of recall or restriction to register that order in the appropriate property register.

#### **124 Duration of land attachment**

- (1) Subject to sections 121 to 123 of this Act and to subsection (2) below, a land attachment ceases to have effect on the expiry of the period of 5 years beginning with the day or, as the case may be, the last day on which the notice of land attachment is registered.
- (2) The creditor may extend the period mentioned in subsection (1) above for a further period of 5 years.
- (3) Such an extension is effected by the creditor registering, during the period of 2 months ending with the day on which the period mentioned in subsection (1) above ends, a notice of extension in (or as nearly as may be in) the form prescribed by Act of Sederunt.
- (4) The creditor may extend the period for which a land attachment has effect on more than one occasion and subsections (1) to (3) above apply as if for the reference in subsection (1) above to the day on which the notice of land attachment is registered there were substituted a reference to the day or, as the case may be, the last day on which the notice of extension is last registered.

#### *Land attachment subsequent to reduction of deed granted in breach of inhibition*

#### **125 Land attachment subsequent to reduction of deed granted in breach of inhibition**

- (1) Notwithstanding section 82(2)(a)(ii) of this Act, where—
  - (a) a debtor has granted a deed to a person (in this section, a “third party”) in breach of an inhibition; and
  - (b) the deed has been reduced by the inhibiting creditor on the ground that it breached the inhibition,
 it is competent for the inhibiting creditor to register a notice of land attachment in relation to land to which the reduced deed relates.
- (2) A land attachment created following registration of a notice of land attachment in the circumstances mentioned in subsection (1) above enjoys preference in ranking in any competition with—
  - (a) a security granted over any land described in the notice in favour of; and
  - (b) a land attachment over any such land executed by, a creditor of the third party.



- (3) Where a notice of land attachment is registered in the circumstances mentioned in subsection (1) above, this Chapter applies with the following modifications (and in those modifications “third party” means a third party within the meaning given by subsection (1) above).
- (4) The references mentioned in subsection (5) below to the “debtor” are to be read as references to the debtor and the third party.
- (5) Those references are the references in sections 83(5)(a), 92(4)(c)(iv) and (5)(a), 103(1)(a), 104(3)(c), 106(1)(a), 108(5) and 117(4)(a).
- (6) The references mentioned in subsection (7) below to the “debtor” are to read as references to the debtor or the third party.
- (7) Those references are—
  - (a) the references in sections 86(1)(b), 91(1)(a), 95(2), 98(1)(b), (2), (3), (8) and (9)(b)(ii), 99(3)(b), 100(1)(b), 106(1) (except the reference in paragraph (a)), 107(1) and (4)(b) and (c), 113(2)(b)(vi), 116(3) and (5), 117(4) and (6) and 120(5); and
  - (b) the first reference in section 101(3)(a).
- (8) In section 114(2)(b), after “to” insert “the debtor or third party”.
- (9) In section 116(1), after paragraph (d) insert—

“(da) any balance due to the third party;”.

#### *General and miscellaneous*

### **126 Land attachment as heritable security**

For the avoidance of doubt, a land attachment is not a heritable security for the purposes of the Heritable Securities (Scotland) Act 1894 (c. 44).

### **127 Statement on impact of land attachment**

- (1) The Scottish Ministers must, within 15 months of the commencement of this Chapter, prepare, publish and lay before the Scottish Parliament a statement setting out the impact of land attachment on debt recovery and homelessness.
- (2) The statement must specify—
  - (a) the number of land attachments registered;
  - (b) the number of warrants for sale—
    - (i) granted;
    - (ii) refused; or
    - (iii) suspended,under section 97;
  - (c) the number of persons made homeless as a consequence of this Chapter;
  - (d) the mean and median sums recovered by land attachment; and
  - (e) the effect which land attachment appears to have had on debtors' abilities to meet ongoing financial obligations and repay other debts.

- (3) In this section, “homeless” has the meaning given in section 24 of the Housing (Scotland) Act 1987 (c. 26).

## 128 Interpretation

- (1) In this Chapter, unless the context otherwise requires—
- “appointed person” has the meaning given by section 97(2)(b) of this Act;
  - “appropriate property register” has the meaning given by section 83(1)(c)(i) of this Act;
  - “attached land” has the meaning given by section 81(5)(a) of this Act;
  - “decree” has the meaning given in section 221 of this Act (except that paragraphs (c), (g) and (h) of the definition of “decree” in that section do not apply) being a decree which, or an extract of which, authorises land attachment;
  - “document of debt” has the meaning given in section 221 of this Act, being a document which, or an extract of which, authorises land attachment;
  - “judicial officer” means the judicial officer appointed by the creditor;
  - “land” has the meaning given by section 82(1) of this Act;
  - “long lease” has the same meaning as in section 28(1) of the Land Registration (Scotland) Act 1979 (c. 33);
  - “notice of land attachment” has the meaning given by section 83(1) of this Act;
  - “prescribed sum” has the meaning given by section 92(1)(c) of this Act;
  - “property register” means the Land Register of Scotland or, as the case may be, the General Register of Sasines;
  - “registering”, in relation to any document, means, unless the context otherwise requires, registering an interest in land or information relating to an interest in land (being an interest or information for which that document provides) in the Land Register of Scotland or, as the case may be, recording the document in the Register of Sasines (cognate expressions being construed accordingly);
  - “sum recoverable by the land attachment” has the meaning given by section 81(5)(b) of this Act; and
  - “warrant for sale” means a warrant granted under section 97(2) of this Act.
- (2) In this Chapter—
- (a) any reference to a purchase, sale, conveyance or disposition is, in a case where the attached land is a lease, to be construed as a reference to an assignation; and
  - (b) any reference to the ownership of land in such a case is to be construed as a reference to the right of lease,
- and cognate expressions are to be construed accordingly.
- (3) The Scottish Ministers may by order modify the definitions of “decree” and “document of debt” in subsection (1) above by—
- (a) adding types of decree or document to;
  - (b) removing types of decree or document from; or
  - (c) varying the description of,
- the types of decree or document to which those definitions apply.

## CHAPTER 3

### RESIDUAL ATTACHMENT

#### *Residual attachment*

#### **129 Residual attachment**

- (1) There is to be a form of diligence over property of a debtor to be known as residual attachment.
- (2) Residual attachment may be used to attach property (heritable or moveable) only of such description or class as may be specified by the Scottish Ministers by regulations.
- (3) The Scottish Ministers may specify any property but only if—
  - (a) it is transferable; and
  - (b) it is not—
    - (i) attachable by; or
    - (ii) exempt from,  
any other diligence.
- (4) The Scottish Ministers may not specify—
  - (a) a right of a debtor as tenant of a dwellinghouse which is the debtor's sole or main residence; or
  - (b) a right of a debtor as tenant of a croft.
- (5) Property which is owned in common by a debtor and a third party may be attached by residual attachment in satisfaction of the debts of the debtor.
- (6) Regulations under subsection (2) above may—
  - (a) vary the description of; or
  - (b) remove property of such description or class from,  
the property which may be attached by residual attachment.
- (7) Regulations under subsection (2) above may make further provision, in the case of property of a particular description or class, about—
  - (a) the content and effect of an application for an order under section 132(2) of this Act (in this Chapter, a “residual attachment order”);
  - (b) the effect of such an order;
  - (c) the content and effect of an application for an order under section 136(2) of this Act (in this Chapter, a “satisfaction order”);
  - (d) the effect of such an order and, in particular—
    - (i) the methods for and procedures involved in satisfying the sum recoverable by the residual attachment out of the attached property which such an order may authorise;
    - (ii) the duration of such an order; and
    - (iii) the disbursement of any sums recovered by such an order;
  - (e) the powers of the court in relation to residual attachment orders, satisfaction orders and other orders made by virtue of this Chapter; and
  - (f) the termination of residual attachment.

- (8) Regulations under subsection (2) above may make further provision—
- (a) about the effect of the making of time to pay directions and time to pay orders on residual attachment; and
  - (b) about the effect of sequestration on residual attachment including, without prejudice to that generality, provision—
    - (i) that a residual attachment created during such period before the date of sequestration as may be prescribed is not to be effectual to create a preference for the creditor;
    - (ii) about the effect of sequestration on the rights of a creditor to insist in a residual attachment created before any such period; and
    - (iii) about the effect of sequestration on the rights of a creditor to create a residual attachment on or after the date of sequestration.

*Application for residual attachment order*

**130 Application for residual attachment order**

- (1) A creditor may apply to the court for a residual attachment order but only if—
- (a) the debt is constituted by a decree or document of debt;
  - (b) the debtor has been charged to pay the debt;
  - (c) the period for payment specified in the charge has expired without payment being made; and
  - (d) where the debtor is an individual, the creditor has, no earlier than 12 weeks before applying for the residual attachment order, provided the debtor with a debt advice and information package.
- (2) An application for a residual attachment order, must—
- (a) be in (or nearly as may be in) the form prescribed by Act of Sederunt;
  - (b) specify the property which it is sought to attach;
  - (c) state—
    - (i) how, were a satisfaction order made, the value of that property would be realised; and
    - (ii) that doing so would result in the sum mentioned in section 134(3) of this Act being paid off or reduced; and
  - (d) be intimated to—
    - (i) the debtor; and
    - (ii) any other person having an interest.
- (3) A person who receives intimation of the application may, before the expiry of the period of 14 days beginning with the day on which that intimation is made, lodge objections to the application.

**131 Effect of application for residual attachment order**

- (1) Where an application for a residual attachment order is intimated to a debtor, the debtor must not, during the period mentioned in subsection (2) below, take any of the steps mentioned in subsection (3) below in relation to the property specified in the application.

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*Status: This is the original version (as it was originally enacted).*

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- (2) The period referred to in subsection (1) above is the period—
  - (a) beginning with the day on which the application is intimated to the debtor; and
  - (b) ending with the day on which the court—
    - (i) makes a residual attachment order; or
    - (ii) dismisses the application.
- (3) The steps referred to in subsection (1) above are—
  - (a) transferring or otherwise disposing of the property;
  - (b) burdening the property;
  - (c) granting any licence or sub-licence in relation to the property; or
  - (d) entering into any agreement to do anything mentioned in paragraph (a), (b) or (c) above in relation to the property.
- (4) Any step mentioned in subsection (3) above which is taken in breach of subsection (1) above is void.
- (5) Breach by the debtor or any other person of subsection (1) above may be dealt with as a contempt of court.

#### *Residual attachment order*

### **132 Residual attachment order**

- (1) At the hearing on an application under section 130(1) of this Act, the court must not make any order without first giving any person who has lodged objections under subsection (3) of that section an opportunity to be heard.
- (2) Subject to subsection (4) below, the court may, if satisfied that the application is in order, make—
  - (a) a residual attachment order; and
  - (b) any other order which the court thinks fit in consequence of the residual attachment order.
- (3) A residual attachment order must—
  - (a) specify the property to be attached;
  - (b) require the creditor to intimate the order to—
    - (i) the debtor; and
    - (ii) any other person the court specifies; and
  - (c) state on whom the schedule of residual attachment must be served.
- (4) The court must make an order refusing the application for a residual attachment order if satisfied—
  - (a) that the property specified in the application (or any part of it) is not capable of being attached by residual attachment; or
  - (b) that—
    - (i) were the satisfaction order proposed in the application made, it would not result in the value of that property being realised; or
    - (ii) were that order made and the value of that property realised, it would not result in the sum recoverable by the residual attachment being paid off or reduced.

- (5) Without prejudice to the generality of subsection (2)(b) above, an order under that paragraph may—
- (a) prohibit a specified person from acting so as to defeat the residual attachment in whole or in part;
  - (b) prohibit a specified person from making payments due to the debtor in respect of the property to be attached;
  - (c) appoint a judicial factor to ingather and manage that property;
  - (d) require a specified person to produce to the court documents relating to the debtor’s right to that property;
  - (e) authorise the creditor to complete title in the name of the debtor to that property; and
  - (f) authorise the creditor to take specified action to preserve the value of that property.

### **133 Schedule of residual attachment**

- (1) Where the court grants a residual attachment order, the creditor may serve a schedule of residual attachment.
- (2) A schedule of residual attachment must—
  - (a) be in (or as nearly as may be in) the form prescribed by Act of Sederunt;
  - (b) be served on—
    - (i) the debtor; and
    - (ii) any person specified in the residual attachment order; and
  - (c) specify the property which is being attached.

### **134 Creation and effect of residual attachment**

- (1) A residual attachment is, subject to section 142(1) of this Act, created over the property specified in the schedule of residual attachment (in this Chapter, the “attached property”) at the beginning of the day after the day on which that schedule is served on the debtor.
- (2) A residual attachment—
  - (a) confers on the creditor a right in security over the attached property; and
  - (b) secures the sum mentioned in subsection (3) below (in this Chapter, the “sum recoverable by the residual attachment”).
- (3) That sum is—
  - (a) the sum for the payment of which the charge was served, together with any interest accruing after such service and before the residual attachment ceases to have effect; and
  - (b) all expenses which are chargeable against the debtor by virtue of the attachment.

### *Satisfaction order*

#### **135 Application for satisfaction order**

- (1) The creditor may, where a residual attachment is in effect, apply to the court for a satisfaction order authorising the satisfaction of the sum recoverable by the residual attachment out of the attached property.
- (2) An application under subsection (1) above must—
  - (a) be in (or as nearly as may be in) the form prescribed by Act of Sederunt;
  - (b) specify the attached property (or part of it) in relation to which the application is made;
  - (c) state—
    - (i) how, were a satisfaction order made, the value of that property would be realised; and
    - (ii) that doing so would result in the sum recoverable by the residual attachment being paid off or reduced; and
  - (d) be accompanied by—
    - (i) a copy of the schedule of residual attachment; and
    - (ii) any other document prescribed by Act of Sederunt.
- (3) An application under subsection (1) above must be intimated to—
  - (a) the debtor;
  - (b) any person to whom the residual attachment order was intimated; and
  - (c) any other person having an interest.
- (4) A person who receives intimation under subsection (3) above may, before the expiry of the period of 14 days beginning with the day on which intimation is made, lodge objections to the application.
- (5) Where provision is made by virtue of this Chapter or by any other enactment permitting the application under subsection (1) above to be an electronic communication, the requirement in paragraph (d) of subsection (2) above that the application be accompanied by the documents mentioned in that paragraph is satisfied by the provision of electronic communications.

#### **136 Satisfaction order**

- (1) At the hearing on an application under section 135(1) of this Act, the court must not make any order without first giving any person who has lodged objections under subsection (4) of that section an opportunity to be heard.
- (2) Subject to subsection (6) below, the court may, if satisfied that the application is in order, make—
  - (a) a satisfaction order authorising the satisfaction of the sum recoverable by the residual attachment out of the attached property (or part of it) specified in the order; and
  - (b) any other order which the court thinks fit in consequence of the satisfaction order.
- (3) A satisfaction order must—
  - (a) specify the attached property to which it applies; and

- (b) require the creditor to intimate the order to—
  - (i) the debtor; and
  - (ii) any other person the court specifies.
- (4) Without prejudice to the generality of subsection (2) above, a satisfaction order may authorise—
  - (a) the creditor to sell the attached property;
  - (b) the transfer of ownership of the property to the creditor;
  - (c) the transfer of income derived from the property to the creditor; or
  - (d) the creditor to lease or licence the property.
- (5) Where the court makes a satisfaction order—
  - (a) authorising the sale of attached property, it must—
    - (i) appoint a suitably qualified person (in this Chapter, the “appointed person”) who is willing to execute the order; and
    - (ii) specify in the order the period within which the attached property is to be sold;
  - (b) it may appoint a suitably qualified person to report on the market value of the attached property.
- (6) The court must make an order refusing the application for a satisfaction order if satisfied that any of the grounds mentioned in subsection (7) below apply.
- (7) The grounds referred to in subsection (6) above are—
  - (a) the residual attachment is invalid;
  - (b) the residual attachment has ceased to have effect; or
  - (c) that—
    - (i) were the satisfaction order proposed in the application made, it would not result in the value of that property being realised; or
    - (ii) were that order made and the value of that property realised, it would not result in the sum recoverable by the residual attachment being paid off or reduced.
- (8) The court may, if satisfied that making a satisfaction order would be unduly harsh to the debtor or any other person having an interest—
  - (a) make a satisfaction order but suspend its effect for a period not exceeding 1 year beginning with the day on which the order is made; or
  - (b) make an order refusing the application.

### **137 Intimation of court’s decision**

- (1) Where a satisfaction order is made, the creditor must, as soon as is reasonably practicable, send a copy of the order to—
  - (a) the debtor;
  - (b) where the satisfaction order authorises the sale of the attached property, the appointed person; and
  - (c) any other person the court specifies in the order.
- (2) Where the court refuses to make a satisfaction order, the court must, as soon as is reasonably practicable, send a copy of the order to the debtor and to any other person appearing to the court to have an interest.



### **138 Effect of certain refusals of application for satisfaction order**

Where, under section 136(6) of this Act, an order is made refusing an application for a satisfaction order by virtue of the ground mentioned in paragraph (c) of subsection (7) of that section—

- (a) the residual attachment does not, by reason only of that refusal, cease to have effect; and
- (b) it is competent for the creditor to make a further application under section 135(1) of this Act.

#### *Termination, discharge etc. of residual attachment*

### **139 Termination by payment etc.**

- (1) Subject to subsection (2) below, if the full sum recoverable by the residual attachment is either paid or tendered to—
  - (a) the creditor;
  - (b) where one has been appointed, the appointed person; or
  - (c) a judicial officer or any other person who has authority to receive payment on behalf of the creditor,the residual attachment ceases to have effect.
- (2) Subsection (1) above does not apply unless the sum is paid or tendered before—
  - (a) where a satisfaction order authorising sale of the attached property is made, a contract of sale of the attached property is concluded; or
  - (b) in any other case, the attached property is otherwise disposed of.

### **140 Recall**

- (1) The debtor or any other person having an interest may apply to the court for an order—
  - (a) recalling a residual attachment; or
  - (b) restricting such an attachment.
- (2) An application under subsection (1) above must—
  - (a) be in (or as nearly as may be in) the form prescribed by Act of Sederunt; and
  - (b) be intimated to the creditor.
- (3) The court must, if satisfied that the residual attachment—
  - (a) is invalid;
  - (b) has been executed incompetently or irregularly; or
  - (c) has ceased to have effect,make an order declaring that to be the case and recalling the residual attachment.
- (4) The court may, if satisfied that the residual attachment is valid but—
  - (a) having regard to the sum recoverable by the residual attachment, that significantly more property is attached than need be; and
  - (b) that it is reasonable to do so,make an order restricting the effect of a residual attachment to part only of the property to which it relates.

- (5) An order of recall or restriction must be in (or as nearly as may be in) the form prescribed by Act of Sederunt.

#### **141 Duration of residual attachment**

- (1) Subject to sections 139 and 140 of this Act and to subsection (2) below, a residual attachment ceases to have effect on the expiry of the period of 5 years beginning with the day on which the schedule of residual attachment is served on the debtor.
- (2) The court may, on the application of the creditor during the period of 2 months ending with the day on which the period mentioned in subsection (1) above ends, extend the period during which a residual attachment has effect.
- (3) The court may extend the period for which a residual attachment has effect on more than one occasion and subsections (1) and (2) above apply as if for the reference in subsection (1) above to the day on which the schedule of residual attachment is served on the debtor there were substituted a reference to the day on which the court last extended that period.

#### **142 Effect of death of debtor**

- (1) Where, in relation to a debt—
- (a) the creditor has taken any steps towards obtaining a residual attachment order against the debtor; but
  - (b) has not, before the date of death of the debtor, served a schedule of residual attachment on the debtor,
- any such steps cease to have effect; and accordingly any residual attachment order relating to that debt becomes, on that date, void.
- (2) Where a residual attachment is created before the death of the debtor, it continues to have effect in relation to the attached property after that death.
- (3) The Court of Session may, by Act of Sederunt, provide for the operation of this Chapter in a case to which this section applies and may, in particular—
- (a) modify the provisions about intimation of applications for satisfaction orders; and
  - (b) confer power on the sheriff to dispense with or modify procedures under this Chapter.

#### *General and miscellaneous*

#### **143 Expenses of residual attachment**

- (1) The expenses incurred by the creditor in executing a residual attachment are chargeable against the debtor.
- (2) Expenses which, in accordance with subsection (1) above, are chargeable against the debtor are recoverable from the debtor by the residual attachment but not by any other legal process.

- (3) Where any expenses such as are referred to in subsection (2) above have not been recovered by the time the residual attachment is completed, or otherwise ceases to have effect, they cease to be so recoverable.
- (4) In subsection (2) above, the reference to expenses does not include a reference to expenses of service of a charge.
- (5) The court may, if satisfied that the debtor has objected to an application for a satisfaction order on frivolous grounds, award expenses, not exceeding such amount as may be prescribed by the Scottish Ministers by regulations, against the debtor.

#### **144 Ascription**

- (1) This section applies where any sums are—
  - (a) recovered by a residual attachment; or
  - (b) paid to account of the sum recoverable by the residual attachment while it is in effect.
- (2) Such sums must be ascribed to the following in the order in which they are mentioned—
  - (a) the expenses which are chargeable against the debtor incurred in the residual attachment;
  - (b) any interest which has accrued, at the date of the making of the residual attachment order, on the sum for payment for which the charge was served;
  - (c) any sum for payment of which that charge was served together with such interest as has accrued after the day mentioned in paragraph (b) above.

#### **145 Interpretation**

- (1) In this Chapter—
  - “appointed person” has the meaning given by section 136(5)(a)(i) of this Act;
  - “attached property” has the meaning given by section 134(1) of this Act;
  - “court” means—
    - (a) the Court of Session; or
    - (b) the sheriff,and references to applying to the court are references to applying by petition or, as the case may be, by summary application;
  - “croft” has the meaning given by section 3 of the Crofters (Scotland) Act 1993 (c. 44);
  - “decree” has the meaning given in section 221 of this Act (except that paragraphs (c), (g) and (h) of the definition of “decree” in that section do not apply) being a decree which, or an extract of which, authorises residual attachment;
  - “document of debt” has the meaning given in section 221 of this Act, being a document which, or an extract of which, authorises residual attachment;
  - “dwellinghouse” includes any yard, garden, outbuilding or other pertinents;
  - “judicial officer” means the judicial officer appointed by the creditor;
  - “residual attachment order” means an order under section 132(2) of this Act;
  - “satisfaction order” means an order under section 136(2) of this Act; and
  - “sum recoverable by the residual attachment” has the meaning given by section 134(2)(b) of this Act.

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*Status: This is the original version (as it was originally enacted).*

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- (2) The Scottish Ministers may by order modify the definitions of “decree” and “document of debt” in subsection (1) above by—
- (a) adding types of decree or document to;
  - (b) removing types of decree or document from; or
  - (c) varying the description of,
- the types of decree or document to which those definitions apply.