

BANKRUPTCY AND DILIGENCE ETC. (SCOTLAND) ACT 2007

EXPLANATORY NOTES

THE ACT

Commentary

Part 15 - Action for Removing from Heritable Property

808. This Part sets out a new procedure which is to be followed when ejecting (otherwise known as removing or evicting) a person from heritable property. It does not change the legal grounds on which a person may be removed from heritable property. Instead, it applies general rules for the process of removing.
809. “Removing” has a general meaning which covers any surrender of heritable property, for example, the surrender of a lease (domestic or commercial) by a tenant. It also has a more specific meaning of an action by which a heritable proprietor, such as a landlord, seeks to recover possession of his or her property from a tenant. The conclusion of such an action is the granting of a “warrant of ejection” by the court by virtue of which occupants of the property can be evicted by judicial officers.
810. “Ejection” is the term used for an action where an owner or possessor of heritable property seeks to recover possession from an occupant of the property who has no legal right or title to occupy the property – for example, a squatter.
811. The law has developed in a piecemeal fashion over many years, leading to (for example) different rules for “removing” an occupier who has or had a right to be in heritable property (e.g. a leased office or a dwellinghouse on mortgage default) and for “ejecting” an occupier who has never had a right to be there (such as a squatter).
812. This area of law covers a variety of types of removings, for example, those related to public sector tenancies, private tenancies, commercial tenancies, agricultural tenancies, debt enforcement and squatters. Much of the law is set down in statute and the terminology used in various statutes has given rise to confusion about the procedures which may be invoked for the purpose of obtaining authority to eject someone from land. This part sets out new, general procedures to apply consistently to all types of removings.

Section 214 – Expressions used in this part

813. **Section 214** sets out the types of removings that will be covered by the new procedures. These include removings which are authorised by virtue of court decrees, warrants or the types of documents set out in subsection (3). This covers a variety of removings, from ejection of squatters (subsection (2)(b)) to tenants whose housing is subject to a demolition order (subsection (2)(g)). For the purposes of this Part, these are collectively labelled “actions for removing from heritable property” and decrees, warrants and other orders obtained in such actions are labelled “decrees for removing from heritable property”.

814. Power is given to the Scottish Ministers by subsection (4) to modify the definitions of decree, warrant or document. If new types of decree, warrant or document are created in the future, this power could be used to extend the new provisions in this Part to them. This power is exercisable by regulations subject to negative resolution procedure.
815. The section following section 214 makes provision for the making of court rules to govern the procedure and practice in execution of a decree of removing from heritable property.

Section 215 – Procedure for execution of removing

816. This section provides that the procedure and practice to be followed in executing any decree for removing from heritable property may be set out in rules of court. Such rules may, in particular, make provision about when a removing is completed (by prescribing notices and forms) and about how effects removed from premises must be dealt with (for example, where they should be taken). Section 218 is also relevant here (see paragraphs 827 to 830 below).

Section 216 – Service of charge before removing

817. **Section 216(1)** requires a defender to be given 14 days' notice (by way of the service of a charge) before any removing of the defender and of any effects (furniture and so on) can take place.
818. Subsection (2) provides for other occupants of the property who derive right to occupy from the defender to also be removed, and for their effects to be removed, provided the defender has been charged in accordance with subsection (1). Once the period of charge has expired the defender, any other occupants of the property and their belongings can be removed without further warning.
819. Subsection (3) authorises judicial officers to open shut and locked places whilst carrying out the removing, and requires them to make an inventory of any effects removed.
820. Subsection (4) gives the court power to vary the 14-day period or dispense with a charge altogether, on cause shown. This could be used, for example, where the person on whose behalf the removing was being carried out, for example, a landlord, was able to satisfy the court that there was a serious risk of the property being badly damaged during the 14-day period.
821. Subsection (5) simplifies the removings procedure by abolishing any need in Court of Session cases to apply for separate letters of ejection. The warrant in the original application will therefore be enough.
822. Subsection (6) provides that the form of charge may be prescribed by the Scottish Ministers by regulations. Until this power is exercised judicial officers and court rules may provide different forms of charge for different circumstances. Regulations made under this power are subject to the negative resolution procedure.
823. A consequential amendment is made in paragraph 6(3) of schedule 5. It ensures consistency in the period of charge for removings under section 7 of the Sheriff Courts (Scotland) Extracts Act 1892. It does this by amending the period of charge for such removings in section 7(4) of that Act from 48 hours to 14 days.

Section 217 – When removing not competent

824. **Section 217** sets out the dates and times when it will not be lawful to carry out a removing (i.e. on a Sunday, on a public holiday or before 8 a.m. or after 8 p.m.).
825. It will be possible to prohibit carrying out removings on additional days by way of court rules.

826. It also enables a judicial officer to execute a decree for removing from heritable property before 8 a.m. or after 8 p.m. with permission from the sheriff for the district where the property is located.

Section 218 – Preservation of property left in premises

827. **Section 218** gives the court a discretionary power, when granting decree for removing, to order the pursuer to preserve the effects (furniture and so on) of the defender or of any other person being removed.
828. This power in subsection (1) does not affect the right of the person carrying out the removing to clear the land and premises of any effects. This is sometimes called leaving the premises “void and redd”.
829. The court is being given power to make an order for preservation where it is persuaded that this is appropriate, which may, for example, be the case when such an order will reduce the risk of damage to the occupier’s goods.
830. Subsection (2) gives the court power to hold the defender liable for any costs (for example, storage costs) incurred by the person in whose favour the decree for removing is granted.

Section 219 – Caution for pecuniary claims

831. **Section 219** abolishes the law on finding caution for “violent profits”. Violent profits are due for illegal (i.e. “violent”) possession of property, as distinct from (say) rent due from the period before a lease was determined. They are penal damages due on top of any actual loss suffered, so that (say) a landlord is entitled to double the amount of rent that would have been paid.
832. Caution is another word for a security provided by the defender in a court action. Caution is usually obtained by the lodging of money with the court, or by taking out an insurance policy (“bond of caution”) that guarantees any payment that may be found due.
833. Under the law before this section, where the pursuer in any removing or ejection claimed compensation for violent profits, the court could order the defender in the action to find caution for violent profits. Where it did so, and if the defender were unable to find caution then the defence would not be heard, and warrant of ejection would be granted without further procedure.
834. The effect of subsection (2) is to make it clear that it is no longer competent for the court to order the defender to find caution for violent profits. Compensation for violent profits is not abolished and may still be claimed.
835. Subsections (1), (3) and (4) provide that the court will be able to order the defender to find caution in the usual way for any non-penal damages that may be claimed by the person seeking to remove the defender, and for which the defender or any occupant deriving right or having permission from the defender may be responsible.
836. A consequential repeal, due to the abolition of caution for violent profits, is set out in schedule 6. That is the repeal of the Ejection Caution Act 1594.