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STATUTORY INSTRUMENTS

1998 No. 890 (S.45)

COURT OF SESSION, SCOTLAND

Act of Sederunt (Rules of the Court of Session Amendment) (Miscellaneous) 1998

Made - - - -	*19th March 1998*
Coming into force - -	*21st April 1998*

The Lords of Council and Session, under and by virtue of the powers conferred on them by section 5 of the Court of Session Act 1988((**1**) and of all other powers enabling them in that behalf, do hereby enact and declare:—

Citation and commencement

1.—(1) This Act of Sederunt may be cited as the Act of Sederunt (Rules of the Court of Session Amendment) (Miscellaneous) 1998 and shall come into force on 21st April 1998.

(2) This Act of Sederunt shall be inserted in the Books of Sederunt.

Amendment of the Rules of the Court of Session

2.—(1) The Rules of the Court of Session 1994((**2**) shall be amended in accordance with the following sub-paragraphs.

(2) In rule 6.2 (fixing and allocation of diets in Outer House)—

(a) for paragraphs (5) to (12) substitute—

"(5) When a party enrols for a proof to be allowed or issues to be approved in a cause depending before the Outer House he shall include in the enrolled motion his estimate of the likely duration of the proof or jury trial and request that the diet be allocated accordingly.

(6) If any other party considers that the estimate so included is too low, he shall record upon the enrolled motion his own estimate.

(7) On such papers (whether or not the closed record) as are transmitted to the Keeper of the Rolls for the purpose of his allocating the diet, the clerk of court shall note the estimate provided in pursuance of paragraph (5) unless a higher estimate is recorded under

(**1**) 1988 c36; section 5 was amended by the Civil Evidence (Scotland) Act 1988 (c. 32), section 2(3) and by the Children (Scotland) Act 1995 (c. 36), Schedule 4, paragraph 45.

(**2**) S.I. 1994/1443; relevant amending instruments are S.I. 1995/1396, S.I. 1996/1756.

paragraph (6), in which case the note shall only be of the higher (or as the case may be the highest) estimate so recorded; and the Keeper of the Rolls shall allocate the diet of proof or jury trial accordingly and give written intimation of it to each party.".

(3) For rule 6.3 substitute—

"**Allocation of diets in Inner House**

6.3.—(1) This rule applies to the allocation of diets in the Inner House.

(2) When a party enrols for a cause depending before the Inner House to be appointed to the Summar Roll for hearing he shall include in the enrolled motion his estimate of the likely duration of the hearing and request that the diet be allocated accordingly.

(3) If any other party considers that the estimate so included is too low, he shall record upon the enrolled motion his own estimate.

(4) On such papers (whether or not the reclaiming print) as are transmitted to the Keeper of the Rolls for the purpose of his allocating the diet, the clerk of court shall note the estimate provided in pursuance of paragraph (2) unless a higher estimate is recorded under paragraph (3), in which case the note shall only be of the higher (or as the case may be of the highest) estimate so recorded; and the Keeper of the Rolls shall allocate the diet for the hearing accordingly and give written intimation of it to each party.

(5) Not less than five weeks before the hearing of the cause on the Summar Roll, the Keeper of the Rolls shall put the cause out on the By Order Roll before a Division of the Inner House.

(6) At a hearing on the By Order Roll under paragraph (5), the parties shall—

(a) advise the court whether or not the hearing on the Summar Roll is to proceed; and

(b) where it is to do so, provide the court with a re-assessment of its likely duration.".

(4) In rule 13.10(1) (application to loose, restrict or recall an arrestment or to recall, in whole or in part, an inhibition), for the words "mentioned in rule 13.6(c)" substitute "such as is mentioned in sub-paragraphs (i) to (iii) of rule 13.6(c) (but irrespective of whether any warrant was inserted in the summons)".

(5) In rule 14.3 (applications to be made by petition in the Inner House), paragraphs (h) and (i) shall be omitted.

(6) In Chapter 22 (making up and closing records)—

(a) for rules 22.1 to 22.3(4) substitute—

"**Making up open record**

22.1 –

(1) Subject to any other provision in these rules—

(a) where defences have been lodged, the pursuer in an action shall, within fourteen days after the date on which the time for lodging defences expired or on which the defences were lodged (whichever date was the earlier); or

(b) where in a cause a party is ordered by the court to make up an open record he shall within such period as is specified by the court,

lodge two copies of the open record in process; and on being given, in accordance with rule 22.2(1), a date for the commencement of the adjustment period and a date on which it shall close, he shall forthwith send not less than four copies of the open record (endorsed in pursuance of that rule) to every other party.

(2) Where the pursuer, petitioner, noter or minuter, as the case may be, fails to comply with the requirements of paragraph (1), the defender or other party may apply by motion for decree of dismissal.

(3) An open record shall consist of the pleadings of the parties and the interlocutors pronounced in the action or cause.

Adjustment

22.2 –

(1) On an open record being lodged in process the Assistant Clerk of Session shall endorse it, and the interlocutor sheet, with a stamp so as to show the date of lodging, a date on which the adjustment period shall commence (which shall be a date determined by the Deputy Principal Clerk of Session, being ordinarily the first Wednesday which occurs at least three days after the date of lodging but which may be such later date as the Deputy Principal Clerk of Session considers appropriate) and a date on which that period shall end and the record shall close (which shall be the date eight weeks after that on which the adjustment period commences); but this paragraph is without prejudice to paragraph (3).

(2) During the adjustment period parties may adjust their respective pleadings and shall intimate any such adjustments to one another.

(3) At any time during the adjustment period the court may, on the motion of any party, pronounce an interlocutor—

(a) closing the record; or

(b) extending the period of adjustment to such date as the court thinks fit, on which date the record shall close.

(4) On enrolling a motion under paragraph (3), a party shall lodge in process a copy of the open record (endorsed in pursuance of paragraph (1)) showing the adjustments, if any, as at the date of enrolment.

(5) An endorsement in pursuance of paragraph (1) may be corrected or altered by the Deputy Principal Clerk of Session at any time before the date for the time being shown in the endorsement as the date on which the record shall close.

(6) An endorsement which cannot be corrected or altered under paragraph (5) may, on cause shown, be corrected by the Lord Ordinary at any time.

Closing record

22.3 –

(1) The pursuer shall, within four weeks after the date on which the record is closed—

(a) send not less than six copies of the closed record to the defender and to every other party; and

(b) lodge three copies of the closed record in process,

and if there is failure to do so the defender or any other party may apply by motion for decree of dismissal.

(2) A closed record shall consist of the pleadings of the parties and the interlocutors pronounced in the action or cause (endorsed in pursuance of rule 22.2(1)).”; and

(b) in rule 22.3(5), for the words “paragraph (2)” substitute “paragraph (1)(b)”.

(7) In rule 37.4 (which lists certain rules relating to proofs which apply also in relation to jury trials) the words "rule 36.6 (notices to admit and notices of non-admission)" and "rule 36.11 (recording of evidence)" shall be omitted.

(8) After rule 37.5 insert—

"**Recording of proceedings at jury trial**

37.5A.—(1) Subject to any other provision in these Rules, proceedings at a jury trial shall be recorded by—

(a) a shorthand writer to whom the oath *de fideli administratione officii* has been administered on his appointment as a shorthand writer in the Court of Session; or

(b) tape recording or other mechanical means approved by the Lord President.

(2) In paragraph (1), "the proceedings" means the whole proceedings including, without prejudice to that generality—

(a) discussions—

(i) with respect to any challenge of a juror; and

(ii) on any question arising in the course of the trial;

(b) the decision of the Lord Ordinary on any matter referred to in sub-paragraph (a);

(c) the evidence led at the trial;

(d) the Lord Ordinary's charge to the jury;

(e) the speeches of counsel or agents;

(f) the verdict of the jury; and

(g) any request for a direction to be given under rule 37.7, any hearing in relation to such a request and any direction so given.

(3) A transcript of the record of proceedings shall be made only on the direction of the court; and the cost shall, in the first instance, be borne by the agents for the parties in equal proportions.

(4) Any transcript so made shall be certified as a faithful record of proceedings—

(a) where the recording was under sub-paragraph (a) of paragraph (1), by whoever recorded the proceedings; and

(b) where it was under sub-paragraph (b) of that paragraph, by whoever transcribed the record.

(5) The Lord Ordinary may make such alterations to the transcript as appear to him to be necessary after hearing the parties; and, where such alterations are made, he shall authenticate the alterations.

(6) Where a transcript has been so made for the use of the court, copies of it may be obtained by any party from the transcriber on payment of his fee.

(7) Except with leave of the court, the transcript may be borrowed from process only for the purpose of enabling a party to consider whether to reclaim against the interlocutor of the court applying the verdict of the jury or whether to apply for a new trial.

(8) Where a transcript is required for a purpose mentioned in paragraph (7) but has not been directed to be transcribed under paragraph (3), a party—

(a) may request such a transcript from the shorthand writer, or as the case may be, from a person who might have transcribed the recording had there been such a direction, the cost of the requested transcript being borne by the agent for the requester in the first instance; and

(b) shall lodge the transcript in process;

and copies of it may be obtained by any party from the transcriber on payment of his fee.”.

(9) In rule 38.4(7) (requirement for leave of commercial judge to reclaim against interlocutor pronounced on the Commercial Roll), for the words “a final interlocutor” substitute “an interlocutor which makes such disposal as is mentioned in rule 38.3(2)”.

(10) In rule 42.1(2) (lodging of account of expenses of process), after sub-paragraph (a) insert—

“(aa) if he has failed to comply with sub-paragraph (a), lodge such account at any time with leave of the court but subject to such conditions (if any) as the court thinks fit to impose; and”.

(11) In rule 42.13(2) (additional witness fees for skilled persons), for the words “before a proof or jury trial in order to qualify him to give evidence, charges for such investigations and for any attendance at the proof or jury trial” substitute “in order to qualify him to give evidence in a prospective proof or jury trial, charges for such investigations and (if there is a proof or jury trial) for any attendance at it”.

(12) In rule 49.60 (defenders in applications for orders under section 11 of Children (Scotland) Act 1995) paragraph (e) shall be omitted.

(13) In rule 59.1 (applications for letters of arrestment or inhibition)—

(a) in paragraph (1)—

(i) the word “or” which occurs immediately after sub-paragraph (c) shall be omitted; and

(ii) after sub-paragraph (d) insert

“; or

(e) Form 59.1-E (inhibition in respect of future or contingent debt)”;

(b) in paragraph (3), at the beginning insert “Except where the application is in Form 59.1-E,”;

(c) in paragraph (4), at the beginning insert “Where the application is in any of Forms 59.1-A to 59.1-D,”; and

(d) after paragraph (4) insert the following paragraphs—

“(4A) Where the application is in Form 59.1-E, it shall be placed before the Lord Ordinary together with any such documents as are mentioned in paragraph (2); and if the Lord Ordinary is satisfied as is mentioned in paragraph (3)—

(a) he shall sign and date the warrant in the application; and

(b) the application shall be signeted,

and such signeted application and warrant shall constitute letters of inhibition.

(4B) The decision of the Lord Ordinary as respects an application in Form 59.1-E shall be final and not subject to review.”.

(14) In rule 67.24(2) (duties of curator *ad litem* as respects application for adoption order), in sub-paragraph (p), for the word “social” substitute “racial”.

(15) In each of rules 70.6(2)(d) and 70.10(2)(d) (persons on whom there is to be service of certain petitions), for the words “the reporter to the children’s panel, in the local authority area in which the child resides” substitute “for the area in which the child resides and the Principal Reporter”.

(16) In rule 76.8(2)(c) (applications under paragraph 12 of Schedule 1 to Proceeds of Crime (Scotland) Act 1995), for the word “of”, where it first occurs, substitute “to facilitate the”.

(17) In the appendix—

(a) omit Forms 6.2 (form for information for fixing and allocation of diet for a hearing in the Outer House) and 6.3 (corresponding form for a hearing in the Inner House);

(b) in Form 16.5 (form of citation by advertisement), for the words "by (*date on which period of notice expires*)" substitute "not later than six months from the date of publication of this advertisement"; and

(c) after Form 59.1-D, insert as Form 59.1-E the following—

"Form of letters of inhibition in respect of future or contingent debt

IN THE COURT OF SESSION

Application of (*applicant's name*) for Letters of Inhibition

My Lords of Council and Session—

1. In a (*describe deed*) dated (*date*), (*debtor's name, designation and address*) bound himself [**or** herself **or** themselves **or** itself] to pay to (*applicant's name, designation and address*), (*amount in words and figures and date when, or circumstances in which, amount falls due*).

2. The deed is not yet liquid but the debtor is [*specify* vergens ad inopiam *or* in medititione fugae *or other similar grounds*].

3. A copy of the deed is produced with this application.

4. The applicant, therefore, requests your Lordships to grant warrant to inhibit (*debtor's name*).

According to Justice etc.

(*Signed*)

Solicitor [*or*Agent] for applicant (*Address*)

Warrant to inhibit granted in accordance with the above application.

Date:

(*Signed*)

Lord

(*Signet*)".

Effect of certain previous amendments of Chapter 61

3. The amendments which were made by Act of Sederunt (Rules of the Court of Session Amendment No.7) (Judicial Factors) 1997([3]) to Chapter 61 of the rules shall have effect as if, in paragraph 6 of the Act of Sederunt, the rule (rule 61.2) substituted by sub-paragraph (3) were of four paragraphs only; and as if the provisions which are numbered "(5)", "(6)" and "(7)" in paragraph 6 were, respectively, sub-paragraphs (4), (5) and (6) of paragraph 6.

Savings

4. Paragraph 2(2) of this Act of Sederunt shall not affect the application of Chapter 6 of the Rules of the Court of Session 1994 in relation to the enrolment, before 21st April 1998, of a motion for a proof to be allowed or issues to be approved; paragraph 2(3) shall not affect such application in relation to the enrolment, before that date, of a motion for a cause to be appointed to the Summar Roll for hearing; paragraph 2(5) shall not affect the application of rule 14.3(h) and (i) of those Rules in

(**3**) S.I. 1997/1720.

relation to any application made under that rule before that date; and paragraph 2(6) shall not affect the application of Chapter 22 of those Rules in relation to any open record lodged before that date.

Edinburgh
19th March 1998

Rodger of Earlsferry
Lord President I.P.D.

EXPLANATORY NOTE

(This note is not part of the Act of Sederunt)

This Act of Sederunt amends the Rules of the Court of Session 1994 as follows:

(a) paragraph 2(2) and (3) and (17)(a) simplifies certain existing procedures for the fixing and allocation of diets for hearings in the Outer and Inner Houses of the Court of Session;

(b) paragraph 2(4) clarifies a reference to arrestments and inhibitions in respect of which certain applications are to be made by motion: the reference is not to be construed as confined to diligences as respects which warrant has been inserted in the summons;

(c) paragraph 2(5) revokes paragraphs (h) and (i) of rule 14.3 and so removes the requirement that applications under section 49 of the Insurance Companies Act 1982 or under section 136 or 425 of the Companies Act 1985 be made by petition to the Inner House;

(d) paragraph 2(6) simplifies the procedures for making up and closing records; and in particular provides for the Assistant Clerk of Session to stamp the open record, at lodging, with *inter alia* a date of commencement for the adjustment period (being a date determined by the Deputy Principal Clerk of Session) and a date on which that period shall end;

(e) paragraph 2(7) removes from rule 37.4(which lists certain rules relating to proofs which apply also in relation to jury trials) references to rule 36.6 (that rule having been revoked by S.I.1996/2168) and to rule 36.6 (which in its application to jury trials is replaced by new rule 37.5A added by this Act of Sederunt to the Rules of Court);

(f) paragraph 2(8) adds the new rule 37.5A, which in effect extends to all the proceedings at a jury trial such provision as is made by rule 36.11 as regards the recording and transcription of evidence at a proof;

(g) paragraph 2(9) extends the class of interlocutors pronounced on the Commercial Roll which are exempt from the requirement that leave of the commercial judge be obtained for reclaiming;

(h) paragraph 2(10) inserts a new sub-paragraph into rule 42.1(2) which enables accounts of expenses to be lodged after the four month period (or any extension allowed by the court) provided for in rule 42.1; but makes this new power subject to any conditions the court may impose;

(i) paragraph 2(11) clarifies the entitlement of a skilled witness to additional charges for his preparatory investigations whether or not a proof or jury trial is proceeded with;

(j) paragraph 2(12) revokes rule 49.60(e) (which provided, in certain circumstances, for the Lord Advocate to be the defender in an application for an order under section 11 of the Children (Scotland) Act 1995);

(k) paragraph 2(13) and (17)(c) provides a form of letters of inhibition in respect of any future or contingent debt;

(l) paragraph 2(14) brings the wording of sub-paragraph (p) of rule 67.24(2) into line with that of section 6(1)(b)(ii) of the Adoption (Scotland) Act 1978;

(m) paragraph 2(15) provides that certain petitions in applications under the Child Abduction and Custody Act 1985 are to be served on the Principal Reporter rather than on any other reporter. This reflects changes made to the Scottish Children's Reporter Administration by Part III of the Local Government (Scotland) Act 1994;

(n) paragraph 2(16) expands, in rule 76.8(2)(c), the description of paragraph 12 of Schedule 1 to the Proceeds of Crime (Scotland) Act 1995;

(o) paragraph 2(17)(b) simplifies the completion of a form for citation by advertisement;

(p) paragraph 3 remedies the effects of errors of punctuation and numbering in Act of Sederunt (Rules of the Court of Session Amendment No.7) (Judicial Factors) 1997; and

(q) paragraph 4 provides various savings.