

*These documents relate to the Bankruptcy and Diligence etc. (Scotland) Bill (SP Bill 50) as introduced in the Scottish Parliament on 21 November 2005*

# **BANKRUPTCY AND DILIGENCE ETC. (SCOTLAND) BILL**

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## **EXPLANATORY NOTES (AND OTHER ACCOMPANYING DOCUMENTS)**

### **CONTENTS**

1. As required under Rule 9.3 of the Parliament's Standing Orders, the following documents are published to accompany the Bankruptcy and Diligence etc. (Scotland) Bill introduced in the Scottish Parliament on 21 November 2005:

- Explanatory Notes;
- a Financial Memorandum;
- an Executive Statement on legislative competence; and
- the Presiding Officer's Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 50–PM.

## **EXPLANATORY NOTES**

### **INTRODUCTION**

2. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

### **THE BILL**

4. There have been three main Executive consultations in respect of the provisions of this Bill:

- the first consultation paper on diligence reform was *Enforcing Civil Obligations in Scotland* (the “ECOS consultation”), published on 22 April 2002, and an analysis of the 68 consultation responses was published on 8 November 2002;
- the first consultation paper on bankruptcy reform was *Personal Bankruptcy Reform in Scotland: a modern approach* (the “Bankruptcy consultation”), published on 19 November 2003, and an analysis of the 84 responses was published during March 2004; and
- the last main consultation paper was *Modernising Bankruptcy and Diligence in Scotland: draft Bill and Consultation* (the “Bill consultation”), published on 2 July 2004, including a draft Bill, and details of the 81 responses were published during March 2005.

5. The Bill is in 16 Parts:

- Bankruptcy;
- Floating charges;
- Enforcement;
- Land attachment and residual attachment;
- Inhibition;
- Diligence on the dependence;
- Interim attachment;
- Attachment of money;
- Diligence against earnings;
- Arrestment in execution and action of furthcoming;
- Mails and duties, sequestration for rent, and landlord’s hypothec;

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- Summary warrants, time to pay and charges to pay;
  - Amendments of the Debt Arrangement and Attachment (Scotland) Act 2002;
  - Admiralty actions and arrestment of ships;
  - Disclosure of information; and
  - General and miscellaneous.
6. There are 6 schedules containing:
- minor and consequential amendments of the Bankruptcy (Scotland) Act 1985 (the “1985 Act”) made in consequence of Part 1 of the Bill;
  - provisions relating to the Scottish Civil Enforcement Commission;
  - provisions on expenses of money attachment;
  - provisions relating to admiralty actions and arrestment of ships;
  - minor and consequential amendments; and
  - repeals and revocations.

## **COMMENTARY**

### **PART 1 – BANKRUPTCY**

#### *Duration of bankruptcy*

##### **Section 1 – Discharge of debtor**

7. This section provides for the reduction of the automatic bankruptcy period from 3 years to 1 year by amending section 54 of the 1985 Act. It also gives the Scottish Ministers the power to change that period by regulations. Any regulations made to that effect are subject to the affirmative resolution procedure of the Scottish Parliament (see the amendment to section 72 of the 1985 Act in subsection (5)). The title of section 54 has been changed to reflect the abolition of the 3-year period.

8. Transitional provisions are required to deal with individuals who have already been made bankrupt when this section is commenced but have not yet been discharged. Section 202 of the Bill contains a power to make transitional provisions in consequence of provisions in the Bill. Our intention is that the transitional measures will provide that the date of discharge will be 1 year from the date of commencement of section 1 or earlier if the 3-year period is due to end before that date.

#### *Bankruptcy restrictions orders and undertakings*

##### **Section 2 – Bankruptcy restrictions orders and undertakings**

9. This section inserts new sections 56A to 56J into the 1985 Act which introduce bankruptcy restrictions orders (BROs) and bankruptcy restrictions undertakings (BRUs). Currently all undischarged bankrupts are subject to a number of restrictions and disqualifications

for the period up to discharge. BROs and BRUs are a way of imposing particular restrictions on debtors for a particular period after discharge depending on the debtor's conduct in relation to the bankruptcy.

*New section 56A – Bankruptcy restrictions order*

10. Section 2 inserts new section 56A into the 1985 Act which provides that an application for a BRO can be made only if the debtor and is a natural person. The BRO and BRU regime does not apply to partnerships and limited liability partnerships. The application can be made only by the Accountant in Bankruptcy (the "AiB") and is made to a sheriff.

*New section 56B – Grounds for making order*

11. Section 2 inserts section 56B into the 1985 Act which details the kinds of conduct the sheriff has to take account of when deciding whether to grant an application for a BRO. The conduct of the debtor both before and after the date of sequestration can be taken into account.

*New section 56C – Application of section 67(9)*

12. Section 2 inserts section 56C into the 1985 Act which provides the sheriff with the power to apply section 67(9) of that Act to the debtor during the time the BRO is in force. Section 67(9) states that a debtor, who has obtained credit in excess of £500, without informing the lender of the debtor's status as an undischarged bankrupt or as someone subject to a BRO or BRU, will have committed an offence. This offence will also apply to any debtor who obtains any amount of credit above a maximum level of £1000.

*New section 56D – Timing of application for order*

13. Section 2 inserts section 56D into the 1985 Act which details the time limits within which an application for a BRO can be made. The application must be made after the date of sequestration and before the date of the debtor's discharge from bankruptcy. Any applications submitted after the date of the debtor's discharge will be allowed only with the sheriff's permission.

*New section 56E – Duration of order and application for annulment*

14. Section 2 inserts section 56E into the 1985 Act which provides details of the start and end dates of any BRO. Section 56E(2) states that the minimum time a BRO can run is 2 years and the maximum time is 15 years from the date of the order. Section 56E(3) provides that the sheriff may annul a BRO if the debtor applies for it.

*New section 56F – Interim bankruptcy restrictions order*

15. Section 2 inserts section 56F into the 1985 Act. Section 56F(1) to (3) provide for interim BROs.

16. Interim BROs can be made by the sheriff at any time between making an application for a full BRO and the decision on the application for the full BRO. The sheriff would have to be satisfied that on the face of the case presented by the AiB the full BRO application is likely to be successful and that making an interim order is in the public interest.

17. Section 56F(4) to (6) provide for the effect and duration of an interim order. An interim order has effect as if it was a full BRO and restrictions will apply on the making of the interim BRO. Where an interim order is followed by a full BRO, the duration of the full order set out under section 56E starts from the date the interim order was made.

*New section 56G – Bankruptcy restrictions undertaking*

18. Section 2 inserts section 56G into the 1985 Act which provides for bankruptcy restrictions undertakings (BRUs). A BRU is an agreement between the debtor and the trustee whereby the debtor is bound by specified restrictions without the need for an application to the sheriff. BRUs can last for the same length of time as BROs and have the same force and effect.

*New section 56H – Effect of recall of sequestration*

19. Section 2 inserts section 56H into the 1985 Act which addresses what will happen to a BRO or BRU that is in force when a debtor's sequestration is recalled. The sheriff has discretion to recall any BRU or BRO in place. If the sheriff does not recall the BRO or BRU, the debtor has 28 days to appeal. After a sequestration has been recalled no new BRO or BRU can be made even if, in the case of a BRO, an application had been made and was pending before the sheriff.

*New section 56J – Effect of discharge on approval of offer of composition*

20. Section 2 inserts section 56J into the 1985 Act which provides for the continuation of a BRO or BRU if a debtor obtains a discharge by way of an offer of composition.

21. Section 2(2) extends the existing supervisory functions of the AiB to include supervision of BRUs and BROs.

*Effect of bankruptcy restrictions orders and undertakings*

**Section 3 – Disqualification from being appointed as receiver**

22. This section extends the restriction on those who are allowed to be a receiver, to include those debtors who are subject to a BRO or BRU made under the new provisions in the 1985 Act or under the equivalent regime in England and Wales.

**Section 4 – Disqualification for nomination, election and holding office as member of local authority**

23. This section extends the restriction on those who are allowed to hold office as a member of a local authority, by inserting section 31(1)(ba) into the Local Government Scotland Act 1973, to include those debtors who are subject to a BRO or BRU made under the 1985 Act or under the equivalent regime in England and Wales.

**Section 5 – Orders relating to disqualification**

24. This section inserts new section 71B into the 1985 Act which gives the Scottish Ministers power to make an order that can modify or amend the effect of a provision which restricts or prevents debtors (or particular categories of debtors) from holding particular offices or positions

or from being members of particular bodies or groups. Such provisions are given the label “disqualification provisions”. One of the things which an order under section 71B can do is extend a disqualification provision to persons subject to a BRO or BRU. Orders under section 71B are subject to the affirmative resolution procedure of the Scottish Parliament.

### *The trustee in the sequestration*

#### **Section 6 – Amalgamation of offices of interim trustee and permanent trustee**

25. This section amends sections 2 and 3 of the 1985 Act. It has the effect, when read together with the repeal of section 2(4) of the 1985 Act (see Part 1 of schedule 6 to this Bill), that in a sequestration where an interim trustee has been appointed, he or she is no longer required to:

- (a) ascertain the reasons for and circumstances surrounding the insolvency; or
- (b) ascertain the state of the debtor’s liabilities and assets.

26. Those functions will instead be carried out by the trustee in sequestration who is appointed when sequestration is awarded and who combines the roles of the interim trustee and permanent trustee from that point. The new style trustee replaces the old style interim trustee and permanent trustee as a result of this section.

27. The interim trustee now has the sole function of safeguarding the debtor’s estate pending a decision on the award of sequestration. The interim trustee can now be in place only for the short period between the creditor presenting the petition for sequestration and the award of (or refusal to award) sequestration.

28. Subsection (3) provides for all references to interim trustees and permanent trustees in other legislation to be read as references to the new style trustee in sequestration.

#### **Section 7 – Repeal of trustee’s residence requirement**

29. Section 7 removes the requirements in sections 2(3)(a) and 24(2)(d) of the 1985 Act that all trustees must live within the jurisdiction of the Court of Session.

#### **Section 8 – Duties of trustee**

30. Section 8(1) and 8(2) insert new subsections 3(8) and 39(9) respectively into the 1985 Act. These two subsections qualify the responsibility of the trustee to adhere to the requirements of sections 3 and 39 of the 1985 Act. The new subsections provide that it is necessary to comply with certain requirements in section 3 (to recover, manage, realise and distribute the debtor’s estate, to ascertain the reasons for the insolvency and the state of the debtor’s assets and liabilities and to take advice from commissioners) or do anything required or permitted by section 39 only to the extent that doing so would be of financial benefit to the estate and be in the interests of the creditors.

31. This section, by inserting section 49(2A) into the 1985 Act, also imposes an obligation on the trustee to circulate details of the creditors’ claims and the amount accepted to the debtor and all known creditors.

## **Section 9 – Grounds for resignation or removal of trustee**

32. This section deals with the reasons for which an interim trustee or a trustee can resign or be removed from office.

33. Subsection (1) makes amendments to section 13 of the 1985 Act removing the interim trustee's right to resign "for any reason whatsoever". The interim trustee must now be incapable of acting, as defined by section 1(6) of the Adults With Incapacity (Scotland) Act 2000 (asp 4), or be incapacitated in some other way.

34. Subsection (2) inserts words into section 28(1) of the 1985 Act making it clear that the trustee in sequestration continues to be permitted to resign if he or she is unable for any reason to act as trustee.

## **Section 10 – Termination of interim trustee's functions**

35. This section inserts new sections 13A and 13B into the 1985 Act which provide for the termination of an interim trustee's functions when a sequestration petition is dismissed or sequestration is awarded and someone other than the interim trustee is appointed as trustee in sequestration. The sheriff is obliged to make a determination of who is liable for the fees and outlays of the interim trustee appointed under section 2(5) of the 1985 Act with the determination of that amount to be by AiB, whose decision is final.

36. The amendments of the 1985 Act made by schedule 1 to this Bill mean that there would be no mechanism for discharging interim trustees, within the new meaning of that term. Sections 13A(6) to (11) provide that mechanism. Section 13B provides details of how the AiB as interim trustee will forward all sequestration papers to the new trustee and then seek discharge as interim trustee.

## **Section 11 – Statutory meeting and election of trustee**

37. An interim trustee, other than the AiB, is currently obliged to call a statutory meeting of creditors within 60 days of the award. Subsections (1) and (2) repeal section 21 and amend section 21A of the 1985 Act so that this will now be optional for all trustees.

38. Subsections (4) and (5), combined with various amendments made by schedule 1, make alterations to the 1985 Act dealing with the process of voting for a trustee when a statutory meeting is called. Under the new process the creditors can vote to retain the trustee in sequestration who was appointed on the award being made or they can vote to replace that person with a new trustee in sequestration.

## **Section 12 – Replacement of trustee acting in more than one sequestration**

39. Currently, the AiB must make applications for each case and in every sheriff court in which the insolvency practitioner was appointed as trustee, when that trustee is no longer qualified to act. This section inserts a new section 28A into the 1985 Act which simplifies this

procedure to allow the AiB to make one application, to the Court of Session, covering all cases and seeking a court order filling the vacated offices of the original trustee with a new trustee.

### **Section 13 – Requirement to hold money in interest bearing account**

40. Section 43 of the 1985 Act provides that monies received by a trustee must be deposited in an appropriate bank or institution, as defined in section 73(1) of the Act. This section introduces a requirement for monies to be deposited in an interest bearing account.

#### *Debtor applications*

### **Section 14 – Debtor applications**

41. Subsection (1) extends section 1A of the 1985 Act to add administering debtor applications for sequestration to the other functions of the AiB.

42. A “debtor application” is the name given to the new process by which a debtor applies to the AiB for his or her estate to be sequestrated. This replaces the current process where a debtor has to petition the court. Creditors seeking sequestration of a debtor’s estate will continue to have to petition the sheriff.

43. Subsections (2) to (8) make a number of amendments of the 1985 Act setting up the procedure for debtor applications.

44. Subsection (2) inserts new subsections (1A) and (1B) into section 2 of the 1985 Act giving the AiB power to appoint a trustee in sequestration following a debtor application.

45. Subsections (3)(a) and (4) make amendments setting out who can make debtor applications and who must proceed by petition to the sheriff.

46. Subsection (3)(b) inserts new section 5(4B) and (4C) into the 1985 Act giving the Scottish Ministers power to make regulations setting out the form of debtor applications and setting the fees that the AiB may charge in relation to those applications.

47. Subsection (5) inserts new section 6B into the 1985 Act which provides that a debtor making a debtor application has to state whether the debtor’s main place of business is in the UK or elsewhere in the EU or whether the debtor has an establishment in the UK or elsewhere in the EU. If the debtor is already subject to proceedings elsewhere in the EU and those proceedings are regarded under EU law as main proceedings for insolvency then the debtor has to send a copy of the debtor application to the person in charge of those proceedings.

48. Subsection (6) inserts new section 8A into the 1985 Act which makes provision for debtor applications in similar terms to the provisions relating to petitions in section 8 of that Act.

49. Subsection (7) makes amendments to section 9 of the 1985 Act. It provides that the AiB may determine debtor applications from debtors who live in Scotland, have an established place

of business in Scotland or, if the debtor is not a natural person, who were constituted under Scots law and carried on business in Scotland at any time.

### *Jurisdiction*

#### **Section 15 – Sequestration proceedings to be competent only before sheriff**

50. This section provides for the removal of the jurisdiction of the Court of Session in respect of sequestration proceedings. All petitions for sequestration, appeals against a refusal to award sequestration and petitions for recall of sequestration will now be heard by the sheriff. Actions of reduction and suspension in relation to a sequestration will continue to be dealt with by the Court of Session.

51. There are a number of amendments of the 1985 Act contained in schedule 1 which are consequential on the changes made by this section.

### *Income received by debtor after sequestration*

#### **Section 16 – Income received by debtor after sequestration**

52. This section amends section 32 of the 1985 Act introducing income payment orders (IPOs) and income payment agreements (IPAs). An IPO is an order requiring the debtor to pay to the trustee a proportion of any income the debtor receives after the award of sequestration. The order may require a third party to pay income due to the debtor straight to the trustee instead. It must be applied for by the trustee before the date of the debtor's discharge. It can run for a maximum period of 3 years and the application must state what period is being applied for. Debtors will be subject to penalties if they default on payments.

53. An IPA is a formal written agreement between the debtor and the trustee in the same terms as an IPO but without the requirement of court involvement.

### *Debtor's home and other heritable property*

#### **Section 17 – Debtor's home and other heritable property**

54. Subsection (1) amends section 32 of the 1985 Act to clarify that, when a trustee gives heritable property back to a debtor, written notification by the trustee is evidence that the debtor is now the owner of the property.

55. Subsection (2) inserts new section 39A into the 1985 Act which has the effect of providing for the ownership or other right in a debtor's family home which is part of the sequestrated estate to be returned to the debtor if the trustee has not taken any action in relation to that property within 3 years of the date of sequestration. If the trustee discovers the interest in the property at a later date, the 3-year period runs from the date the trustee became aware of the property.

56. Subsection (3) of section 39A lists the types of action the trustee may take which would prevent the home being returned to the debtor. The Scottish Ministers may modify that list by regulations.

57. Subsection (8) of section 39A gives the Scottish Ministers power to make regulations setting out circumstances in which the 3-year period may be shortened or where section 39A will not apply or where the sheriff may decide that the section does not apply. The regulations can also make provision for compensation.

*Protected trust deeds*

**Section 18 – Modification of provisions relating to protected trust deeds**

58. This section amends Schedule 5 to the 1985 Act to provide the Scottish Ministers with a regulation-making power setting out what conditions are required in order for a trust deed to become protected.

*Modification of composition procedure*

**Section 19 – Modification of composition procedure**

59. This section amends Schedule 4 to the 1985 Act which makes sets out the procedure for an offer of composition (which is a settlement offer made by a sequestrated debtor to the creditors which, if accepted, results in the debtor being discharged). Offers of composition will now be made by the debtor to the trustee and passed for approval to the AiB rather than to the court.

60. The previous requirement for active agreement by the creditors is changed so that those creditors who do not actively object and have been notified of the offer will be considered to have agreed to the offer of composition.

*Status and powers of Accountant in Bankruptcy*

**Section 20 – Status of Accountant in Bankruptcy as officer of the court**

61. This section makes it clear that the AiB has duties to the court in the same way as a solicitor or advocate would have.

**Section 21 – Accountant in Bankruptcy’s power to investigate trustees under protected trust deeds**

62. This section amends section 1A of and Schedule 5 to the 1985 Act to extend the powers of the AiB in respect of protected trust deeds. The AiB will now be able to audit the trustee’s accounts and fix the fees in protected trust deeds without the requirement of a request from creditors to do so.

*Offences*

**Section 22 – Modification of offences under section 67 of the 1985 Act**

63. This section amends section 67 of the 1985 Act.

64. It widens the grounds of the offence in subsection (2) of that section to include the disposal of assets.

65. It repeals subsection (8) so that a failure to keep records is no longer an offence under section 67.

66. The limit set out in subsection (9) on credit that can be applied for without disclosing the information required about the sequestration is increased to £500. A further requirement to disclose the information required about the sequestration is added to subsection (9). If a debtor already has debts of at least £1000 (or another amount which is substituted for the £1000 by the Scottish Ministers in regulations made under the power now contained in subsection (9)) the debtor has to disclose the required information when applying for any amount of credit.

67. New subsection (9A) provides that, in calculating the amount of credit in relation to the limits in subsection (9), any liability for utility supplies or council tax can be ignored.

68. The amendments of subsection (10) provide that a failure to disclose a BRO or BRU made in England or Wales amounts to a failure to provide the information required in subsection (9). The same provision is made for BROs and BRUs made in Scotland by new section 56C of the 1985 Act (see section 2 of the Bill).

69. The addition of new subsection (11A) clarifies that offences committed elsewhere in the UK will have the same effect and carry the same penalties as if they were committed in Scotland.

#### *Miscellaneous and general*

### **Section 23 – Creditor to provide debt advice and information package**

70. This section amends section 5 of the 1985 Act to introduce a requirement for creditors to have provided debtors with a copy of a debt advice and information package (which is defined as the same pack referred to in section 10 of the 2002 Act) before the creditor can petition for sequestration.

### **Section 24 – Abolition of summary administration**

71. This section repeals various provisions of the 1985 Act with the effect that the Certificate of Summary Administration (COSA) procedure is abolished.

### **Section 25 – Non-vested contingent interest reinvested in debtor**

72. This section inserts new section 31(5A) into the 1985 Act. Section 31(5) of that Act gives the trustee the right to non-vested contingent interests (potential assets) as if an assignation (transferring rights to those assets) of the interest had been executed by the debtor and intimation of the assignation made at the date of sequestration. This meant that the trustee continued to hold the right to these interests even after the debtor was discharged.

73. This was not the case prior to section 97(4) of the Bankruptcy (Scotland) Act 1913. New section 31(5A) reverts the position to as it was prior to the 1913 Act; non-vested contingent interests will no longer remain vested in the trustee after the debtor is discharged.

**Section 26 – Debtor’s requirement to give account of state of affairs**

74. This section inserts new section 43A into the 1985 Act which requires any debtor who is not discharged or who is subject to an IPO or IPA to give the trustee an account in writing providing details of income and expenditure every 6 months.

**Section 27 – Restriction of debtor’s rights to appeal under sections 49(6) and 53(6) of the 1985 Act**

75. Section 49(6) of the 1985 Act allows the debtor or any creditor to appeal against the adjudication on claims. Section 53(6) of that Act allows the same parties to appeal against the trustee’s remuneration and outlays.

76. This section inserts a new subsection (6A) into both sections introducing a restriction on the right of appeal by the debtor. The debtor can now appeal only if the debtor has a financial interest in the outcome of the appeal, such as a reversion of funds after dividend.

**Section 28 – Status of order on petition to convert protected trust deed into sequestration**

77. This section inserts a new subsection (2A) into section 59C of the 1985 Act. It applies to the situation where a sheriff grants an application by a person in charge of proceedings akin to sequestration commenced in another EU country which requests the conversion of a protected trust deed granted by the debtor into sequestration of the debtor’s estate. The sheriff’s order granting that conversion is to be treated as if it is an award of sequestration granted by the AiB following a debtor application.

**Section 29 – Treatment of student loans on sequestration**

78. Debtors who are sequestrated in Scotland are currently able to write off their student loan liability. This section amends the relevant legislation governing student loans to provide that debtors will be obliged to continue paying their student loans despite being sequestrated.

**SCHEDULE 1 – MINOR AND CONSEQUENTIAL AMENDMENTS OF THE 1985 ACT (INTRODUCED BY SECTION 30)**

79. This schedule contains a number of minor amendments of the 1985 Act and amendments of that Act consequential on the provisions in Part 1 of the Bill.

80. Paragraph 8 inserts new sections 10 and 10A into the 1985 Act. Section 10 deals with the duty to notify the existence of concurrent proceedings for sequestration or proceedings which are similar to sequestration.

81. Where a debtor or a concurring or petitioning creditor is aware of the existence of another sequestration, of proceedings that may lead to sequestration or of proceedings that are similar to sequestration in relation to the same debtor, that person must notify the sheriff (or the AiB in the case of a debtor application) of the existence of the other proceedings. Subsections (4) to (6) set out the consequences of failure to notify on the part of any of those persons. A petitioner may be

liable for the expenses of presenting the petition, a concurring creditor may be liable for the expenses of a debtor application and a debtor shall be guilty of an offence and liable on summary conviction to a fine up to the limit at level 5 on the standard scale.

82. New section 10A of the 1985 Act sets out what may be done when any of the other proceedings listed in section 10(2) are in progress or have been completed.

83. Paragraph 44 inserts new section 53A into the 1985 Act which modifies the procedure under section 53 of that Act where the AiB is trustee. These relate to the determination of fees, accounts of intromissions, appeals against such determinations, and the payment of dividends.

## **PART 2 – FLOATING CHARGES**

*Registration and creation etc.*

### **Section 31 – Register of Floating Charges**

84. This section provides for the setting up of the new Register of Floating Charges under the management of the Keeper of the Registers of Scotland. The form and manner in which the Register is to be organised and maintained will be the subject of regulations made by statutory instrument. The date of receipt is to be the date of registration of the relevant document (or advance notice). The intention is that (as with the Sasine Register) the Register should record the text of the document and not (as with the Books of Council and Session) retain the document in its physical form. Subject to the stipulation of appropriate procedures, it is intended that registration can in due course be effected electronically.

### **Section 32 – Creation of floating charges**

85. Subsections (1) and (2) derive from section 462(1) of the Companies Act 1985 and restate the statutory rule that, in Scotland, a company may grant a floating charge. In view of the generality of the phrases “debt or other obligation” and “all or any part of the property” the reference in parentheses in the existing provision to the former including a “cautionary obligation” and the latter “uncalled capital” is unnecessary. The term “company” is defined in section 40.

86. Subsection (3) lays down the new rule that, after the new legislation enters into force, the creation of a floating charge occurs only when the document granting the floating charge is registered in the Register of Floating Charges (which is instituted in terms of section 31).

87. Section 462(5) of the Companies Act 1985 provides that a floating charge has effect in relation to heritable property without the need for the document granting the charge to be recorded in the Land Register or Register of Sasines. It is evident from section 28 of the Land Registration (Scotland) Act 1979 that a floating charge constitutes an “overriding interest” and is not a registrable interest. The provision that floating charges are created by registration in the Register of Floating Charges implies no further act of registration is required and the terms of section 462(5) are not re-enacted.

### **Section 33 – Advance notice of floating charges**

88. This section makes provision for the registering of an advance notice of a floating charge. The purpose of an advance notice is to assist the mechanics of settling secured transactions by allowing parties to obtain priority of ranking from the date of the advance notice provided that settlement is completed to the extent that the floating charge is registered within 21 days of the advance notice. An advance notice cannot be registered unilaterally. The form of an advance notice and the way in which it may be given may be prescribed by statutory instrument. It is envisaged that the regulations will provide that the advance notice may be subscribed either by the parties or by their solicitors.

### **Section 34 – Ranking of floating charges**

89. This section is concerned with the ranking of a floating charge both with other floating charges and with fixed securities affecting all or part of the same property as that covered by the floating charge. Subsections (1), (2) and (3) set out the leading principle that ranking proceeds on the basis of date of creation which, in the case of fixed securities is the date upon which the security was constituted as a real right. Where the floating charge is created on the same day as another floating charge or fixed security, the rule is that the respective securities rank equally.

90. Subsection (4) is concerned with a competition between a floating charge and a fixed security arising by operation of law – such as lien or a landlord's hypothec. It continues the existing rule that such fixed securities arising by operation of law have priority over any floating charge.

91. Subsections (5) and (6) continue an existing provision whereby the holder of the second, later floating charge may protect the value of the security by giving notice to the holder of the earlier floating charge in which event the priority ranking of the earlier floating charge is restricted to the amount of the debt then outstanding plus any further advances which the holder of that earlier floating charge is contractually obliged to make. In view of the change in the ranking rule, the same facility is extended to the holder of a subsequent fixed security.

92. The ranking of securities may be the subject of agreement among the secured creditors and this is dealt with in subsections (7) and (8), the latter of which makes express what might otherwise be implied namely that any ranking agreement requires the participation of the holder of any subsisting security who would be adversely affected by the ranking arrangement. Reference should be made to section 36 for the method whereby a ranking agreement may be registered. The priority of preferential debts is preserved by subsection (9).

### **Section 35 – Assignment of floating charges**

93. The existing legislation contains no provision on assignment of floating charges but in one first instance judicial decision (*Libertas-Kommerz v Johnson*, 1977 SC 191) it was held that a floating charge was assignable on general principles of law. Subsection (1) gives statutory affirmation of the assignability of a floating charge and further provides for vesting in the assignee on registration in the Register of Floating Charges. Subsection (2) makes clear that partial assignment is possible. Subsection (3) is necessary since a floating charge may transfer

not only by voluntary assignation but also by operation of law (e.g. on sequestration of the holder, the floating charge transfers to the trustee).

### **Section 36 – Alteration of floating charges**

94. This section is intended to ensure that third parties can rely upon the Register. Given that the terms of a floating charge must be published in the Register, it follows that any agreement between the holder of the floating charge and any other adversely affected security holder to alter the terms of the floating charge or its ranking must likewise be registered before it can receive effect as an alteration of the registered text. An unregistered agreement to alter the terms of a floating charge would remain as a contractual agreement between the parties to it but could not affect any third party.

95. One way in which the terms of a floating charge may be altered is by inserting a ranking agreement or changing an existing ranking arrangement. A ranking agreement is essentially an agreement between secured creditors and may be of no interest to the debtor. Subsection (2) enables an agreement between the secured creditors, in which the debtor is not participant, to be registered, provided that the debtor is not thereby adversely affected.

96. Subsection (3) addresses the case – exemplified in *Scottish & Newcastle plc v Ascot Inns Ltd*, 1994 SLT 1140 - in which the holder of a floating charge gives consent to specific assets, or a specific class of assets, of the company being released from the scope of the floating charge while yet remaining in the ownership of the company. If, as is currently the case, the fact of such a release is not published, an acquirer from a receiver appointed by the holder of the floating charge cannot be confident of their title. The subsection is not, of course, directed towards the escape of individual assets from the scope of the charge on the onerous or gratuitous transfer of the asset by the company to a third party prior to attachment of the floating charge.

### **Section 37 – Discharge of floating charges**

97. This section is essentially permissive. Payment of the debt, or performance of the obligation, secured by the floating charge will normally discharge or extinguish the security and this is recognised in subsection (3). But it is useful to have a means whereby the Register of Floating Charges may be cleared of floating charges which have been so discharged or extinguished. There may also be instances in which, as part of a re-financing arrangement, it is desired to discharge an existing floating charge in favour of some other form of security and this section provides a ready, public means of achieving that.

### **Section 38 – Effect of floating charges on winding up**

98. The essence of a floating charge is that until some event, such as the company going into liquidation or the appointment of a receiver, the security right is inchoate and the company may dispose (even gratuitously) of assets within the scope of the charge and the acquirer will obtain ownership unencumbered by any security right. This section, which simply repeats the existing law, deals with attachment, or crystallisation, of the floating charge on a winding up, when the floating charge is converted into a fixed security over the assets then within its scope.

99. A floating charge similarly attaches or crystallises on the appointment of a receiver. The relevant statutory provisions on receivership are in the Insolvency Act 1986. They are not affected by these reforms. Going into liquidation “within the meaning of section 247(2) of the Insolvency Act 1986” encompasses the insolvent liquidation of assets of an overseas company – see sections 220 and 221 of that Act.

### **Section 39 – Repeals, savings and transitional arrangements**

100. Subsection (1) repeals Part XVIII of the Companies Act 1985 which is replaced by the new provisions on floating charges as set out in this Part. However, so that the new rules do not have retrospective effect, it is necessary to regard Part XVIII as still having effect in respect of all floating charges subsisting before the coming into force of these new rules (see subsections (2) and (3)). This will enable all matters relating to pre-commencement floating charges, such as the alteration of them, to be dealt with under the relevant pre-commencement provisions.

101. The new rules on creation of floating charges and ranking by date of creation will not disturb the priority of ranking of existing securities, whether fixed or floating, since they have all been created prior to the coming into force of the new rules. Holders of such securities will not be adversely affected by the creation of any new floating charge. In the interest of clarity, subsection (4) is intended to make plain that, for existing security rights, the pre-commencement rules of ranking continue in force.

102. Similarly, it will be necessary to repeal Chapter II of Part XVII of the Companies Act 1985 but to regard it as still having effect in respect of pre-commencement floating charges (and other securities). This will facilitate matters such as the registration of a memorandum of satisfaction (indicating, for example, that the debt for which the security was given has been paid or satisfied completely or partly) in terms of the pre-commencement legislation. (The new Register of Floating Charges will contain records only of floating charges created on or after the commencement of the new provisions and of documents relating to them.) It is understood that the necessary provision in this respect will be sought by the Department of Trade and Industry through the United Kingdom Parliament.

### **Section 40 – Interpretation**

103. This section defines company in a way which includes an overseas company. It also defines “fixed security” in terms based on and to the same effect as the definition in section 486 of the Companies Act 1985.

#### *Related further provision*

### **Section 41 – Formalities as to documents**

104. The Requirements of Writing (Scotland) Act 1995 provides for a form of subscription of documents whereby the document has an evidential presumption of having been validly subscribed by the signatory. Essentially, the requirement is that the signature has been witnessed. The 1995 Act provides that only documents having such “presumed authenticity” may be registered in *inter alia* the Sasine Register. In practice the same requirement is asked of documents presented to the Land Register. Subsection (1) applies the equivalent rule in the case

of the Register of Floating Charges, which will facilitate a uniform treatment of applications to the Registers of Scotland when electronic conveyancing is introduced.

105. Subsections (2) and (3) are necessary to deal with the following situations: (a) where a document registered in the Register of Floating Charges has been annulled as a result of an application to the court for a decree of reduction and (b) where something has been inaccurately expressed in a document registered in the Register of Floating Charges and, on application, the court has granted an order rectifying the defect. Although both may happen rarely, it is important that, as is already the law in relation to standard securities, a third party such as a person to whom a floating charge is being assigned should be able to rely on the Register. Accordingly, the effect of these provisions is that the decree of reduction or order of rectification will not affect the rights of the third party unless it has been duly registered in the Register of Floating Charges.

## **Section 42 – Industrial and provident societies**

106. The purpose of this section is to apply the recommended registration regime for floating charges by companies to floating charges in Scottish form granted by industrial and provident societies registered in Great Britain. Such charges are currently registered with the Financial Services Authority by virtue of section 4 of the Industrial and Provident Societies Act 1967, which is repealed.

## **PART 3 – ENFORCEMENT**

### *Scottish Civil Enforcement Commission*

## **Section 43 – Scottish Civil Enforcement Commission**

107. Subsection (1) establishes a new corporate body to be known as the Scottish Civil Enforcement Commission. The Commission has to exercise its functions in accordance with any directions given to it by the Scottish Ministers. It also has to carry out its functions in a way which encourages equal opportunities and, in particular, the observation of the equal opportunity requirements.

108. Subsection (4) gives the Scottish Ministers power to confer functions on the Commission, take functions away from the Commission or to otherwise modify the functions of the Commission by making subordinate legislation in the form of regulations. “Functions” in this context includes powers and duties. Hence the ability of the Scottish Ministers to confer functions on the Commission allows them to impose duties on the Commission.

109. Subsection (5) provides that the regulations under subsection (4) may transfer a function conferred on another person (including the Scottish Ministers) by a previous regulation or Act to the Commission. Those regulations may also amend regulations or an Act as a consequence of transferring the function where this is considered necessary or expedient.

110. Subsection (6) abolishes the Advisory Council on Messengers-at-Arms and Sheriff Officers.

111. Subsection (7) introduces schedule 2 which makes general provisions about the Commission.

## **SCHEDULE 2 – THE SCOTTISH CIVIL ENFORCEMENT COMMISSION**

112. Schedule 2 makes detailed provision concerning the status, governance, remuneration and other terms of appointment of Commissioners, and the general and disciplinary powers of the Commission. It also makes detailed provision in relation to various matters of an administrative nature.

113. Paragraph 1 makes it clear that the Commission is not to be regarded as a servant or agent of the Crown and that the Commission's property is not to be regarded as property of the Crown. This has legal implications in relation to immunities which are applied to servants or agents of the Crown and also in relation to particular statutory provisions which relate to Crown property.

114. Paragraph 2 deals with the membership of the Commission. It must be made up of a judge, a sheriff, a lawyer, a messenger of court, 3 lay persons and 2 *ex-officio* members (the Lord Lyon King of Arms and the Keeper of the Registers of Scotland). Paragraphs 3 to 12 deal with the tenure of each member and the procedure for filling vacancies in membership.

115. Paragraphs 21 to 26 give the Commission the necessary powers to appoint and pay a chief executive and such other employees as it sees fit. These powers can be exercised only with the approval of the Scottish Ministers because the Commission, as a non-departmental public body, will be funded by the Scottish Executive.

### **Section 44 – Information and annual report**

116. Subsection (1) obliges the Commission to provide information relating to the carrying out of its functions to the Scottish Ministers.

117. Subsection (2) obliges the Commission to prepare an annual report on its activities. This report should be prepared as soon as practicable after the end of the financial year to which the report relates.

118. Subsection (3) states that the report has to include a statement of accounts prepared according to the audit and account requirements specified in schedule 2, paragraphs 29 to 31. The report may also contain a statistical analysis of the performance of messengers of court during the reporting period or any other period.

119. In preparing the report, the Commission has the power to require a messenger of court to provide information it thinks necessary for the preparation of the report (subsection (4)). Failure to provide information is considered to be "misconduct" under section 58(9).

120. Subsections (5) and (6) provide that the Commission must publish and send a copy of each report to the Scottish Ministers, who must lay a copy before the Scottish Parliament.

### **Section 45 – Publication of guidance and other information**

121. Section 45 provides that the Commission must, for the purposes of informing and educating the public, prepare and publish information and other material on its functions, the functions of messengers of court and the law of and procedures relating to diligence. It can also carry out other such activities as it thinks fit with regard to informing and educating the public. Examples include publicity campaigns, market research, school and college based activities, career promotion work, advice services etc.

### **Section 46 – Published information not to enable identification**

122. Section 46 provides that the information contained or published in a report under sections 44(2) or 45(1) must not be in a form which will enable identification of messengers of court or any person who has had diligence executed against them.

### **Section 47 – Register of messengers of court**

123. Section 47 provides that the Commission must keep a register of messengers of court. It may make rules as to the particulars and other information to be recorded in the register, regulate the procedure by which this will be provided by messengers of court and how changes in this information must be notified. The Commission must open the register to public inspection at reasonable times determined by them.

### **Section 48 – Code of practice**

124. Section 48 provides that the Commission must prepare and publish a code of practice relating to the exercise of the functions of messengers of court. The code may, from time to time, be revised in whole or in part and any revised code must be published. The Commission will send a copy of each code of practice to the professional association for messengers of court (see section 56) and the Scottish Ministers, who must lay a copy before the Scottish Parliament.

### **Section 49 – Publication of information relating to debt collection**

125. Section 49 provides that the Commission may publish information and other materials promoting good practice and informing the public about informal debt collection. This information may be published as a code of practice or guidance for persons carrying out informal debt collection.

126. Subsections (3) and (4) define “informal debt collection” as the collection of a debt which is either not payable under a formal court decree or registered document or, if it is payable under a formal decree or document, the payment is enforced by means other than diligence.

### *Messengers of court*

### **Section 51 – Messenger of court**

127. Subsection (1) creates the office of messenger of court and any person holding the office will have the functions (which include powers and duties) conferred on that office by the

provisions of this Bill and any other legislation (including any subordinate legislation made under powers contained in this Bill).

128. A commissioned messenger of court may carry out the functions of a messenger of court throughout Scotland (subsection (2)). This also applies to former messengers-at-arms and sheriff officers deemed to be commissioned messengers of court by section 54(2).

129. Subsection (3) provides that any person wishing to be a messenger of court must apply to the Commission unless they are deemed to hold a commission as a messenger of court as a result of section 54(2).

### **Section 52 – Appointment of messenger of court**

130. Subsection (1) provides that the Commission must grant an applicant a commission as messenger of court where it is satisfied as to the suitability of the person. In taking a decision to grant a commission it must also take into account the numbers of commissioned messengers of court and any other matter it considers relevant. Decisions under subsection (1) are subject to appeal as set out in section 64(1).

131. The Commission must, on granting the commission, issue an official identity card to the messenger of court (subsection (2)). The messenger of court must, when requested, show the identity card when carrying out official duties (subsection (3)).

132. Subsection (4) provides that the Commission may make rules for the procedure for applications to become a messenger of court, the qualifications such a person must hold, the examinations and training to be undertaken before a commission may be granted and any other matter considered to be relevant to applications.

### **Section 53 – Annual fee**

133. Subsection (1) provides that the Commission may make rules requiring every commissioned messenger of court to pay an annual fee to the Commission. These may include a specific date each year for payment, how it is to be paid and any other matter the Commission considers to be appropriate (subsection (2)).

134. Subsection (3) provides that anything done under this section must be approved by the Scottish Ministers.

### *Abolition of offices of messenger-at-arms and sheriff officer*

### **Section 54 – Abolition of offices of messenger-at-arms and sheriff officer**

135. Subsection (1) abolishes the offices of messenger-at-arms and sheriff officer.

136. Subsection (2) provides that, from the day this section comes into force, those officers will be deemed to hold a commission as a messenger of court granted under section 52(1).

137. Subsections (3) to (5) provide that it is competent for a messenger of court to carry out any function it was competent for a messenger-at-arms or sheriff officer to carry out (providing it does not conflict with any legislative provision about messengers of court) and references in any legislation to “messenger-at-arms”, “sheriff officer” and “officer of court” are to be treated as if they are references to a messenger of court.

138. There are certain provisions in Acts in which the references set out in subsection (5)(a) to (c) are not to be read as references to messengers of court (for example, because the Act refers to the term “officer of court” in a context other than Scottish sheriff officers or messengers-at-arms). Subsection (6) specifies those provisions which are excluded from the effect of subsection (5).

#### *Regulation of messengers of court*

### **Section 55 – Regulation of messengers of court**

139. Subsection (1) provides that the Scottish Ministers may, by regulations, grant, remove or modify the functions of messengers of court. Again, functions in this context includes powers and duties of messengers of court.

140. Subsection (2) gives the Scottish Ministers further powers to make regulations. Those regulations may deal with the types of business associations that messengers may form, provision about the ownership, membership, management and control of those associations, and conditions to be satisfied by those associations.

141. Subsection (2)(d) provides that the Scottish Ministers may make provision regulating the fees and charges that may be levied by a messenger of court in the performance of the messenger’s functions.

142. Subsection (3) requires the Scottish Ministers to consult the Commission on regulations made under their powers in subsections (1) or (2). That consultation must take place before the regulations are made.

143. Subsection (4) gives the Commission the power to make rules regulating the conduct of messengers of court and prohibiting extra-official activities which are incompatible with their functions. Rules may permit extra-official activities which are not incompatible with messenger’s functions but may impose conditions on the carrying out of such activities. The rules may include a requirement on messengers of court to keep and audit accounts, maintain records for inspection, provide a bond of caution and other matters that the Commission considers appropriate.

144. Subsections (5) to (7) provide that no messengers of court may undertake allowable extra-official activities for payment without the consent of the Commission and the Commission may attach conditions to its consent. Permission to undertake extra-official duties for remuneration will be withheld only if the activity is incompatible with messenger of court functions.

## **Section 56 – Messengers of court’s professional association**

145. Section 56 gives the Scottish Ministers power to designate a professional association for messengers of court and to regulate the constitution and procedures of the professional association. Regulations will be made after consultation with the Commission, representatives of the professional association (or proposed association if one has yet to be designated) and any other body the Scottish Ministers consider to have an interest. A commission as a messenger of court will not be granted to anyone who is not a member of the professional association.

### *Investigation of messengers of court*

## **Section 57 – Inspection of messenger of court**

146. Section 57 provides for the Commission to appoint a person to inspect the work or a particular aspect of the work of a messenger of court. The person must, if required by the Commission, inquire into any paid activities undertaken by the messenger of court. The person appointed will be required to prepare a report on the inspection for the Commission and will be entitled to a fee and any expenses except if they are civil servant working in that capacity.

## **Section 58 – Investigation of alleged misconduct by messenger of court**

147. Subsection (1) applies where a person appointed under section 57 to carry out an inspection submits a report to the Commission disclosing that a messenger of court may have been guilty of misconduct, or a sheriff or judge makes a report to the Commission alleging misconduct. It also applies where any other person complains to the Commission alleging misconduct or the Commission otherwise has reason to believe that a messenger of court may have been guilty of misconduct.

148. Subsection (2) provides that the Commission may disregard a complaint if it is considered that the complaint is frivolous or is made simply to harass the messenger of court.

149. Subsections (3) and (4) provide that the Commission, after giving the messenger an opportunity to admit, deny or give an explanation of the matter, may appoint a person it thinks fit to investigate the matter. The Commission may not appoint a person if a messenger of court admits the misconduct in writing or gives a satisfactory explanation of the matter.

150. Subsection (5) provides that the appointed person must provide a report to the Commission and may make a recommendation that the matter is referred to the disciplinary committee of the Commission where there is a probable case of misconduct with sufficient evidence to justify proceedings.

151. Subsection (6) provides that the Commission must, where it receives a recommendation, refer the matter to the disciplinary committee.

152. Subsection (7) provides that the Commission must pay the fees of the person conducting the investigation, except if the person is a civil servant acting in that capacity, and must pay the person’s outlays.

153. Subsection (9) defines “misconduct” as including bringing the office of messenger of court into disrepute, failure to provide information under section 44(4) and a failure to pay fees to the Commission within 3 months of the due date.

### **Section 59 – Suspension of messenger of court pending outcome of disciplinary or criminal proceedings**

154. This section applies where there is a report or complaint alleging misconduct on the part of a messenger of court or where a messenger of court has been charged with an offence.

155. Subsections (2) and (3) provide that the disciplinary committee may make an order suspending the messenger from practice for a specific period. It may also extend the period or revoke the order. Any decisions under this section are subject to appeal as set out in section 64(1).

### **Section 60 – Commission’s duty in relation to offences or misconduct by messenger of court**

156. Subsections (1) and (2) apply where the Commission becomes aware that a messenger of court has been convicted by a court of any offence or admits misconduct under section 58(4)(a). The Commission must refer the matter to the disciplinary committee to be dealt with under section 61.

157. Subsection (3) specifies that “offence” means any offence which the messenger of court has been convicted of before or after being granted a commission as a messenger of court, other than any offence disclosed in the person’s application for a commission.

### *Disciplinary proceedings*

#### **Section 61 – Referrals to the disciplinary committee**

158. Subsections (1) and (2) provide that in dealing with any matter referred to the disciplinary committee, the committee must consider any report made to the Commission under section 58(5)(a) and any other relevant information held by the Commission and hold a hearing if it is considered appropriate. Where a messenger of court requests a hearing relating to a matter under consideration, the disciplinary committee must hold a hearing.

159. Subsections (3) and (4) provide that the disciplinary committee must, when holding a hearing allow the messenger of court, the person who carried out the investigation or any other person the committee thinks appropriate, to make a statement orally or in writing and lead, or produce evidence.

160. Subsections (5) and (7) provide that the disciplinary committee may award expenses in any hearing in favour of or against the messenger of court to whom the hearing relates. Those expenses awarded in favour of the messenger of court will be paid by the Commission while expenses against the messenger of court will be paid to the Commission by the messenger.

161. Subsection (8) provides that the Commission may make rules, as to the procedures, including the procedures to be followed during a hearing, of the disciplinary committee.

162. Subsection (9) provides that any rules made under subsection (8) must be approved by the Scottish Ministers.

### **Section 62 – Disciplinary committee’s powers**

163. Section 62 covers the situation where, after dealing with a matter referred to the disciplinary committee, the committee is satisfied that it is appropriate to take further action.

164. Where the messenger of court is guilty of misconduct the disciplinary committee can suspend the messenger, deprive the messenger of office, censure the messenger or impose a fine. If the messenger is guilty of charging excessive fees the committee can also require the messenger to pay back the excessive amounts (with interest).

165. Where the messenger of court is convicted of an offence, an order suspending the messenger, depriving the messenger of office or censuring the messenger can be made.

166. Subsection (5) provides that where a messenger fails to comply with an order imposing a fine, the disciplinary committee may suspend the messenger from practice for a specified time or deprive the messenger of office. Any decisions under this section are subject to appeal as set out in section 64(1).

### **Section 63 – Orders under sections 59 and 62: supplementary provision**

167. Section 63 provides that an order imposing a fine is enforceable as if it were an extract decree arbitral issued by the sheriff. This means the Commission may recover any fine imposed by the order by means of diligence. The Commission must also notify any order made by the disciplinary committee to the Court of Session and every sheriff principal.

### *Appeals*

#### **Section 64 – Appeals from decisions under sections 52, 59 and 62**

168. Section 64 provides that an appeal against specific decisions of the Commission and disciplinary committee may be made to the Inner House of the Court of Session. The decision on an appeal to the Inner House is final. These decisions relate to the commissioning of messengers of court under section 52(1) or the disciplining of messengers under sections 59(2) and 62.

### *Miscellaneous*

#### **Section 65 – Messenger of court’s actions void where messenger has interest**

169. Section 65 specifies the conditions under which a messenger of court who has a particular kind of interest may not exercise their functions. This covers individual interest as well as

circumstances where a debt is owed to or by a business associate or family member of the messenger of court. Any action by the messenger in relation to such cases is void.

### **Section 66 – Measure of damages payable by messengers of court for negligence or other fault**

170. This section replicates the provisions of section 85 of the Debtors (Scotland) Act 1987, which is now repealed. It makes clear that no common law rule which limited damages payable to the amount of debt being recovered, is revived as a result of the repeal of section 85 or the provisions in this Part.

### **Section 67 – Effect of code of practice**

171. Subsection (1) provides that a messenger of court must exercise that messenger's functions with regard to any code of practice published by the Commission under section 48.

172. Subsection (2) provides that failure to comply with a code of practice in itself will not cause a messenger of court to be liable to any criminal or civil proceedings.

173. Subsections (3) and (4) provide that a code of practice will, however, be allowed as evidence in any criminal or civil proceedings. Where a court or tribunal conducting a civil or criminal proceeding, or the disciplinary committee of the Commission, considers a code of practice to be relevant to any question arising in the proceedings, the code can be taken into account when determining that question.

## **PART 4 – LAND ATTACHMENT AND RESIDUAL ATTACHMENT**

### **Chapter 1 – Abolition of adjudication for debt**

#### **Section 68 – Abolition of adjudication for debt**

174. Adjudication for debt is the diligence which creditors may use against heritable (and some other) property of debtors. A creditor who has, say, decree for payment, must first raise an action of adjudication. Decree in that action gives the creditor some rights over the debtor's property (such as the ability to remove the debtor from possession and to let the property). However, if the debt is not paid off, a 10-year period (the "legal") must expire before the creditor can take the next step, raising an action for declarator of expiry of the legal. Decree in that action has the effect of transferring ownership of the property to the creditor.

175. This section abolishes adjudication for debt. That abolition does not affect an action raised before the day this section comes into force provided decree is granted no later than 6 months after that day.

#### **Section 69 – Renaming of the Register of Inhibitions and Adjudications**

176. This section provides that, following from the abolition of adjudication for debt, the Register of Inhibitions and Adjudication is renamed the Register of Inhibitions. That register has

had several titles over the years and various enactments make reference to it by those titles. Subsection (2) provides that all references in those enactments to the Register of Inhibitions and Adjudications, the General Register of Inhibitions or the Register of Adjudication are to be read as references to the Register of Inhibitions.

## **Chapter 2 – Attachment of land**

### *Land attachment*

#### **Section 70 – Land attachment**

177. Section 70 creates a new diligence over land to be known as land attachment.

178. Subsection (2) provides that land attachment is competent only if the debt is established by a decree or document of debt, the debtor has been charged to pay the debt, the period for payment has expired without payment being made and the creditor has, before or on serving a charge for payment, provided the debtor with a debt advice and information package. “Decree” and “document of debt” are defined in section 116. The debt advice and information package is the same package required, in the case of attachment of moveables, by section 10 of the Debt Arrangement and Attachment (Scotland) Act 2002 (see subsection (8)).

179. Subsection (3) provides that a land attachment is created over land at the beginning of the day which falls 28 days after the last day on which a notice of land attachment is registered. The period between registration of the notice and creation of the land attachment gives third parties notice that the attachment, which may affect a deed granted by the debtor, is pending. This is subject to sections 72(4) and 110(1). Under section 72(4), no land attachment will be created if the creditor does not register a certificate of service of the notice of land attachment within the 28-day period. Section 110 provides that no land attachment will be created if the debt is paid, or tendered to, the creditor or others on the creditor’s behalf within that period.

180. Subsection (4) provides for the effect of a notice of land attachment during the period after it is registered and before the land attachment is created. The notice has effect as if it were an inhibition registered against the debtor in the Register of Inhibitions but restricted to the land described in the notice.

181. Subsection (5) provides that a land attachment gives the creditor a subordinate real right over the land. It secures the sum for payment together with any interest accrued and all expenses chargeable against the debtor.

182. Subsection (7) gives the Scottish Ministers power, by regulations, to change the 28-day period. This power extends to amending any enactments in which that period is mentioned (see, for instance, new section 13A being inserted into the Conveyancing and Feudal Reform (Scotland) Act 1970 by section 74).

#### **Section 71 – Attachable land**

183. Section 71(1) defines what is meant by “land” in this Chapter and, therefore, the property of the debtor which may be attached by land attachment. This is land which is owned by the

debtor and land of which the debtor is the tenant under a long lease. Subsection (2) provides that, such land is attachable only if the debtor has a recorded or registered title. That section also excludes proper liferents and long leases which are not assignable.

184. Subsection (3) provides that land attachment will apply to a lease which is assignable but only with the consent of the landlord. Only leases which are not assignable under any circumstances may not be attached by land attachment.

## **Section 72 – Notice of land attachment**

185. Section 72(1) provides that a notice of land attachment must be in the form prescribed in rules of court and provide a description of the attached land. The notice must also be registered in both the relevant property register (either the Register of Sasines or the Land Register – see section 116) and in the Register of Inhibitions.

186. Subsection (2) provides that it is competent to register a single notice of land attachment in relation to two or more amounts which the debtor has been charged to pay.

187. Subsection (3) specifies that the notice of land attachment must be served by a messenger of court on the debtor, any person who owns the land and any tenant under a long lease of the land, as soon as is practicable after the notice is registered.

188. Subsection (4) provides that if the certificate of service on the debtor is not registered before the 28-day period expires, the notice will be, and will be deemed always to have been void. Accordingly, no land attachment will be created. Subsection (5) provides for the certificate of service to be in a form prescribed in rules of court and to contain a description of the land to be attached and to be registered in the same way as the notice of land attachment.

### *Consequences of land attachment*

## **Section 73 – Debts secured by land attachment not rendered heritable**

189. Section 73 specifies that the creation of land attachment will not make a moveable debt heritable, which avoids (for example) any affect on rights of succession. This is particularly relevant, if the creditor dies while the land attachment still has effect, in succession to the creditor's estate.

## **Section 74 – Restriction on priority of ranking of certain securities**

190. This section inserts section 13A into the Conveyancing and Feudal Reform (Scotland) Act 1970 (the "1970 Act").

### *New section 13A – Effect of subsequent land attachment on ranking of standard securities*

191. Section 13(1) of the 1970 Act covers the preference in ranking of standard securities. Where a creditor has registered a standard security over land, and another creditor subsequently registers a standard security over the same land, the first creditor's preference in ranking is

restricted to security for present advances and those future advances which that creditor is obliged to make.

192. Section 13A applies this rule where, instead of a subsequent standard security being registered, a land attachment is created over the same land. That subsequent land attachment will have effect on the existing security as if the land attachment were a subsequent security and the creditor in the first security had received notice of the subsequent security on the day the land attachment was created.

### **Section 75 – Lease granted after registration of notice of land attachment**

193. This section applies where a notice of land attachment is registered and where, during the 28-day period mentioned in section 70(3), the debtor or a tenant of the debtor grants a lease (or sublease) of land specified in the notice. Where a land attachment is created at the end of that period, any such lease which would be reducible were it granted in breach of an inhibition (for which see section 150) is reducible by the creditor.

### **Section 76 – Assignment of title deeds etc.**

194. Section 76(1) provides that a land attachment has the effect of assigning the title deeds, searches and all unregistered conveyances affecting the attached land to the creditor. Subsection (2) entitles the creditor, where the land is sold by virtue of the land attachment, to deliver those title deeds and other documents to the purchaser and to assign to that purchaser any right the creditor has to have any title deeds not in the creditor's possession delivered to the creditor. This mirrors the effect of section 10(4) of the 1970 Act (which operates in a similar way when a creditor registers a standard security).

### **Section 77 – Acquisition of right to execute land attachment**

195. Section 88 of the Debtors (Scotland) Act 1987 provides for how diligence may be done where a decree or document of debt is assigned to (or otherwise acquired by) a person who is not the original creditor (for ease of reference, called here the “assignee”). The assignee must apply to the court for warrant authorising the assignee to do any diligence authorised by the original decree or other document.

196. Section 77 provides for how such assignment or other acquisition affects land attachment. The assignee may take, or continue to take steps towards enforcing the debt by land attachment provided that (a) before the assignment or other acquisition, a notice of land attachment has been registered; and (b) before taking those steps, the assignee registers a notice in the relevant property register and the Register of Inhibitions. If the assignee so registers notice, the assignee is treated as having been granted a warrant under section 88(4) of the 1987 Act. The notice must be in the form prescribed in rules of court.

### **Section 78 – Effect of debtor’s death before land attachment created**

197. Section 78(1) applies where a debtor dies after a creditor has taken steps to begin or carry out a land attachment but before a land attachment has been created. Section 79 covers the case where a debtor dies after a land attachment is created.

198. The basic position, as set out in subsection (2), is that any steps taken cease to have effect and the charge served on the debtor becomes void.

199. Subsection (3) provides that nothing in subsection (2) stops the creditor from proceeding to raise, against any executor of the debtor, an action to constitute the debt against the debtor’s estate.

200. Subsection (4) provides that any warrant for diligence in such an action authorises land attachment.

### **Section 79 – Effect of debtor’s death after land attachment created**

201. Section 79(1) provides that, where a debtor dies after a land attachment has been created, the land attachment will continue to have effect.

202. Subsection (2) gives the Court of Session power, by rules of court, to modify the procedures under this Chapter to reflect that the debtor is dead and that the land attachment is proceeding. Provisions about the service of notices of applications for warrant for sale and foreclosure which require the creditor to serve or intimate such applications to the debtor will obviously require to be modified, as will other procedures.

### **Section 80 – Caveat by purchaser under missives**

203. Section 80 provides for the situation where a person has entered into a contract to purchase land from a debtor but ownership has not been transferred to that person. Such a person may be concerned that a creditor of the debtor will execute a land attachment affecting that land.

204. Subsection (2) provides that, by registering a notice in the appropriate property register in the form prescribed in rules of court, the person will be informed of any application under section 81(1) for a warrant for sale of the land since the creditor must carry out a search in that register (see section 81(3)(c)) and must intimate the application to any person who has registered a notice under this section (see section 81(4)(b)).

#### *Preparations for sale of attached land*

### **Section 81 – Application for warrant to sell attached land**

205. Section 81 provides for the form and method of applying for a warrant to sell attached land.

206. A creditor may apply for warrant to sell attached land only where a land attachment is in effect, 6 months have elapsed since the notice of land attachment was registered, the sum recoverable by the land attachment exceeds £1,500 (or another sum prescribed by the Scottish Ministers) and that sum has not been paid off.

207. The application must, among other things, name a solicitor who is willing to act as the “appointed person” (see sections 86(2)(b) and 97) and to sell the land if warrant is granted. Subsection (3) covers the form and content of the application and the documents which are to accompany it, while subsection (4) provides for the persons to whom the application must be intimated.

208. Under subsection (5), any person who receives intimation of the application is entitled to object to it but must lodge objections within 14 days of receiving the application.

### **Section 82 – Notice to local authority of application for warrant for sale**

209. This section provides that a creditor, other than a local authority, who applies for a warrant to sell attached land which comprises or includes a dwellinghouse, must notify the local authority in whose area the dwellinghouse is situated. The notification must be given in the form and manner prescribed under section 11(3) of the Homelessness (Scotland) Act 2003.

### **Section 83 – Preliminary hearing on application for warrant to sell**

210. Section 83 requires the sheriff to hold a preliminary hearing which the creditor must attend and at which persons who lodged objections under section 81(5) are to be given the opportunity of making representations.

211. If satisfied that the application is in order, the sheriff must fix a date for a full hearing on the application. In addition, the sheriff must, among other things, appoint a surveyor or other suitably qualified person to report on the open market value of the land and, where the creditor has been unable to ascertain the amount outstanding under any security or other diligence affecting the land, require any such security or diligence holder to disclose those amounts.

### **Section 84 – Valuation report**

212. Section 84(1) authorises the valuer, appointed under section 83(3)(c), to take all necessary steps to produce a valuation report which must be sent to the creditor and those persons mentioned in 81(4).

213. Subsection (2) provides that the debtor and any other person occupying the land must allow the valuer to inspect the land and carry out all necessary steps to produce the valuation report.

214. Subsections (3) and (4) provide that the creditor is liable for all costs associated with the production of the report. These will be expenses of the land attachment and (under section 109) will be chargeable against the debtor.

### **Section 85 – Creditor’s duties prior to full hearing on application for warrant for sale**

215. Section 85(1) requires the creditor, at least 7 days before the date of the full hearing under section 86, to lodge the valuation report, a continuation of the report on the search in the property registers (lodged with the initial application for warrant for sale) and a note of any amounts outstanding on any securities or diligences affecting the land.

216. Subsection (2) provides for further intimation of the application and the date of full hearing where a search in the property registers reveals a deed registered since the date of application. The sheriff, if it appears necessary, may postpone the date of the hearing and the creditor will be required to inform the debtor and other relevant persons of the later date.

### **Section 86 – Full hearing on application for warrant for sale**

217. Section 86(1) provides that at the hearing on an application for warrant to sell attached land, the sheriff must not make any order without first giving any person who has lodged objections under section 81(5) an opportunity to be heard.

218. The sheriff may grant the application under subsection (2) provided subsections (3) and (5) do not apply, provided sections 87 (warrant for sale of dwellinghouses), 88 (protections for purchasers under missives) and 91 (land owned in common) do not apply and provided the sheriff is satisfied that the application is in order.

219. Where the sheriff grants the application, the sheriff must grant warrant for sale of the attached land and must appoint a solicitor (either the solicitor specified in the application or another of the sheriff’s choosing) as the appointed person.

220. Subsection (4) provides that, where the sheriff grants warrant for sale, the sheriff must specify a time within which the land must be sold, may limit the warrant to part only of the attached land and may authorise the sale of the attached land by lots.

221. Subsection (3) provides that the sheriff may, if satisfied that granting the warrant for sale is unduly harsh to the debtor or any other interested person, either refuse the application or grant it and warrant for sale but suspend the warrant for a period up to 1 year.

222. Under subsection (5), the sheriff must make an order refusing the application if satisfied that any of the grounds specified in subsection (6) apply. Those grounds include the ground that, if the attached land were sold, the net likely proceeds would not exceed the aggregate of the expenses of the land attachment and either £500 or 10 per cent of the outstanding debt. The Scottish Ministers are given power by subsection (7) to alter the figure of £500 and the percentage of 10 per cent.

### **Section 87 – Application for warrant for sale of sole or main residence**

223. Section 87(1) applies where the creditor applies for a warrant for sale of attached land which is or includes a dwellinghouse which is the sole or main residence of the debtor, the owner if it is not the debtor, or any of the persons specified in subsection (2).

224. Those persons are a non-entitled spouse of the debtor or owner, a cohabitee of the debtor or owner, a civil partner of the debtor or owner, a same sex cohabitee of the debtor or owner and a former partner of the debtor or owner who resides with a child, where that child is also a child of the debtor or owner.

225. The sheriff is not prohibited from granting a warrant for sale of a dwellinghouse where this section applies but, before making a decision, the sheriff is obliged by subsection (4) to consider the matters in subsection (5). Those matters are the nature and reasons for the debt secured by the land attachment, the debtor's ability to pay, any action taken by the creditor to help the debtor in paying the debt and the ability of those living in the property to obtain reasonable alternative accommodation.

226. Subsection (6) provides that, where the sheriff grants warrant for sale, the sheriff can suspend the operation of the warrant for a period not exceeding 1 year.

227. Subsection (7) provides that a dwellinghouse may be a sole or main residence even if it is also used by the debtor or other relevant person for the purposes of any profession, trade or business. Subsection (8) defines what is meant by "child", "dwellinghouse" and "non-entitled spouse".

### **Section 88 – Protection of purchaser under contract where creditor applies for warrant for sale**

228. Sections 88 to 90 deal with the situation where the debtor has concluded a contract to transfer attached land to a third party (called in those sections the "prospective purchaser").

229. Section 88 applies where a creditor applies for a warrant to sell attached land and a person who has registered a caveat under section 80 has lodged objections to the application.

230. Subsections (2) and (3) provide that the sheriff may, if satisfied the prospective purchaser did not seek to defeat the rights of creditors of the debtor in entering into the contract and that both the purchaser and debtor agree to proceed quickly with the purchase, make an order suspending the application (i.e. without making a decision on whether or not to grant warrant for sale) and requiring the prospective purchaser to pay the price under the contract to the creditor.

231. Subsection (4) provides that section 105 applies to the proceeds of sale paid to the creditor under this section as if the sale had taken place under a warrant for sale and those proceeds were the proceeds of that sale.

### **Section 89 – Protection of purchaser under contract where warrant for sale granted**

232. This section applies where a prospective purchaser had (before notice of land attachment was registered) entered into a contract to buy attached land from the debtor and a warrant for sale is subsequently granted.

233. Subsection (2) operates in a similar way to section 88(2) and (3) and provides that the sheriff may make an order suspending the warrant for a period of up to 1 year and requiring the prospective purchaser to pay the price under the contract to the appointed person.

234. Subsection (3) operates in a similar way to section 88(4).

### **Section 90 – Provision supplementary to sections 88 and 89**

235. This section applies where an order is made under section 88(2) or 89(2) and gives the sheriff power, on an application by the creditor or the appointed person, to revoke the order under section 88(2) or 89(2). The sheriff may do so if satisfied that the prospective purchaser and the debtor entered into the contract to defeat the rights of creditors of the debtor or if there has been undue delay in completing the sale.

### **Section 91 – Warrant for sale of attached land owned in common**

236. Section 91 applies where the land specified in an application for warrant to sell attached land is owned in common by the debtor and another person or persons. Land owned in common may be capable of being separated into part owned by the debtor and part owned by the co-owner. Where this is possible, the debtor's part may be sold. Where this is not possible, the whole land would have to be sold and the proceeds of sale divided, with the debtor's share going to pay the sum recoverable by the land attachment and the co-owner's share being paid to that co-owner.

237. Subsection (2) provides that, subject to subsection (3), the sheriff may make an order under section 86(2) granting warrant for sale of the land owned in common.

238. Subsection (3) provides that the sheriff must specify in the order whether the warrant authorises the division of the land owned in common and the sale only of the part belonging to the debtor or sale of all the land owned in common and, subject to subsection (5), division of the proceeds.

239. Subsection (4) provides that, where the warrant authorises division of the land, from the day on which the order granting the warrant is made the debtor's part will be subject to the land attachment and the remaining land will be released from it. The warrant will apply as if the land specified in it were the debtor's part and the warrant for sale granted were warrant for sale of that part.

240. Subsection (5) provides that, where the warrant authorises the sale of all the land owned in common and a division of the proceeds, the share of the proceeds of sale which would be due to the debtor must be paid to the appointed person. The appointed person must pay the other owner of the land the share of the proceeds of sale due to that owner and deal, as specified in section 105, with the share of proceeds that would be due to the debtor.

241. Subsections (6) and (7) make further provision providing that a common owner of common property may buy out the attached property and sets out the amount payable to the

appointed person by such an owner if the whole land is bought by that owner and the proceeds fall to be divided.

### **Section 92 – Intimation of sheriff’s decision at full hearing**

242. Section 92(1) provides that, where a warrant for sale is granted under section 86(2), the creditor must send a copy to the debtor and the appointed person.

243. Subsection (2) provides that, where a warrant is refused under section 86(3)(b) or (5), the sheriff clerk must send a copy of the order to the debtor and to any other person the sheriff clerk considers to have an interest.

### **Section 93 – Supplementary orders as respects sale**

244. Section 93(1) and (2) give the sheriff power, when either granting an application for sale or subsequently, to make any order in connection with the sale that appears to the sheriff to be appropriate. In particular, on application by the appointed person, the sheriff may extend the period within which the land is to be sold or may remove that appointed person and appoint another solicitor as appointed person instead.

245. Subsection (3) provides for the intimation, by the creditor, of orders made under subsection (1) after the granting of warrant for sale.

### **Section 94 – Effect of certain refusals of application for warrant for sale under section 86(5)**

246. This section provides that, where an application for sale is refused on a ground specified in paragraph (d), (e), (f) or (g) of section 86(6), the land attachment will not, because of that refusal, cease to have effect and it will be competent for the creditor to make a further application for a warrant to sell the attached land.

### **Section 95 – Termination of debtor’s right to occupy land**

247. Section 95 provides the creditor with power to terminate the right of the debtor or other person having a right derived from the debtor to occupy land in respect of which warrant for sale has been granted.

248. This is achieved by the creditor serving a notice (which complies with subsection (2)) on the debtor or other person. The right of the debtor or other person to occupy the land is terminated with effect from the day specified in the notice, which must be a minimum of 7 days after the date of service. A certificate of service of the notice in the form prescribed in rules of court may be registered.

249. Subsection (3) provides that where a person (other than the debtor) has a right to occupy the land which, leaving out of account the registration of the notice of land attachment, would have been good against a singular successor of the debtor, that person’s right cannot be terminated by notice under this section.

## **Section 96 – Consequences of giving notice under section 95(1)**

250. Section 96 governs the consequences where a creditor has, by serving notice under section 95, terminated the right of the debtor or another person to occupy the land to be sold.

251. Subsection (1) provides that, from the date the creditor serves notice under section 95, the creditor has the rights and obligations of a heritable creditor in lawful possession of the land. This is similar to section 20(5) of the Conveyancing and Feudal Reform (Scotland) Act 1970, which applies where a creditor under a standard security has obtained lawful possession of the security subjects on the default of the debtor. This includes any right the debtor has to receive rent from a tenant but only on or after the date on which the creditor notifies the tenant of the termination of the debtor's rights. The creditor also has right to any lease, and any permission or right of occupancy. The creditor does not, however, have power to grant a lease.

252. Subsection (3) gives the creditor power to apply to the sheriff for an order authorising reconstruction, alteration or improvement works if they are required to maintain the market value of the land, the costs of which will be expenses of the land attachment recoverable from the debtor (see subsection (4)). The creditor may also bring an action of ejection against the debtor and will have title to bring any action of removing, intrusion or ejection which the debtor might have brought in respect of the land.

### *The sale*

## **Section 97 – Appointed person**

253. Section 97 makes provision about the appointed person and that person's functions (the main function being to carry out the sale of the attached land under the warrant).

254. Subsection (1) provides that the appointed person is an officer of the court and must act independently of the creditor, debtor and any interested person. Subsection (2) requires the appointed person to lodge a bond of caution before exercising any functions under this Chapter.

255. Subsection (3) provides that the appointed person may apply to the sheriff who granted the warrant for sale for directions as to how to perform any of the appointed person's functions.

256. Subsections (5) to (7) provide that the appointed person is liable to the creditor, debtor and any secured creditor for patrimonial loss as a result of negligence on the part of the appointed person in executing the warrant for sale. The creditor is liable for the appointed person's expenses and outlays incurred in doing so. Those expenses will be expenses of the land attachment and will be recoverable from the debtor by the creditor.

257. Subsection (8) gives the Scottish Ministers power to make further provision about the functions of the appointed person.

### **Section 98 – Method of sale**

258. Section 98 provides for the appointed person's main function – selling the attached land. Subsection (3) requires the appointed person to consult the creditor about the method of sale (private bargain or public auction) which is to be used. Subsection (4) requires the appointed person to advertise the land for sale and ensure the best price is obtained.

### **Section 99 – Legal incapacity or disability of debtor not to affect title of purchaser**

259. The effect of this section is that a purchaser who buys the land sold in execution of the warrant for sale can get a good title to the land without being adversely affected by any legal incapacity or disability affecting the debtor (such as the debtor being not of full age).

### **Section 100 – Title of purchaser not to be affected by certain irregularities**

260. This section provides protection for purchasers who buy land sold under warrant for sale provided they acted in good faith when buying the land and provided a certificate in the form prescribed in rules of court has been granted by the appointed person confirming the land attachment was properly carried out. The validity of a disposition which is registered by such a purchaser will not be challengeable on the ground that the land attachment was not carried out properly or that it was no longer in force when the sale took place.

### **Section 101 – Effect of registration of disposition on securities**

261. This section provides that, where a disposition of attached land is granted to a purchaser and registered, the land will no longer be subject to the land attachment or to any heritable security or diligence ranking equally with, or after, the land attachment.

### **Section 102 – Report of sale**

262. Section 102(1) imposes a duty on the appointed person to lodge a report of the sale with the sheriff clerk for the court which granted the warrant. That report must be lodged within 28 days of the date on which the sale price is paid. Subsection (2) provides for the form and content of in the report.

263. Subsection (3) provides that, if the appointed person submits a report after the specified period has expired or refuses or delays submitting a report, the sheriff may make an order providing that the appointed person will not be entitled to payment of some or all of the expenses incurred in executing the warrant for sale from the creditor.

### **Section 103 – Audit of report of sale**

264. This section deals with auditing the report on sale lodged under section 102(1). The sheriff must forward it to the auditor of court. Subsection (2) provides that the auditor must tax the expenses chargeable against the debtor, confirm the balance due to or by the debtor following the sale and give a report to the sheriff. The auditor will not be entitled to charge a fee for the report (see subsection (3)).

265. Subsection (4) provides that the report of sale and the auditor's report will be held by the sheriff clerk, and be available for inspection, for a time prescribed by rules of court. A fee for inspection may be prescribed in an order under section 2 of the Courts of Law Fees (Scotland) Act 1895.

#### **Section 104 – Sheriff's consideration of report**

266. This section provides for the sheriff's powers on receiving the auditor's report. Under subsection (1), the sheriff may, after considering that report and the report of sale lodged under section 102(1), make an order approving the report of sale subject to any amendments made following a hearing with all interested parties or by the auditor. Alternatively, the sheriff may, if satisfied that there has been a substantial irregularity in the land attachment, make an order declaring the land attachment void and making any consequential order which the sheriff considers necessary in the circumstances.

267. Subsection (3) deals with intimation of the sheriff's order by the sheriff clerk. Subsection (4) provides that any order declaring the land attachment void does not affect the title of any person who purchased the attached land under the warrant for sale.

#### **Section 105 – Proceeds of sale**

268. Section 105(1) provides for the distribution of the proceeds of the sale where land is sold in execution of a warrant for sale. The appointed person must disburse the proceeds in the following order:

- any expenses due to the creditor under section 103(2)(a);
- any sums due to any creditor holding a security or diligence over the land which ranks before the land attachment;
- any sums due to—
  - the creditor who executed the land attachment; and
  - any creditor under a security or diligence which ranks equally with the land attachment;
- any sums due to any other creditor under any security or diligence which ranks after the land attachment; and
- any balance of the proceeds will be paid to the debtor.

269. Subsection (2) provides that the appointed person must pay any balance due to the debtor to the debtor or other person authorised by the debtor to give a receipt for it.

270. Subsection (3) obliges a creditor who receives the sums due under a security or diligence to grant a discharge of that security or diligence.

271. Subsections (4) and (5) provide that, if the appointed person is unable to obtain a receipt or discharge relating to the distribution of the proceeds of sale from the debtor or any creditor, the appointed person may consign the amount due to the person in the sheriff court. That

consignation will discharge the duty to pay the amount due and a certificate of the sheriff clerk will be evidence of the discharge.

### *Foreclosure*

#### **Section 106 – Foreclosure**

272. Section 106 provides for what happens where the appointed person has exposed the land to sale but has failed to find a buyer or has succeeded in selling only part of the land at a price which is less than the secured amount. This section provides that the court may, among other things, grant decree of foreclosure, which transfers the land to the creditor.

273. Subsections (2) to (4) provide for the procedure to be followed by the appointed person when applying for a decree of foreclosure. The application must be accompanied by a statement setting out the whole amount secured by the land attachment and secured by any other security or diligence ranking before or equal to the land attachment. Where part of the land has been sold, a report on that sale under section 102(1) must accompany the application. A copy of the application must be served by a messenger of court on the debtor, any occupier of the land specified in the warrant for sale, the creditor in any heritable security affecting the land and any other person with a land attachment or other diligence over the land.

274. Subsection (5) provides that the sheriff, after allowing any person served with a copy of the application an opportunity to make representations, may grant the decree of disclosure, suspend the application for no more than 3 months or appoint a valuer to fix a reserve price at which the land must be auctioned or advertised for sale and, if unsold, auctioned.

275. Subsection (6) provides the debtor may bid and purchase at any auction or purchase at the price advertised for sale. Subsection (7) provides that the sheriff may, where the appointed person produces an auctioneer's certificate that the land remains unsold at the reserve price or that the land did not achieve a sale at the advertised reserve price, grant decree of foreclosure.

276. Subsection (8) provides a decree of foreclosure must be in the form prescribed by rules of court, provide a detailed description of the land and contain a declaration of the price the creditor is deemed to have paid for the land (which is relevant for the purposes of section 107(2)).

#### **Section 107 – Registration of decree of foreclosure**

277. Section 107 provides for the effects of registration of the decree of foreclosure in the appropriate property register. Subsection (1) provides that the debtor's right to bring the land attachment to an end by paying the debt is removed and the land will vest in the creditor. At the same time, the land will no longer be subject to the land attachment, securities or any diligence ranking after the land attachment and the creditor will have the right to redeem any security or diligence ranking prior to or equal with, the land attachment. Effectively, the creditor will now own the land (or, in the case of a long lease, will become the tenant in place of the debtor).

278. Subsection (2) provides that, despite the decree of foreclosure, the debtor will remain liable for any balance due to the creditor which is not extinguished by the price at which the

creditor is (under section 106(8)(c)) deemed to have acquired the land and for any sums due to any creditor under a postponed security. Subsections (3) and (4) provide that the creditor's title will not be challengeable on the ground of any irregularity in the diligence or foreclosure proceedings although the debtor will retain a right to claim damages for wrongful diligence.

*Payments to account and expenses*

**Section 108 – Ascription**

279. This section provides that any sums recovered by land attachment or any payment made by the debtor while the attachment is in force will be ascribed in the following order:

- the expenses of the land attachment chargeable against the debtor;
- interest on the debt due as at the date the notice of land attachment was registered;
- the debt due and any interest on it which has accrued since the registration of the notice.

**Section 109 – Expenses of land attachment**

280. This section provides that the expenses incurred by the creditor in carrying out the land attachment will be chargeable against the debtor and can be recovered only by the land attachment itself and not by any other legal process. Any expenses not recovered by the time the land attachment is completed will cease to be chargeable against the debtor. If the sheriff is satisfied that the debtor has objected on frivolous grounds to an application for a warrant for sale or for decree of foreclosure, the sheriff may award expenses against the debtor not exceeding an amount prescribed by the Scottish Ministers by regulations.

*Termination, discharge etc. of land attachment*

**Section 110 – Termination by payment etc.**

281. Section 110(1) covers the situation where the debt owed is paid or tendered before the land attachment is created. It provides that, if the full sum owed is paid or tendered to the creditor, a messenger of court or any other person authorised to receive payment on behalf of the creditor before the expiry of 28 days from the date the notice of land attachment is registered, no land attachment is created and the notice ceases to have effect.

282. Subsections (2) and (3) cover the situation where such payment is made or tendered after a land attachment is created. Provided the debtor complies with subsections (2) and (3), the land attachment will cease to have effect. The land attachment will cease to have effect, however, only if the debtor pays or tenders the sum owed before either a contract of sale is concluded or a decree of foreclosure is registered.

**Section 111 – Discharge**

283. Section 111 applies where the debtor complies with section 110 and either the notice of land attachment or the land attachment ceases to have effect. The creditor must discharge the notice of land attachment or the land attachment if the expenses of discharge are also paid or

tendered to the persons specified in section 110(1). It is competent to register the discharge which must be in the form prescribed in rules of court.

### **Section 112 – Recall and restriction of land attachment**

284. Section 112 provides for the sheriff's powers to recall or restrict a land attachment.

285. Subsections (1) and (2) provide that the debtor or any interested person may apply to the sheriff for an order recalling or restricting a land attachment. The application must be in the form prescribed by rules of court and be notified to the creditor.

286. Subsection (3) provides that the sheriff must make an order for recall if satisfied that the land attachment is invalid, has been carried out incompetently or irregularly, has ceased to have effect or the creditor, under section 111(2)(b) is obliged to discharge it. Subsection (4) provides that the sheriff may make an order restricting the land attachment if satisfied that significantly more land is attached than need be and it is reasonable to restrict the attachment.

287. Subsections (5) and (6) provide that an order for recall or restriction must be in the form prescribed by rules of court and that it is competent for a person who obtains such an order to register it in the property registers.

### **Section 113 – Duration of land attachment**

288. Section 113(1) provides that a land attachment will cease to have effect 5 years after the date on which the notice of land attachment was registered, if not terminated earlier by payment, discharge or recalled by order of the sheriff.

289. Subsections (2) to (4) give the creditor power to extend that period for a further 5 years. To extend the period the creditor must register a notice of extension in the form prescribed by rules of court within 2 months before the current 5-year period expires. The creditor may extend the period on more than one occasion.

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

### **Section 114 – Land attachment subsequent to reduction of deed granted in breach of inhibition**

290. Section 114 provides for the situation where a debtor has been inhibited, breaches the inhibition by disposing of the property affected and the inhibiting creditor reduces the transaction which breached the inhibition. Taking the example of the sale of inhibited land, the reduction of the disposition granted by the debtor is *ex capite inhibitionis*. This means that, in any question between the creditor and the debtor, the debtor is regarded as still having title to the land. However, the person who purchased the land from the debtor, in a question with anyone else, has that title.

291. Land attachment is not competent against land in respect of which the debtor does not have a recorded or registered title (see section 71(2)). Even where the disposition is reduced, the

debtor does not have recorded or registered title. Section 114 provides that, notwithstanding section 71(2) and this rule from the law of inhibition, the inhibiting creditor who has reduced the disposition may proceed to register a notice of land attachment over the land. A land attachment may subsequently be created and this section makes the necessary modifications to other sections in this Chapter to take account of the fact that the purchaser from the debtor (the “third party”) needs to be involved in the land attachment process.

292. In addition, subsection (2) provides that the land attachment registered in the circumstances mentioned in subsection (1) enjoys preference in ranking in any competition with a security granted in favour of, and a land attachment executed by, a creditor of the third party.

#### *General and miscellaneous*

### **Section 115 – Land attachment as heritable security**

293. This section clarifies that a land attachment is not a heritable security for the purposes of the Heritable Securities (Scotland) Act 1894 and that the remedies of the creditor on default of the debtor under that Act are not therefore available to the creditor under a land attachment.

### **Section 116 – Interpretation**

294. This section defines what is meant by expressions used in this Chapter. It also provides the Scottish Ministers with power to modify the definitions of “decree” and “document of debt”.

## **Chapter 3 – Residual attachment**

### **Section 117 – Residual attachment**

295. This section introduces a new form of diligence over property of a debtor to be known as residual attachment.

296. Subsection (2) gives the Scottish Ministers power by regulations to specify the kind of property that may be attached by residual attachment. That power is subject to subsections (3) and (4).

297. Only property which is transferable and which cannot be attached by any other diligence can be specified. In addition, property which is exempt from all diligence or from a particular diligence (such as the property listed in section 11 of the Debt Arrangement and Attachment (Scotland) Act 2002) cannot be specified. Finally, property of which the debtor is the tenant and which is either a dwellinghouse used by the debtor as a sole or main residence or which is a croft cannot be specified.

298. Subsection (5) makes it clear that property of a debtor which is of a kind specified as attachable by residual attachment can be attached even though it is owned in common by the debtor and a third party.

299. Subsections (6) and (7) give further content to the power of the Scottish Ministers to specify property under subsection (2). In particular, subsection (7) envisages that the regulations may make provision for how that particular kind of property can be attached and how its value can be realised in order to pay off the debt secured by the residual attachment.

300. As section 118 makes clear, residual attachment is available only in execution and not on the dependence and it cannot be executed as of right but must be sanctioned by the court.

#### *Application for residual attachment order*

### **Section 118 – Application for residual attachment order**

301. This section provides for the first stage of the residual attachment process. The creditor must obtain a residual attachment order (under section 120) before then obtaining a satisfaction order (under section 124).

302. This section governs the application by a creditor for a residual attachment order. The creditor may do so only where the debt is established by a decree or a document of debt, the creditor has, before or on the service of a charge to pay, provided the debtor with a debt advice and information package, the debtor has been charged to pay the debt, and the period of payment has expired without payment being made.

303. “Decree” and “document of debt” are defined in section 133 (as read with section 199) of the Bill. The “debt advice and information package” is the same package required, in the case of attachment of moveables, by section 10 of the Debt Arrangement and Attachment (Scotland) Act 2002 (see section 199(1)).

304. An application for residual attachment must be in the form prescribed in rules of court, must specify the property to be attached and must set out how the creditor intends to realise the value of the property which the creditor proposes to attach. The debtor and any person having an interest in the property must be notified of the application. A person notified of the application may lodge objections to the application before the 14 day period for doing so has expired (see subsection (3)).

### **Section 119 – Effect of application for residual attachment order**

305. This section sets out the effects on the debtor and other persons where the creditor makes an application for a residual attachment order. The debtor must not, from the date the application was served until the court either makes a residual attachment order or dismisses the application, take any of the specified steps set out in subsection (3). Those steps are transferring or otherwise disposing of the property, burdening the property, granting any licence in relation to the property or entering into any agreement to do any of these steps. Subsection (4) provides that any steps which are taken after service of the application on the debtor are void and subsection (5) provides that a breach of this section by the debtor or any other person may be dealt with as a contempt of court.

*Residual attachment order*

**Section 120 – Residual attachment order**

306. This section provides for the making and effects of a residual attachment order.

307. Subsection (1) provides that at the hearing on the application for a residual attachment, the court must allow any person who has lodged an objection a chance to be heard.

308. Subsection (2) provides that the court may, if satisfied that the application is in order, make a residual attachment order which (in terms of subsection (3)) must specify the property to be attached, require notification of various persons by the creditor and state the persons on whom the schedule of residual attachment (see section 121) must be served. When making a residual attachment order, the court may make any other order the court considers appropriate. Subsection (5) makes further provision about the kinds of ancillary orders the court may make.

309. Under subsection (4), the court must refuse the application if either the property specified in it cannot be attached by residual attachment or if the creditor's proposals for realising the value of the property would be ineffective (either in realising any value or, where the value was realised, it would not result in the debt being paid off or reduced).

**Section 121 – Schedule of residual attachment**

310. This section provides for the necessary step which the creditor must take if that creditor wants to create a residual attachment (see section 122). Where the court grants a residual attachment order, the creditor may serve a schedule of residual attachment.

**Section 122 – Creation and effect of residual attachment**

311. This section provides a residual attachment is created at the beginning of the day after the schedule of residual attachment is served on the debtor. Subsection (2) provides for the effects of a residual attachment. The residual attachment gives the creditor a security over the attached property for the debt, interest on it and the expenses of the diligence.

*Satisfaction order*

**Section 123 – Application for satisfaction order**

312. Where a creditor has created a residual attachment over property of a debtor, and the debtor does not pay off the debt, the next step will be an application to the court for a satisfaction order.

313. Section 123 makes provision for applications for satisfaction orders and is in similar terms to section 118 (application for residual attachment order). The application must, among other things, be accompanied by a copy of the schedule of residual attachment and any other document prescribed by rules of court. Any person wishing to object to the application must do so within 14 days of the intimation of the application on that person.

## **Section 124 – Satisfaction order**

314. This section provides for the making and effects of a satisfaction order.

315. Subsection (1) provides that, at the hearing on the application under section 123(1), the court must allow those who have lodged objections an opportunity to be heard.

316. Subsection (2) provides for when the court can make a satisfaction order. The court may make a satisfaction order if it is satisfied the application is in order and provided it is not obliged by subsection (6) to refuse the application. Subsection (3) provides that a satisfaction order must specify the property to which it applies and must require the creditor to intimate it to the debtor and other persons the court specifies.

317. Under subsection (4), a satisfaction order may authorise the sale of the attached property, the transfer of the property to the creditor, the transfer of income derived from the property to the creditor or the granting by the creditor of leases or licences of the property. The types of order listed in subsection (4) are not exclusive. In addition, section 117(7)(d) envisages that the Scottish Ministers may make provision for the types of satisfaction orders that may be made in respect of particular types of property.

318. Where a satisfaction order is made which authorises sale of the property, the court must appoint a qualified person to carry out the sale and specify a period within which that should happen (subsection (5)(a)). In the case of any kind of satisfaction order, the court may appoint a suitably qualified person to provide a report to the court on the market value of the property (subsection (5)(b)).

319. Subsections (6) and (7) determine when the court must refuse an application for a satisfaction order. The grounds in subsection (7) partially mirror those in section 120(4) (grounds for refusing application for residual attachment order).

320. Subsection (8) gives the court power, if it thinks that making a satisfaction order would be unduly harsh to the debtor or a third party, to either refuse the application or make one but suspend it for a year.

## **Section 125 – Intimation of court's decision**

321. Section 125(1) provides that, where a satisfaction order is made under section 124(2), the creditor must send a copy to the debtor, the appointed person and any other person the court specifies.

322. Subsection (2) provides that, where an application is refused, the court must send a copy of the order to the debtor and to any other person the court considers has an interest.

### **Section 126 – Effect of certain refusals of application for satisfaction order**

323. This section provides that the refusal of an application for a satisfaction order on the ground mentioned in section 124(7)(c) does not lift the residual attachment. In other words the creditor still has the protection of the security over the attached property – which could give that creditor priority if the debtor is sequestrated. In addition, the creditor can make another application for a satisfaction order at a later date, perhaps with a different proposal as to how the value of the attached property might be realised.

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

### **Section 127 – Termination by payment etc.**

324. This section covers the situation where the debt owed is paid or tendered after a residual attachment is created. It provides that the residual attachment will cease to have effect if the full sum recoverable by the residual attachment is either paid or tendered to the creditor, the appointed person, a messenger of court or another person authorised to receive payment on behalf of the creditor. Where a satisfaction order has been made, the residual attachment will not cease to have effect unless the sum is paid or tendered before the contract of sale is concluded (where the satisfaction order authorises sale) or the property is otherwise disposed of.

### **Section 128 – Recall**

325. This section provides for the court's powers to recall or restrict a residual attachment.

326. Subsections (1) and (2) provide that the debtor or any other person having an interest may apply to the court for an order recalling or restricting the residual attachment. The application must be in the form prescribed in rules of court and be notified to the creditor.

327. Subsection (3) provides that the court, if satisfied that a residual attachment is invalid, has been carried out incompetently or irregularly or that it has ceased to be in force, may make an order recalling the residual attachment. Subsection (4) provides that, where the court is satisfied that significantly more property is attached than need be and it is reasonable to do so, it may make an order restricting the effect of the residual attachment to only that part of the property to which it relates.

328. Subsection (5) provides that an order for recall or restriction must be in the form prescribed by rules of court.

### **Section 129 – Duration of residual attachment**

329. This section provides that, subject to the court extending the period under subsection (2), a residual attachment will cease to have effect 5 years after the day the debtor receives the schedule of residual attachment. Subsections (2) and (3) provide that the court may extend that period on the application of the creditor and may do so on more than one occasion.

### **Section 130 – Effect of death of debtor**

330. This section provides that where the creditor has taken steps to carry out a residual attachment but has not served a schedule of residual attachment on the debtor before the death of the debtor, no residual attachment is created and the residual attachment order will fall. Where a residual attachment is created before the death of the debtor, it will continue and the creditor will be entitled to continue the attachment against the debtor's executor or other representative. Rules of court may modify the procedures for residual attachment under this Chapter to reflect the circumstances covered by this section.

#### *General and miscellaneous*

### **Section 131 – Expenses of residual attachment**

331. This section provides that the expenses incurred by the creditor in carrying out the residual attachment will be chargeable against the debtor and can be recovered only by the attachment and not by any other legal process. Any expenses not recovered by the time the residual attachment is completed will cease to be chargeable against the debtor. If the court is satisfied that the debtor has objected on frivolous grounds to an application for a satisfaction order, the court may award expenses against the debtor not exceeding an amount prescribed by the Scottish Ministers by regulations.

### **Section 132 – Ascription**

332. This section provides that any sums recovered by residual attachment or any payment made by the debtor while the attachment is in force must be ascribed in the following order:

- the expenses of the residual attachment chargeable against the debtor;
- interest on the debt due as at the date the residual attachment order was made;
- the debt due and any interest on it which has accrued since the making of that order.

## **PART 5 – INHIBITION**

#### *Creation*

### **Section 134 – Certain decrees and documents of debt to authorise inhibition without need for letters of inhibition**

333. Subsection (1) provides that inhibition in execution is competent to enforce payment of a debt constituted by a decree or document of debt or to enforce an obligation to perform a particular act (sometimes referred to as an obligation *ad factum praestandum*). Inhibition is competent only to enforce that kind of obligation where it is contained in a decree and the action to which the decree relates either contained an alternative conclusion or crave for payment of money (for example, payment of damages if the obligation was not adhered to) or was an action demanding the conveyance of or granting of a real right in heritable property (subsection (2)).

334. Subsections (3) to (5) insert provisions relating to an inhibition for ordinary debt into the Writs Execution (Scotland) Act 1877, Sheriff Courts (Scotland) Extracts Act 1892 and the Debtors (Scotland) Act 1987 which provide that extract decrees or documents for payment

automatically carry a warrant for inhibition (including extracts of decrees granted in the sheriff court). There is therefore no need to apply for letters of inhibition and subsection (6) abolishes this procedure.

335. Subsection (7) provides that the sections 152 and 153 dealing with expenses and allocation of sums paid to account do not apply to inhibitions executed to enforce the performance of an obligation. This is because there is no principal sum along with which expenses could be recovered under section 153 and no sum can be paid to account when there is no principal sum being recovered.

336. Subsection (8) defines “decree” and “document of debt” by reference to section 199 of the Bill. Subsection (9) provides for those definitions to be modified by the Scottish Ministers by regulations.

### **Section 135 – Registration of inhibition**

337. This section provides that an inhibition is registered only by registering the schedule and certificate of inhibition in the Register of Inhibitions. The schedule and certificate must be in the form prescribed by the Scottish Ministers by regulations.

### **Section 136 – Date on which inhibition takes effect**

338. This section replaces section 155 of the Titles to Land Consolidation (Scotland) Act 1868.

339. New section 155 provides that an inhibition takes effect on the day it is registered unless a notice of inhibition is registered in the Register of Inhibitions; the schedule is served on the debtor after the notice is registered and the inhibition is registered before 21 days have expired from the date of registering the notice. In those circumstances the inhibition takes effect from the date of the serving of the schedule. A notice of inhibition must be in the form prescribed by the Scottish Ministers by regulations.

### *Effect*

### **Section 137 – Property affected by inhibition**

340. Subsection (1) provides that inhibition may affect any heritable property.

341. Subsection (2) provides that any rule of law authorising inhibition against any other category of property will cease to be in force. In particular the rule that inhibition may only affect property which may be subject to the diligence of adjudication is abolished by this provision.

342. Subsection (3) states that property is acquired on the day the deed transferring the property is delivered. For the purposes of subsection (1) this means that, where a person has a deed delivered to them which transfers ownership of a house to them, an inhibition executed against that person will affect the house even if the person’s title to the house has yet to be

registered. This subsection also applies to section 157 of the Titles to Land Consolidation (Scotland) Act 1868 which states that inhibition does not affect property acquired by a debtor after the inhibition is executed. So if inhibition is executed before the day that a deed transferring a house is delivered, the house will not be affected by the inhibition.

### **Section 138 – Effect on inhibition to enforce obligation when alternative decree granted**

343. This section provides that where there is an inhibition to enforce a decree for performance of a particular act and subsequently a decree for the alternative conclusion for payment is granted (for example, following failure to comply with the original decree), the inhibition continues in force and is treated as if it was executed to enforce payment under the later decree. Without this provision, the inhibition would lapse and a new inhibition would have to be executed to enforce the decree for payment.

### **Section 139 – Effect of conversion of limited inhibition on the dependence to inhibition in execution**

344. This section applies to the situation where a creditor obtains a decree for payment of all or part of a principal sum in an action in which the creditor had executed inhibition on the dependence of the action. Under section 15J(b) of the 1987 Act (inserted by section 156 of the Bill) the court can limit the warrant to specified property. The effect of this section is that when that limited inhibition turns into an inhibition in execution of the decree (which happens when decree is granted) it is no longer limited to that property.

### **Section 140 – Property affected by inhibition to enforce obligation to convey heritable property**

345. This section provides that where an inhibition is executed to enforce a decree for implement of an obligation to convey or grant a real right in heritable property, the inhibition is limited to the heritable property to which the decree relates.

### **Section 141 – Inhibition not to confer a preference in ranking**

346. This section abolishes the rule that an inhibition confers a preference by exclusion in any sequestration, insolvency proceedings or other process in which there is ranking. Inhibitions no longer confer any preference. However, this section does not affect any preference in proceedings where the inhibition is executed before this section comes into force even if the ranking process itself does not begin until after the section comes into force.

### **Section 142 – Power of receiver or liquidator in creditor's voluntary winding up to dispose of property affected by inhibition**

347. Subsection (2) amends the Insolvency Act 1986 by inserting section 61(1A) which provides that an inhibition which comes into force after the creation of a floating charge is not an effective diligence. This means the inhibition does not restrict the power of a receiver appointed under such a floating charge to deal with any property which would normally be affected by the inhibition. Section 32 of the Bill changes the date of the creation of a floating charge.

348. Subsection (2) inserts section 166(1A) into the Insolvency Act which provides that a liquidator in winding up can exercise his power under Schedule 4 of that Act to sell property without that being affected by any inhibition affecting the company's property.

#### *Termination*

#### **Section 143 – Termination of effect of inhibition**

349. This section repeals the second reference to “inhibitions” in section 44(3)(a) of the Conveyancing (Scotland) Act 1924 and inserts section 44(3)(aa) which provides all inhibitions will cease to be in force after 5 years have expired from the date on which they come into force.

#### **Section 144 – Inhibition terminated by payment of full amount owing**

350. This section applies where an inhibition is executed to enforce payment of a debt and a sum is paid in respect of that debt to the creditor, a messenger of court or any other person who has authority to receive payment on behalf of the creditor. Where the sum paid amounts to the total debt plus interest, the inhibition expenses and the expenses of discharging the inhibition, the inhibition will cease to be in force.

#### **Section 145 – Inhibition terminated by compliance with obligation to perform**

351. This section provides that where a decree for the performance of a particular act (a decree *ad factum praestandum*) is complied with any inhibition executed to enforce that decree ceases to have effect.

#### **Section 146 – Termination of inhibition when property acquired by third party**

352. Subsection (1) provides that, despite the fact that the conveyance or granting of a right in property affected by an inhibition is a breach of the inhibition (see section 147), an inhibition ceases to be in force if the conveyance or granting of the right for value and is made to a person acquiring the property or right who acts in good faith. In other words, the person acting in good faith acquires the property or right free of the encumbrance of the inhibition. This applies regardless of whether the person acquiring the property does so from the inhibited debtor or from another person who themselves had acquired from the debtor (or who acquired from such a person etc.) (subsection (3)). Only the person acquiring the property or right needs to act in good faith for the inhibition to cease to affect that property.

353. Subsection (2) is in similar terms to section 137(3) and provides that a person acquires property or a right in it when the deed is delivered to that person.

354. Subsection (4) provides that a person is assumed to act in good faith if the person does not know about the inhibition and has taken all reasonable steps to find out whether or not an inhibition exists affecting the property in question. An example of taking all reasonable steps might be where a buyer of a house instructs a search taken up to the date of completion of the sale (or whatever date close to that is reasonable according to current practice) in the Register of Inhibitions against the seller and any previous owner against whom an inhibition could be in force affecting the house and the search fails to disclose the existence of the inhibition.

*Breach*

**Section 147 – Breach of inhibition**

355. This section provides that an inhibited debtor breaches an inhibition when the debtor delivers a deed to a third party transferring or granting a right in any property which is affected by the inhibition. As with sections 137(3) and 146(2) it is the date of delivery of the deed which is relevant. That is the date on which the breach occurs.

**Section 148 – Prescription of right to reduce transactions in breach of inhibition**

356. This section removes any doubt that the 20 year period of long negative prescription (set out in section 8(1) of the Prescription and Limitation (Scotland) Act 1973) applies to the right of an inhibitor to have a deed granted in breach of an inhibition reduced.

**Section 149 – Registration of notice of litigiosity and discharge of notice**

357. This section inserts section 159A into the Titles to Land Consolidation (Scotland) Act 1868.

*New section 159A – Registration of notice of summons of action of reduction*

358. This section applies where an inhibiting creditor raises an action of reduction of a deed granted in breach of an inhibition. The inhibiting creditor will register a notice of the signeted summons in the action in the Land Register of Scotland or the Register of Sasines (property registers), specifying the land in the deed under reduction. This provides notice in the property registers that the land in question is litigious pending the outcome of the action of reduction. An inhibiting creditor who fails to obtain a decree of reduction will discharge the notice in the form prescribed by regulations so that the land no longer appears as litigious in the property registers.

**Section 150 – Reduction of lease granted in breach of inhibition**

359. This section applies where an inhibited debtor grants a lease of land affected by inhibition. A lease granted in those circumstances will be reducible if it is capable of lasting for a period of 5 years as at the date on which the action for reduction of the lease is raised. A lease which is not capable of lasting 5 years after that date will be reducible if the Court of Session is satisfied that in all circumstances it would be fair and reasonable to reduce it. Section 150(4) specifies how to calculate the unexpired duration of a lease.

*General and miscellaneous*

**Section 151 – Power to prescribe forms in the 1868 Act**

360. Subsection (2) inserts new section 159B into the Titles to Land Consolidation (Scotland) Act 1868 which provides that the power to prescribe the form of notices in sections 155, 159 and 159A of that Act is to be exercised by the Scottish Ministers by regulations subject to the negative resolution procedure of the Scottish Parliament.

### **Section 152 – Expenses of inhibition**

361. Subsection (1) provides that the expenses incurred by the creditor in carrying out an inhibition will be chargeable against the debtor but (by virtue of subsection (3)) the expenses of only one further inhibition in relation to the same debt as the original inhibition will be chargeable against the debtor.

362. Subsection (2) provides that inhibition expenses will be recoverable from the debtor only by land attachment and residual attachment executed to recover the debt to which the inhibition relates. There is no other legal method available to recover these expenses.

363. Subsection (4) provides that in a sequestration or other process where there is ranking, the inhibition expenses will be treated as part of the debt to which the inhibition relates. This section and sections 144 and 153 do not apply to an inhibition on the dependence.

### **Section 153 – Ascription**

364. This section applies where an inhibition executed to enforce payment of a debt is in force and any payment is made by the debtor on account of the total recoverable by the inhibiting creditor. The payments made on account are allocated to the sum recoverable in the following order:

- the expenses of any other diligence chargeable against the debtor;
- the inhibition expenses;
- interest on the sum due as at the date the inhibition came into force;
- the debt to which the inhibition relates and any interest due after the date the inhibition comes into force.

### **Section 154 – Keeper’s duty to enter inhibition on title sheet**

365. This section inserts subsections (1A) and (1B) into section 6 of the Land Registration (Scotland) Act 1979.

366. New subsection (1A) provides that the Keeper will enter an inhibition registered in the Register of Inhibitions in the title sheet of a property only where the property (or a right in it) has been transferred in breach of the inhibition.

367. New subsection (1B) provides that the Keeper will, on application by the third party or any other person having an interest, amend the title sheet to show any subsequent discharge or restriction of the entered inhibition.

### **Section 155 – Inhibition effective against judicial factor**

368. This section provides that irrespective of the appointment of a judicial factor on an inhibited debtor’s estate, the inhibition will continue to be in force. This will not be the case

where the inhibited debtor is dead and a judicial factor is appointed under section 11A of the Judicial Factors (Scotland) Act 1889.

## **PART 6 – DILIGENCE ON THE DEPENDENCE**

### **Section 156 – Diligence on the dependence**

369. Section 156 inserts a new Part 1A (after section 15) into the Debtors (Scotland) Act 1987 (c.18). This new Part sets out a new regime for the granting of diligence on the dependence and replaces the common law on this.

370. Diligence on the dependence of an action is a provisional or protective measure which is used during the progress of a court action, or just before an action is raised. There are two types of diligence on the dependence, arrestment on the dependence and inhibition on the dependence. Arrestment “freezes” goods or money owned by the person against whom the arrestment is executed (usually the defender in the action) which are held by a third party (usually called the “arrestee”). Inhibition principally prohibits the defender from selling heritable property.

#### *New section 15A – Diligence on the dependence of action*

371. Section 15A(1) gives the Court of Session and the sheriff court equivalent powers to grant warrants for arrestment (including, to a certain extent, admiralty arrestments) and inhibition on the dependence of a court action. How the courts can exercise these powers is given further content by subsection (2) and sections 15C to 15F.

372. Subsection (1) extends the powers of the sheriff by giving sheriffs the power to grant a warrant for inhibition on the dependence. Under the present law, a pursuer who wishes to inhibit on the dependence of a sheriff court action has to obtain the warrant to do so from the Court of Session using a procedure which involves preparation and presentation of an Act and Letters of Inhibition.

373. Subsection (2) provides that a warrant for arrestment on the dependence is competent only where the action on the dependence of which it is sought contains a conclusion for payment of a sum other than expenses. Warrant for inhibition on the dependence is competent only where the action contains a similar conclusion for payment of money or where it contains a conclusion seeking specific implement of an obligation to convey heritable property to the creditor or to grant the creditor a real right in security, or some other right, over property.

374. Subsection (3) provides that “action” in this Part of the 1987 Act includes in the sheriff court those brought as summary causes, small claims and summary applications as well as those brought as ordinary actions.

#### *New section 15B – Diligence on the dependence of petition*

375. Section 15B gives the Court of Session an additional power by providing that it is competent for the Court of Session to grant warrant for diligence by arrestment or inhibition on the dependence of a petition. How this power can be exercised is again given further content by subsection (2) and by sections 15C to 15F. Again, the court can grant warrant for arrestment on

the dependence only where the petition contains a prayer for payment of money other than expenses. Warrant for inhibition on the dependence can be granted where the petition contains a similar prayer for payment or where it contains a prayer for specific implement of a similar obligation as that described in section 15A(2)(b)(ii).

376. Subsection (3) provides that legislation and rules of law relating to diligence on the dependence of actions are to apply to diligence on the dependence of petitions, so far as practicable and provided the contrary intention does not appear.

*New section 15C – Diligence on the dependence to secure future or contingent debts*

377. Section 15C provides that it will be competent for the court to grant warrant for diligence on the dependence of a conclusion for payment of a debt which is a future or contingent debt. Examples of such debts are aliment and financial support or a capital sum claimed in an action for divorce or nullity of marriage. These particular examples of future or contingent debts were formerly governed by section 19 of the Family Law (Scotland) Act 1985. That provision is now repealed (see schedule 6 to this Bill).

*New section 15D – Application for diligence on the dependence*

378. Section 15D(1) provides that at any time before a final decision has been taken in a court action, the “creditor” may apply for warrant for diligence on the dependence. In the scheme of the 1987 Act, “creditor” in this new Part means the person seeking to do diligence, and “debtor” means the person against whom that diligence is sought. Those terms are used throughout this Part. Section 15D should also be read with section 15G, which makes it clear that warrant for diligence on the dependence can be applied for, granted and executed before service of the summons in the action.

379. Subsection (2) requires the application for the warrant: (a) to be in the form, or nearly as may be in the form specified in rules in court; (b) to be intimated to the debtor and any other interested party; (c) to state where an immediate warrant is being sought before a hearing on the application; and (d) to include any other information which the Scottish Ministers require such applications to contain.

380. Subsection (3) provides that an application for warrant for diligence on the dependence need not be intimated where an immediate warrant is sought before a hearing of the application.

381. Subject to section 15E, which enables the court to grant warrant without an initial hearing, subsection (4) requires the court to fix a date for a hearing on the application and to order the creditor to so notify the debtor and any other interested party which the court thinks has an interest.

*New section 15E – Grant of warrant without a hearing*

382. Subsections (1) and (2) of section 15E give the court power to make an order granting a warrant for diligence on the dependence before an initial hearing of the application provided it is satisfied that:

- the creditor has a *prima facie* case on the merits of the court action;

- there would be a real and substantial risk of the debtor frustrating enforcement of a decree found in favour of the creditor by being or becoming insolvent, or putting the debtor's assets beyond the reach of the creditor, if warrant for diligence on the dependence were not granted in advance of a hearing; and
- it is reasonable in all the circumstances including the effect granting warrant may have on any person having an interest, to grant the warrant.

383. Subsection (3) puts the onus of satisfying the court of the case for granting warrant in advance of a hearing on the creditor.

384. Subsection (4) requires the court, on making an order granting warrant for diligence on the dependence without a hearing on the application to fix a date for a hearing under section 15K (recall of diligence on the dependence) and to require the creditor to so notify the debtor and any other interested party.

385. Where a hearing has been fixed under subsection (4)(a), section 15E(5) applies section 15K, as if the debtor or a person having an interest had applied to the court for an order under that section.

386. In applying section 15K, this means that at the hearing the court must consider the validity of the warrant and any diligence on the dependence executed under it. The effect of section 15K(7) is to place the onus on the creditor to satisfy the court that a recall or restriction order should not be made.

387. Where the court is satisfied the warrant is invalid it is under a duty to make an order recalling the warrant or any diligence on the dependence which has been executed under it (the court can also make an ancillary order) (section 15K(3)).

388. Subsection (6) provides that, where the court decides that a warrant should not be granted without a hearing and the creditor insists on pursuing the application, the court is obliged to fix a date for a hearing on the application and require the creditor to so notify the debtor and any other interested party.

#### *New section 15F – Hearing on application*

389. Section 15F sets out the procedure to be followed at a hearing on an application for warrant for diligence on the dependence. Such a hearing on an application takes place in respect of applications where the creditor either doesn't apply for a warrant to be granted in advance of a hearing or where the court refuses to make an order granting a warrant without a hearing.

390. Subsection (1) places a duty on the court, at the hearing, to give any person who received intimation of the hearing date (namely the debtor and any person appearing to the court to have an interest) the chance to make representations before the court makes a decision on the application.

391. Under subsections (2) and (3) the court may make an order granting the warrant if it is satisfied as to the same matters which it is obliged to consider under section 15E(2), namely that:

- the creditor has a *prima facie* case on the merits of the court action;
- there would be a real and substantial risk of the debtor frustrating enforcement of a decree found in favour of the creditor by being or becoming insolvent, or putting the debtor's assets beyond the reach of the creditor, if warrant for diligence on the dependence were not granted; and
- it is reasonable in all the circumstances, including the effect granting warrant may have on any person having an interest, to grant the warrant.

392. Subsection (4) puts the onus of satisfying the court that it should grant warrant to the creditor.

393. Subsection (5) provides for intimation of the court's decision to the debtor and any other interested party it thinks has an interest.

394. Subsection (6) provides that in refusing the warrant the court may impose such conditions as it thinks fit.

395. Subsection (7) gives examples of particular conditions which the court might impose under subsection (6).

#### *Execution before service*

##### *New section 15G – Execution of diligence before service of summons*

396. Section 15G applies where diligence on the dependence is executed before the summons in the action is served on the debtor. By virtue of sections 15A(3) and 15B(3), "summons" (which is the initiating document in the Court of Session) is construed here as meaning also "initial writ" (in the sheriff court) and "petition" in the case of Court of Session petitions.

397. It provides that the summons must be served on a debtor within 21 days of the execution of the diligence on the dependence. Where the summons is not served within that period, the diligence ceases to have effect unless the 21-day period has been extended by the court.

398. Subsections (3) and (4) deal with the court's power to grant an extension. They provide that the court may, on the application of the creditor, extend the period having regard to the efforts of the creditor to serve the summons within 21 days and any special circumstances preventing or obstructing service within that period.

#### *Restriction on property attached*

##### *New section 15H – Sum attached by arrestment on dependence*

399. This section and section 15J change the effect of diligence on the dependence. Currently, there is no monetary or other limit of value placed on a warrant for diligence on the dependence. This means that where an arrestment on the dependence is served the whole funds owed to the

defender by the arrestee are frozen, not just the amount sued for. Similarly an inhibition upon the dependence of an action affects all heritable property of the defender even if it is worth far more than the amount sued for.

400. Subsections (1) and (2) provide that the court, when granting warrant for arrestment on the dependence, may limit the warrant specifying an amount, which must not exceed a maximum amount calculated by reference to the formula set out in subsection (2). The maximum limit is calculated as being the aggregate of:

- the principal sum claimed;
- a sum of up to 20% of the principal sum (or such other percentage as the Scottish Ministers prescribe by regulations);
- interest on the principal sum at the judicial rate accrued up to 1 year;
- any sum which the Scottish Ministers prescribe by virtue of their power under subsection (3) (being a sum which they think reasonably represents the likely expenses of the arrestment incurred and chargeable against a debtor).

401. Subsection (4) provides that section 73E of the Debtors Scotland Act 1987 (which is inserted into that Act by section 192) applies. The court, under section 15H, may restrict the total sum which may be arrested. But section 73E will operate whenever a creditor seeks to arrest a bank account to protect a minimum balance in that account. This note should be read with paragraphs 584 to 588 of the note for section 192 for further explanation.

*New section 15J – Property affected by inhibition on dependence*

402. Section 15J provides that where a court grants warrant for inhibition on the dependence in a case where the action is specifically to oblige the debtor to convey heritable property, to grant a real right in security or some other right to the creditor, the court must limit the property attached to that particular property. In any other case, the court may limit the property attached to such property it may specify.

*New section 15K – Recall of diligence on the dependence*

403. Under section 15K(1), the debtor or any other person having an interest can apply to the court for any order set out in subsection (2). Those orders are an order recalling or restricting the warrant granted, if the warrant has been executed, an order recalling or restricting any arrestment or inhibition so executed, an order determining any question as to the validity, effect or operation of the warrant or an order ancillary to any other order sought.

404. Subsection (3) provides that, where the court is satisfied the warrant is invalid it is under a duty to make an order recalling the warrant or any diligence on the dependence which has been executed under it (the court can also make an ancillary order).

405. By virtue of subsection (4), where the court decides the warrant is valid it may still make an order recalling or restricting the warrant or diligence done under it if it considers that an arrestment or inhibition executed in pursuance of the warrant is irregular, incompetent or ineffective or if it is reasonable in all the circumstances, including the effect granting warrant

may have had on any person having an interest, to do so. The power in subsection (4) is subject to subsection (5).

406. Subsection (5) imposes a duty on the court to make an order recalling the warrant or an arrestment or inhibition executed in pursuance of the warrant and gives it power to make an ancillary order, where it is no longer satisfied as to the matters set out in subsection (6). Those matters mirror the considerations which the court must take into account when determining whether to grant a warrant (see section 15F(3)).

407. Subsection (7) places the onus on the creditor to satisfy the court that a recall or restriction order should not be made. Subsections Section 15K(8) and (9) enable the court to impose any conditions it thinks fit when making an order which may include requiring the debtor to consign money into court, to find caution or to give some other kind of security as the court thinks fit.

408. Subsection (10) provides that this section applies regardless of whether the warrant for diligence on the dependence was obtained, or executed, before the section came into force.

*New section 15L – Variation and recall of conditions*

409. Under section 15L, the court may, on an application by the debtor, vary an order restricting a warrant for diligence on the dependence under section 15K(4), or vary or remove a condition imposed under section 15F(6) or 15K(8).

*General and miscellaneous*

*New section 15M – Expenses of diligence on the dependence*

410. Subsection (1) provides that a creditor will generally be entitled to the expenses incurred in obtaining a warrant for diligence on the dependence and the costs in executing an arrestment or inhibition. This is subject to subsection (3)(a) which provides that the court may modify or refuse those expenses where it finds that the creditor was acting unreasonably in applying for the warrant or considers the modification or refusal to be reasonable in all the circumstances with regard to how the action was decided.

411. Subsection (2) entitles the debtor to claim the expenses incurred in opposing the warrant where the warrant was granted and the court is satisfied that the creditor was acting unreasonably in applying for the warrant. This section is subject to subsection (3)(b) which gives the court a power to modify or refuse those expenses where it is satisfied that it is reasonable in all the circumstances of the case, including the outcome of the case, to do so.

412. Subsection (4) provides that, apart from the matters covered by subsections (1) to (3), the court retains its discretion to deal with expenses as it thinks fit.

413. Subsection (5) provides that expenses incurred in obtaining or opposing warrant for diligence on the dependence are expenses of process.

414. Subsection (6) preserves existing rules in legislation or common law on the recovery of expenses chargeable against a debtor as are incurred in executing an arrestment or inhibition on the dependence of an action. In particular, section 93 of the Debtors (Scotland) Act 1987 applies to the recovery of expenses incurred in executing arrestments.

*New section 15N – Application of this Part to admiralty actions*

415. Section 15N applies this Part of this Act where it is consistent with the provisions of Part V of the Administration of Justice Act 1956 (c.46) (admiralty jurisdiction and arrestment of ships), to an arrestment on the dependence of an admiralty action as it applies to any other arrestment on the dependence. However, sections 15J (property affected by inhibition on the dependence) and 15M (expenses) do not apply. See also schedule 4 to this Bill, which inserts a new section 47B on expenses into the 1956 Act.

**Section 157 – Prescription of arrestment**

416. This section inserts a new section 95A into the 1987 Act as a replacement for section 22 of the Debtors (Scotland) Act 1838 (which is repealed by schedule 6). This applies to arrestments on the dependence and to arrestments in execution.

*New section 95A – Prescription of arrestment*

417. Subsection (1)(a) provides that, where an arrestment on the dependence of an action is not insisted in, for example where no action is taken on it, then it prescribes (and cannot be enforced) after the expiry of 3 years from the date on which a final interlocutor is obtained by the creditor for payment of all or part of the principal sum which was sought in the action.

418. Subsection (1)(b) provides that, where an arrestment in execution of an extract decree or other extract registered document relating to a debt which is due (so not a future or contingent debt) is not insisted in, it prescribes (and cannot be enforced) after the expiry of 3 years from the date on which the arrestment was executed.

419. Subsection (2) provides that an arrestment securing or enforcing a future or contingent debt, if not insisted in, prescribes after the expiry of 3 years from the date the debt became due.

420. Subsection (3) provides that any time during which a time to pay direction, an interim order under section 6(3) of the 1987 Act or a time to pay order is in effect is to be disregarded when determining the date the arrestment will expire.

421. Subsection (4) excludes earnings arrestments, current maintenance arrestments and conjoined arrestment orders from the application of this section.

422. Subsection (5) provides that this section will apply irrespective of whether warrant for the arrestment is obtained, or the arrestment is executed, before this section comes into force.

423. Subsection (6) defines “final interlocutor” for the purposes of subsection (1)(a).

### **Section 158 – Abolition of letters of loosing**

424. Loosing is a method, by way of signeted letters of loosing, of releasing arrested property which does not extinguish the arrestment itself until the debtor uplifts the arrested property. Section 158(1) abolishes loosing. Subsection (2) provides that the abolition of loosing does not affect the law relating to the loosing of an arrestment of a ship or its cargo, nor does it affect the exercise of any other power of the court to recall or restrict an arrestment.

### **Section 159 – Abolition of adjudication in security**

425. Adjudication in security is available on documents of debt in relation to which the time for payment had not yet arrived, such as future debts. Section 159 abolishes adjudication in security.

## **PART 7 – INTERIM ATTACHMENT**

### **Section 160 – Interim attachment**

426. Section 160 inserts a new Part 1A (after section 9) into the Debt Arrangement and Attachment (Scotland) Act 2002 (asp 17).

427. Part 1A creates a new diligence known as interim attachment which will allow a creditor to attach a debtor's tangible assets (also known as corporeal moveable property) on the dependence of a court action for payment.

#### *New section 9A – Interim attachment*

428. Section 9A(1) creates interim attachment by giving the court power, subject to sections 9B to 9E, to grant a warrant which will authorise the attachment of corporeal moveable property (owned either solely by the debtor or in common with a third party) on the dependence of a court action. This power to attach is to be known as "interim attachment".

429. Subsection (2) provides that a warrant for interim attachment is competent only in relation to a court action for payment provided that action is not limited to a conclusion for expenses.

430. Subsection (3) has the effect of allowing interim attachment on the dependence of petitions in the Court of Session.

431. Subsection (4) makes it clear that interim attachment is available in all sheriff court actions and also sets out definitions of "court", "creditor" and "debtor" within the meaning of this Part of the Bill. It also provides that expressions used in Part 1A of the 2002 Act have the same meanings as those expressions have in Part 2 of that Act, unless the context otherwise requires.

*New section 9B – Articles exempt from interim attachment*

432. Section 9B provides that interim attachment may not be used to attach the following assets:

- section 9B(a) - those inside the debtor's home;
- section 9B(b) – those which are exempt under section 11 of the 2002 act, namely:
  - equipment which the debtor reasonably requires for a profession, trade or business provided it doesn't exceed £1000 in aggregate value (or any other sum prescribed in regulations);
  - any vehicle reasonably required by the debtor which is not worth more than £1000 (or any other sum prescribed in regulations);
  - a mobile home which is the debtor's only or principal residence;
  - any equipment reasonable required for maintenance of a garden or yard beside or associated with the debtor's home; and
  - by virtue of the amendment of section 11 by schedules 4 and 5 to this Bill, cargo onboard ships and money (as defined in section 162 of this Bill);
- section 9B(c) - a mobile home which is the only or main residence of a person other than the debtor;
- section 9B(d) – those which are perishable or with potential to deteriorate quickly and to a great extent in condition or value; and
- section 9B(e) – material for a manufacturing process or goods to be sold as a normal part of a debtor's stock in trade.

*Application for interim attachment*

*New section 9C – Application for warrant for interim attachment*

433. Section 9C(1) provides that the creditor may apply for warrant for interim attachment at any time during which a court action is in dependence. This section should be read with section 9G, which makes it clear that warrant for interim attachment can be applied for before service of the summons in the action.

434. Subsection (2) requires the application for the warrant: (a) to be in the form, or nearly as may be in the form, specified in rules in court; (b) to be intimated to the debtor and any other interested party; (c) to state where an immediate warrant is being sought before a hearing on the application; and (d) to include any other information which the Scottish Ministers require such applications to contain.

435. Subsection (3) provides that an application for warrant for interim attachment need not be intimated where an immediate warrant is sought before a hearing of the application.

436. Subject to section 9D, which enables the court to grant warrant without an initial hearing, subsection (4) requires the court to fix a date for a hearing on the application and to

order the creditor to intimate that date to the debtor and any other party which the court thinks has an interest.

*New section 9D – Grant of warrant without a hearing*

437. Sections 9D(1) and (2) give the court power to grant a warrant for interim attachment without an initial hearing on the application provided it is satisfied that:

- the creditor has a *prima facie* case on the merits of the court action;
- there would be a real and substantial risk of the debtor frustrating enforcement of a decree found in favour of the creditor by being or becoming insolvent, or putting the debtor's assets beyond the reach of the creditor, if warrant for interim attachment were not granted in advance of a hearing; and
- it is reasonable in all the circumstances, including the effect granting warrant may have on any person having an interest, to grant the warrant.

438. Subsection (3) puts the onus of satisfying the court of the case for granting warrant in advance of a hearing on the creditor.

439. Subsection (4) requires the court, on making an order granting warrant for interim attachment without a hearing on the application, to fix a date for a hearing under section 9L (recall of interim attachment) and to require the creditor to so notify the debtor and any other interested party.

440. Where a hearing has been fixed under subsection (4)(a), subsection (5) applies section 9L as if an application had been made to the court for an order under section 9L.

441. In applying section 9L, this means that at the hearing the court must consider the validity of the warrant and any interim attachment executed under it. The effect of section 9L(7) is to place the onus on the creditor to satisfy the court that a recall or restriction order should not be made.

442. Where the court is satisfied the warrant is invalid it is under a duty to make an order recalling the warrant or any interim attachment which has been executed under it (the court can also make an ancillary order) (section 9L(3)).

443. Subsection (6) provides that where the court decides that a warrant should not be granted without a hearing and the creditor insists on pursuing the application, the court is obliged to fix a date for a hearing on the application and require the creditor to so notify the debtor and any other interested party.

*New section 9E – Hearing on application*

444. Section 9E sets out the procedure to be followed at a hearing on an application for warrant for interim attachment. Such a hearing on an application takes place in respect of applications where the creditor either doesn't apply for a warrant to be granted in advance of a hearing or where the court refuses to make an order granting a warrant without a hearing.

445. Subsection (1) places a duty on the court, at the hearing, to give any person who received intimation of the hearing date (namely the debtor and any person appearing to the court to have an interest) the chance to make representations before the court makes a decision on the application.

446. Under subsections (2) and (3) the court may make an order granting the warrant if it is satisfied as to the same matters which it is obliged to consider under section 9D(2), namely that:

- the creditor has a *prima facie* case on the merits of the court action;
- there would be a real and substantial risk of the debtor frustrating enforcement of a decree found in favour of the creditor by being or becoming insolvent, or putting the debtor's assets beyond the reach of the creditor if warrant for interim attachment were not granted; and
- it is reasonable in all the circumstances, including the effect granting warrant may have on any person having an interest, to grant the warrant.

447. Subsection (4) puts the onus of satisfying the court that it should grant warrant on the creditor.

448. Subsection (5) provides for intimation of the court's decision to the debtor and any other interested party it thinks has an interest.

449. Subsection (6) provides that in refusing the warrant the court may impose such conditions as it thinks fit.

450. Subsection (7) gives examples of particular conditions which the court might impose.

### *Execution of interim attachment*

#### *New section 9F – Execution of interim attachment*

451. Section 9F(1) applies sections 12, 13, 15 and 17 (except section 17(3)(b) and (4)) of the 2002 Act to the execution of interim attachment. Section 12 states on which days, and during which times, it is not competent to execute an attachment. Section 13 allows a messenger of court, when executing an attachment, to assume that articles are owned by the debtor, although the messenger is required to enquire as to ownership when attaching articles. Section 15 allows a messenger executing an attachment to open shut and lockfast places and requires the messenger to value articles attached (or arrange for their valuation). Section 17 requires the messenger to make a report of the attachment to the court.

452. Subsection (2) requires the messenger of court, immediately after executing an interim attachment, to serve a schedule of interim attachment on the debtor. Subsection (3) makes further provision in relation to the schedule which should be in accordance with the form prescribed in court rules, should be signed by the messenger and should specify the property attached. By virtue of subsection (4), the messenger of court is obliged to provide the debtor with a copy of the schedule of interim attachment, or where that's not practicable, give a copy to

a person who is present at the location of the interim attachment. Alternatively, where there's no such person, the messenger must leave a copy of the schedule at that location.

453. Subsection (5) makes it clear that references elsewhere in Part 1A of the 2002 Act to the day on which an interim attachment is executed are references to the day on which the schedule of interim attachment is given to the debtor, to a person present or left at the premises where the interim attachment was executed by a messenger of court.

*New section 9G – Execution of interim attachment before service*

454. Section 9G applies where an interim attachment is executed before the action is served on the debtor. By virtue of section 9A(3) and (4), “summons” (which is the initiating document in the Court of Session) is construed here as meaning also “initial writ” (in the sheriff court) and “petition” in the case of Court of Session petitions.

455. It provides that the summons must be served on the debtor within 21 days of the execution of the interim attachment. Where the summons is not served within that period, the attachment ceases to have effect unless the 21 day period has been extended by the court.

456. Subsections (3) and (4) deal with the court's power to grant an extension. They provide that the court may, on the application of the creditor, extend the period having regard to the efforts of the creditor to serve the summons within 21 days and any special circumstances preventing or obstructing service within that period.

*Interim attachment: effects*

*New section 9H – Unlawful acts after interim attachment*

457. Section 9H applies the provisions on unlawful acts for attachment in section 21 (except subsections (3) and (15)) of the 2002 Act to interim attachment, with relevant modifications.

458. Section 21 prohibits the removal, sale, gifting or other disposal of attached articles and their wilful destruction or damage. To do so is in breach of the attachment and may be dealt with as a contempt of court. Section 21(7) requires the debtor to give notification to the creditor and officer if an attached article is stolen and of any insurance claim which the debtor intends to make. Section 21(10) provides that, where attached articles have been damaged, destroyed or stolen, the court may order that others be attached. Damaged articles may, on the authority of the court, be revalued. Section 21(11) to (15) makes provision for a sum of money to be consigned into court in circumstances where an article is made unavailable (by being moved, damaged, lost, stolen or sold) by the debtor or any third party who knows the article is attached.

*New section 9J – Articles belonging to or owned in common by a third party*

459. Section 9J(1) provides that the court may make an order releasing an article from an interim attachment where it is satisfied a third party owns the article.

460. Subsection (2) gives the court similar power to release an article from an interim attachment where the court is satisfied that a third party owns the article in common with the

debtor and that the continued attachment of the article in question would be unduly harsh to the third party.

461. Subsection (3) applies section 34(2) of the 2002 Act where a third party claims sole ownership of the article as it applies where a third party makes an application for the purposes of section 34(1)(b)(ii). This has the effect of preserving a third party's rights so that that the third party is not precluded from taking any other proceedings for the recovery of the article.

462. Subsection (4) provides that, where the interim attachment of an article ceases under subsection (1) or (2), the messenger of court may attach other articles which are owned by the debtor and kept at the place at which the original interim attachment was executed.

*New section 9K – Duration of interim attachment*

463. Section 9K(1) provides that an interim attachment, unless recalled, will continue to have effect:

- for a period of 6 months after the conclusion of the action on the dependence of which interim attachment was executed provided the creditor obtains a final interlocutor for payment of all or part of a principal sum concluded for (or for such longer period as the court may specify);
- until the court grants decree of absolvitor in favour of the debtor or dismisses the action; or
- when, by virtue of section 9K(3), the creditor agrees to the interim attachment ceasing to be in force in relation to every attached item.

464. Subsection (2) provides that an interim attachment ceases to have effect if an attached item is attached by the creditor in execution of the final interlocutor mentioned in section 9K(1)(a).

465. Subsection (3) provides that the creditor may at any time agree in writing to the interim attachment ceasing to have effect in relation to a specific attached item. The attachment ceases when the court is so notified.

466. Subsection (4) provides that the court may, on application by the creditor, extend the time an interim attachment continues to have effect after final interlocutor in the creditor's favour, but only if the application is made before the 6-month period expires and the court is satisfied that exceptional circumstances make it reasonable to grant the application.

467. Where an application is made under subsection (4) but not determined before the expiry of the 6-month period, subsection (5) has the effect of extending that period until the application is disposed of.

468. Subsection (6) makes it clear that the calculation of the 6-month period under subsection (1)(a) should not include any period during which a time to pay direction, interim order or time to pay order under the 1987 Act is in existence.

469. Subsection (7) defines, for the purposes of subsection (1), what a “final interlocutor” is and when an action is “disposed of”.

*New section 9L – Recall of interim attachment*

470. Where warrant for interim attachment has been granted, the debtor or any other person having an interest can apply to the court for any order set out in section 9L(2). Those orders are an order recalling or restricting the warrant granted, if the warrant has been executed, an order recalling or restricting any interim attachment so executed, an order determining any question as to the validity, effect or operation of the warrant or an order ancillary to any other order sought.

471. Subsection (3) provides that, where the court is satisfied the warrant is invalid it is under a duty to make an order recalling the warrant or any interim attachment which has been executed under it (the court can also make an ancillary order).

472. By virtue of subsection (4), where the court decides the warrant is valid it may still make an order recalling or restricting the warrant or interim attachment if it considers that an interim attachment executed in pursuance of the warrant is irregular, incompetent or ineffective or if it is reasonable in all the circumstances, including the effect granting warrant may have had on any person having an interest, to do so. The power in subsection (4) is subject to subsections (5) and (8).

473. Subsection (5) imposes a duty on the court to make an order recalling the warrant or an interim attachment executed in pursuance of the warrant and gives it power to make an ancillary order, where it is no longer satisfied as to the matters set out in subsection (6). Those matters mirror the considerations which the court must take into account when determining whether to grant a warrant (see section 9E(3)).

474. Subsection (7) places the onus on the creditor to satisfy the court that a recall or restriction order should not be made.

475. Subsection (8) prevents the court from making an order under subsection (4) where, by virtue of section 9K(1)(a) the interim attachment continues to have effect after the creditor obtains a final interlocutor for payment and the relevant 6-month period has not expired.

476. Subsections (9) and (10) enable the court to impose any conditions it thinks fit when making an order which may include requiring the debtor to consign money into court, to find caution or to give some other kind of security as the court thinks fit.

*New section 9M – Variation and recall of conditions*

477. Under section 9M, the court may, on an application by the debtor, vary an order restricting the interim attachment under section 9L(4), or vary or remove a condition imposed under section 9E(6) or 9L(9).

*General and miscellaneous provisions*

*New section 9N – Expenses of interim attachment*

478. Section 9N(1) provides that, subject to subsection (3)(a), a creditor will be entitled to recover from the debtor the expenses incurred in obtaining and executing a warrant for interim attachment.

479. Subsection (2) provides that, subject to subsection (3)(b), where a warrant for interim attachment is granted and the court is satisfied that the creditor was acting unreasonably in applying for it, a debtor will be entitled to recover from the creditor the expenses incurred in opposing that warrant.

480. Subsection (3) provides that the court may modify or refuse those expenses mentioned in subsection (1) if it is satisfied that the creditor was acting unreasonably in applying for the warrant or if it is reasonable in all circumstances allowing for the outcome of the action. It can also modify or refuse those expenses mentioned in subsection (2) where it is satisfied that it is reasonable in all the circumstances having regard to the outcome of the action.

481. Subsection (4) provides that, subject to subsections (1) to (3), the court may make such findings as it thinks fit in relation to expenses as mentioned in subsections (1) and (2). Subsection (5) provides that expenses incurred in obtaining or opposing a warrant are expenses of process.

*New section 9P – Recovery of expenses of interim attachment*

482. Section 9P(1) provides that subject to subsection (4), any expenses chargeable against the debtor which are incurred by the creditor in carrying out an interim attachment can be recovered only by attachment of the debtor's assets:

- in execution of a decree granted in the action on the dependence of which the warrant for interim attachment was granted; or
- where the court finds for the debtor, in execution of a decree granted under this section for the purposes of recovering the appropriate expenses.

483. Subsection (2) provides any expenses which cease to be recoverable under subsection (1) will no longer be chargeable against the debtor.

484. Subsections (3) and (4) provide that expenses remain chargeable to the debtor under subsection (4) where:

- an interim attachment is recalled on the making of a time to pay direction, an interim order or a time to pay order under the 1987 Act;
- the interim attachment was in effect immediately before the date of sequestration of the debtor's estate under the Bankruptcy (Scotland) Act 1985 or the appointment of an administrator under Part 2 of the Insolvency Act 1986;
- the interim attachment was in effect against property of the debtor immediately before a floating charge attaches all or part of that property;

*These documents relate to the Bankruptcy and Diligence etc. (Scotland) Bill (SP Bill 50) as introduced in the Scottish Parliament on 21 November 2005*

- the interim attachment was in effect immediately before the commencement of the winding up, under the 1986 Act, of the debtor; or
- the interim attachment becomes unenforceable because the creditor enters into a composition contract or accedes to a trust deed for creditors or by virtue of the subsistence of a protected trust deed for creditors.

485. Subsection (4) also has the effect that, where the debtor's obligation to pay the expenses is not discharged under the proceedings and processes referred to in subsection (3), those expenses are recoverable in pursuance of subsection (1).

*New section 9Q – Ascription of sums recovered while interim attachment is in effect*

486. Section 9Q provides for the priority for satisfying expenses where any amounts are secured by an interim attachment, paid to account of the amounts recoverable by the debtor while the attachment is in force and then the interim attachment ceases to have effect.

487. Subsection (2) provides that those amounts will be credited in following order: first, to the expenses incurred in obtaining warrant for and executing the interim attachment; secondly, to any interest on the principal sum due under decree in the action which has accrued as at the date of carrying out the interim attachment; and, finally, any sum due under that decree together with any interest which has accrued after that date.

488. Subsection (3) provides that where an interim attachment is followed by the diligence of attachment, section 41 of the 2002 Act which deals with ascription, will apply to amounts to which section 9Q applies as it applies to amounts to which that section applies.

*New section 9R – Ranking of interim attachment*

489. Section 9R provides that in competition with the claims of other creditors of the debtor, whether those claims are secured by voluntary securities or other diligences or are unsecured, the interim attachment will be treated, on final conclusion of the action in the creditor's favour, as if it were an attachment under section 10 of the 2002 Act executed on the day of execution of the interim attachment.

490. Also, where an interim attachment has ceased to have effect in relation to any specific article on the attachment of it in execution of a final interlocutor in the creditor's favour, the attachment of the item will be taken to have been carried out, in respect of that item, when the interim attachment was carried out.

## **PART 8 – ATTACHMENT OF MONEY**

### *Money attachment*

#### **Section 161 – Money attachment**

491. Subsection (1) establishes a new diligence of “money attachment” which can be used to attach money owned by debtor. Money is not attachable by the existing diligence of attachment.

492. Subsection (2) provides that money attachment is permitted only to enforce payment of a debt and only if:

- the creditor holds a court decree or other enforceable document by which the debt is constituted;
- a charge to pay has been served on the debtor;
- the creditor has, before or on the service of the charge, provided the debtor with a debt advice and information package; and
- the period for payment set out in the charge (14 days, or 28 days if the debtor is outside the UK or the debtor's whereabouts are unknown, see section 90(3) of the 1987 Act) has expired without the debtor having made payment of the debt.

493. Subsection (3) provides that money in a dwellinghouse cannot be attached. "Dwellinghouse" does not include a garage even if it is built into the house nor does it include garden sheds or other outbuildings but a mobile home, caravan or houseboat can be regarded as a dwellinghouse. Subsection (3) also provides that money attachment is not competent when the money is capable of being arrested. That is to say the money is held on behalf of a debtor by a third party, for instance a cheque made out to a debtor is being held by the debtor's solicitor or accountant.

### **Section 162 – Meaning of "money" and related expressions**

494. This section deals with what is meant by "money" and so clarifies what can be attached by the new diligence.

495. "Money" means cash and banking instruments but excludes any cash or instrument which has an intrinsic value greater than any value it may have as a medium of exchange (which in simple cases such as coins and notes, will be the face value). An example would be a collectable coin which has a greater value as a collectable coin than it has as a medium of exchange. Such money, whilst excluded from money attachment, will instead be attachable by the diligence of attachment.

496. "Cash" is defined as coins and banknotes in any currency. "Banking instrument" is defined in paragraphs (a) to (e) of subsection (1) as meaning:

- (a) cheques and other instruments to which section 4 of the Cheques Act 1957 (c.36) applies (section 4 covers cheques, other documents issued by a customer of a bank which permit a person to receive payment from the bank of the sum stated in the document, documents which enable a person to obtain payment from the Paymaster General or the Queen's and Lord Treasurer's Remembrancer (often referred to as government cheques) and bankers drafts);
- (b) any document issued by a public officer which entitles a person to payment of a sum from a government department (these are effectively another form of government cheque). Documents under section 4(2)(c) of the Cheques Act 1957 are excluded from this part of the definition not because they aren't covered but simply because the reference to "cheques and other instruments" in (a) already covers them;

- (c) promissory notes (other than banknotes). A promissory note is an unconditional promise in writing and made by one party to another engaging to pay, on demand or at a fixed determinable future time, a sum certain in money to, or to the order of, a specified person, or to a bearer. The most common example is banknotes, however, these are already defined to mean “cash” for the purposes of money attachment and so are expressly excluded from the definition of “promissory note”;
- (d) other negotiable instruments. This covers other negotiable instruments which are not already expressly defined such as dividend warrants; and
- (e) money orders and postal orders. It is necessary to expressly include this category of instrument as they are not negotiable instruments.

497. Subsection (1) also makes it clear that references to “the value of money” in the sections relating to money attachment, unless the context otherwise requires, is a reference to:

- (a) the amount of cash (coins and banknotes),
- (b) in the case of currency other than sterling, the equivalent sterling amount, and
- (c) in the case of a banking instrument, the amount of cash that would be obtained by realising the instrument (for example, the amount credited to a bank account when a cheque is banked).

498. Subsection (4) gives the Scottish Ministers power to add, remove or vary the definition of banking instrument by order made by statutory instrument subject to the negative resolution procedure of the Scottish Parliament.

### **Section 163 – When money attachment not competent**

499. Subsections (1) and (2) provide that money attachment cannot be carried out on a Sunday, a public holiday in the area in which the attachment is to be carried out or another day designated by rules of court. An attachment must not begin before 8 a.m. or after 8 p.m. and cannot continue after 8 p.m. if it is in progress. A messenger of court can apply to the sheriff for authority to carry out a money attachment outwith these times.

500. Subsection (3) provides that a second money attachment cannot be executed in the same place as a money attachment has already been executed if the second attachment is to enforce the same debt. The words “or is purported to be attached” make it clear that even if the first money attachment turns out to be invalid a second money attachment at the same place is not permitted because of this provision.

501. Subsection (4) provides that money can be attached only once to enforce a particular debt. If money is attached and then the money attachment ceases to have effect and the money is released back to the debtor, that money cannot be re-attached.

*Execution of money attachment*

**Section 164 – Removal of money attached**

502. Subsections (1) and (2) provide that the messenger of court executing a money attachment can attach and remove money only up to an amount which, in the opinion of the messenger of court, does not exceed the amount claimed in the charge plus any interest together with all expenses chargeable against the debtor for the money attachment. This amount of money is referred to as the “sum recoverable by the money attachment” throughout the money attachment sections. Because the expenses of the money attachment are not settled until the end of the process and the value of some banking instruments may not be immediately ascertainable the messenger of court has to take a view on how much attached money would represent the sum recoverable.

503. Subsections (3) and (4) put a duty on the messenger of court to convert any non-sterling currency into sterling as soon as reasonably practicable and to obtain the best amount practicable for that non-sterling currency. All cash in sterling, including that which has been converted from foreign currency, is to be deposited in a bank account (subsection (5)).

504. Subsection (6) provides that the messenger does not need to attach and remove any banking instrument other than cheques unless instructed to attach instruments like this by the creditor. If the creditor does not instruct the messenger to attach these other instruments, the messenger cannot be liable for any loss incurred by a failure to attach those instruments. Where a banking instrument is attached, the messenger must have it valued at the price it is likely to fetch on the open market unless the messenger thinks a professional valuation is needed (subsection (7) and see also section 167).

**Section 165 – Presumption of ownership**

505. Subsection (1) provides that while a messenger of court is carrying out a money attachment, the messenger can assume that any money found in the premises where the attachment is being carried out is owned wholly or in part by the debtor. But, before attaching any money, the messenger must ask anyone present about the ownership of the money and particularly ask whether the money is owned by the debtor in common with someone else.

506. Subsection (3) provides that a messenger cannot presume that money is owned wholly or in part by the debtor if the messenger of court knows or ought to know that this is not the case. But a simple assertion by a person that the money is not owned by the debtor is not enough to override the presumption that the debtor owns the money. The messenger would need to be presented with more information or evidence that the money was not the debtor’s before the messenger would be precluded from relying on the normal assumption.

**Section 166 – Schedule of money attachment**

507. Subsection (1) provides that immediately after carrying out a money attachment, a schedule of money attachment must be completed by the messenger of court. The schedule of money attachment is a document which will contain all the details about the money which has

been attached. It may either be a paper document or it can be completed electronically, in which case it would need to include an electronic signature (see section 186(3) and (4)).

508. Under subsection (2)(b)(ii) the schedule must specify the value of the attached money but only so far as ascertainable because the messenger may not have been able to make an accurate valuation of all the attached instruments at the time of executing the attachment.

509. Under subsection (3) the messenger of court must give a copy of the schedule to the debtor. Where this is not practicable, a copy must be given to any other person present at the place where the money attachment was executed or, if nobody is there, the messenger must leave a copy at that place.

510. Subsection (4) provides that the day on which a money attachment is carried out is to be the day on which the messenger of court hands over a copy of the schedule under subsection (3).

### **Section 167 – Valuation of banking instruments**

511. This section gives a messenger of court the power to seek a professional valuation where the messenger thinks a professional is needed to value a banking instrument. In particular this may be necessary for complex negotiable instruments where the value on the open market may not be obvious to a non-expert. The costs of obtaining a valuation are charged to the creditor but may be recoverable from the debtor under section 184 and schedule 3.

### **Section 168 – Order for realisation of money likely to deteriorate in value**

512. This section permits a creditor, messenger of court, or debtor, to apply to the sheriff for an order allowing the creditor or messenger to immediately realise the value of any of the attached money. The sheriff may grant such an order if the sheriff thinks the money in question is likely to deteriorate quickly and substantially in value. An example would be cash or an instrument denominated in the currency of a country where the economy was collapsing and that currency was very quickly losing value on the money markets.

513. Subsection (4) authorises the messenger to act as the irrevocable agent of the debtor, so the messenger can do anything to realise the value of the money that the debtor could do.

### **Section 169 – Report of money attachment**

514. Subsection (1) requires the messenger of court to make a report of the money attachment within 14 days of the day the money attachment is executed, unless the messenger of court has requested and the sheriff has authorised a longer period.

515. The report will be a detailed account of the money attached and must include the value of all the attached money (including any money which required a professional valuation), the details of any ownership dispute and the details of any money already released. As with the schedule of money attachment the report can be made electronically but would require an electronic signature in accordance with section 186(3) and (4).

516. Under subsection (5) the sheriff may refuse to receive a report if the stipulated period has expired or the report is not in the correct form. Where the sheriff does refuse the report the money attachment ceases to be in force and the messenger has to return the money attached or, where it has already been realised, a sum equivalent to the money attached.

#### *Release of money attached*

### **Section 170 – Creditor’s application for payment order**

517. This section permits the creditor to apply to the sheriff for an order (a “payment order”) permitting the creditor to receive payment of the sum recoverable out of the attached money. A payment order cannot be applied for if all the money attached has already been released.

518. The creditor must apply for a payment order within 14 days of the date on which the report of the money attachment is made (subsection (3)).

519. Under subsection (5) the sheriff must make a payment order unless there has been a material irregularity in the execution of the money attachment (subsection (10)) or there is an opposition to the payment order (subsection (6)). An opposition to the order must be made within 14 days of the application for a payment order (subsection (7)). The sheriff must allow the creditor, debtor and any third party who opposes the order to make representations or alternatively the sheriff can hold a hearing (subsection (8)). If the opposition is on the grounds that the money attached is not owned by the debtor the burden of proving that falls on the debtor and the third party claiming ownership (subsection (9)).

520. If there is a material irregularity or an opposition is upheld, the money attachment ceases to have effect and the money must be returned to the original owner (either the debtor or a third party who correctly claimed ownership). If the opposition was only in relation to some of the money attached then the attachment only ceases in relation to that money and only that money is returned.

### **Section 171 – Effect of payment order**

521. Subsection (1) provides that a payment order authorises a messenger of court to realise the value of money attached and pay the creditor the sum recoverable (with any surplus to the debtor) whilst first retaining an amount to meet the messengers fees and outlays. The disposal of the money is subject to section 37 of the Bankruptcy (Scotland) Act 1985 which has the effect of equalising diligences executed later than 60 days before sequestration of a debtor with the sequestration itself. In those circumstances the sum to be disposed of becomes part of the debtor’s sequestrated estate and is distributed accordingly.

522. Subsections (2) and (3) authorise the messenger to act as the irrevocable agent of the debtor in relation to attached cheques and negotiable instruments and to do anything the debtor could have done to realise the instrument.

523. Subsection (4) imposes a duty on the messenger to obtain the highest amount as is reasonably practicable for the instrument being realised.

### **Section 172 – Release of money where attachment unduly harsh**

524. This section provides for a debtor to apply, before a payment order is made or a money attachment ceases, to the sheriff for an order releasing the money attached (or a portion of it) on the grounds that the attachment is unduly harsh to the debtor. It is for the sheriff to decide whether the attachment is unduly harsh.

525. The effect of subsection (4) is that an order to release money under this section cannot permit the release of any more than £1000 to the debtor. There is a power given to the Scottish Ministers to prescribe a different amount by regulations.

526. Subsection (7) provides that where a messenger has realised an instrument so as to pay a sum back to the debtor as required by an order under this section, the messenger has to pay the amount realised only if it is less than the amount the order stated should be returned to the debtor by realising that instrument.

### **Section 173 – Invalidity and cessation of money attachment**

527. This section provides the sheriff with the power to order a money attachment to cease and to return any money attached (or a sum equal to the money's value if the money has already been realised) to the debtor (or third party owner) where either there was a material irregularity in the money attachment or the sheriff is satisfied that the money attached did not belong to the debtor.

528. If the sheriff is satisfied that only part of the money attached did not belong to the debtor the sheriff can order that part to be returned to the third party who does own the money in question.

529. An order can be made on the sheriff's own initiative (for example if the report of the money attachment discloses an irregularity or an issue about ownership) or can be applied for by the debtor or a third party. A hearing may be held or representations made prior to an order being made and the sheriff has to provide reasons for making an order (or refusing to do so if it has been applied for).

### **Section 174 – Effect of creditor's failure to apply for payment order**

530. This section provides that where the creditor fails to apply for a payment order before 14 days have expired from the date on which the report of the money attachment is made, the sheriff must make an order stating that the attachment of money is no longer in force and requiring the messenger of court to return that money, or an equivalent sum, to the debtor.

### **Section 175 – Money attachment terminated by payment, etc.**

531. This section provides that a money attachment ceases to be in force if the debt plus the expenses of the money attachment (insofar as they are chargeable against the debtor) are paid to the creditor, the messenger of court or any other person authorised to receive payment on behalf of the creditor. The attachment will also cease if any offer to pay that amount is not accepted within a reasonable time.

### **Section 176 – Redemption of banking instrument**

532. Subsection (1) permits a debtor, at any time before 14 days have expired from the date on which the report of the money attachment is made, to buy back a banking instrument. But subsection (2) prevents a debtor from doing so if the instrument is already the subject of an order for immediate realisation (see section 168).

533. If the debtor wishes to buy back the instrument the debtor must buy it at the value specified in the messenger of court's report of the money attachment (subsection (3)).

534. When the debtor pays the messenger of court, the messenger has to issue a receipt and report the buy back to the sheriff (subsection (4)). The issuing of the receipt stops the money attachment from having any effect on the instrument that has been bought back.

#### *Statement of money attachment*

### **Section 177 – Final statement of money attachment**

535. This section provides for a messenger of court to make a statement to the sheriff detailing everything that has happened in the course of the money attachment. The messenger has 14 days from the later of the day the creditor was paid under a payment order or the last of the money attached was returned to the debtor or a third party under the various provisions of this Part (subsections (1) and (2)).

536. The statement must specify details about any banking instruments with a value which subsequently have been realised, the amount realised for each instrument, any item with a value which has not been realised, any chargeable expenses, any sums paid to the creditor, any surplus paid or items with value returned to the debtor and any balance due to or by the debtor (subsection (4)). If the statement is made electronically it will require an electronically certified signature (see section 186(3) and (4)).

537. The messenger must submit the statement within the time limit, otherwise the messenger may be liable for some or all of the expenses of the money attachment unless there is a reasonable excuse for any delay (subsection (6)). The messenger may also be reported to the Scottish Civil Enforcement Commission for misconduct if the statement is late or is not submitted (subsection (7) and see section 58).

### **Section 178 – Audit of final statement under section 177(1)**

538. Subsection (1) provides that the sheriff must send the final statement of money attachment to the auditor of court who must check the expenses and fix the amount of expenses chargeable, confirm any balance due by or to the debtor and make a report to the sheriff. Under subsection (2) the auditor of court must not alter the statement without first giving all interested parties an opportunity to make representations. The auditor is not entitled to a fee for making the report to the sheriff (subsection (3)).

539. Subsection (4) provides that once the report from the auditor of court has been received, the sheriff must certify the balance due by or to the debtor but may make modifications to the

balance confirmed by the auditor of court. If the sheriff is satisfied that there has been a material irregularity in the carrying out the money attachment (other than the timing of the messenger of court's final statement), the sheriff can declare the attachment void. A consequence of that would be that the creditor would not be entitled to any sums paid under a payment and these would have to be paid back to the debtor (or a third party, if a third party claimed ownership of the attached money). But even if the money attachment is declared void a person who, in good faith, has purchased or otherwise obtained cash or a banking instrument that was attached can keep the money in question and remains the lawful owner.

#### *General and miscellaneous*

### **Section 179 – Money in common ownership**

540. Subsection (1) permits money which is owned in common between a debtor and third party to be attached.

541. Subsection (2) permits a third party who owns money in common with a debtor to buy out the debtor's share in the money so that the third party becomes the sole owner. This is done by paying the messenger an amount equal to the debtor's interest in the money. Before being able to buy out the debtor's share, the third party must first satisfy the messenger that the third party is a part owner of the money. But, if the messenger is not satisfied, the third party can apply to the sheriff and if the sheriff is satisfied as to the third party's ownership the buy out can go ahead.

542. Subsection (3) provides for the third party to apply to the sheriff for an order declaring the attachment of money owned in common to be unduly harsh on the third party. The application has to be made before the money is paid to the creditor under a payment order or is realised under an order for immediate realisation (see section 168). If the sheriff makes such an order the money attachment ceases in relation to the money owned in common.

543. Under subsection (4), where a sheriff makes an order under subsection (3) or where the third party buys out the debtor's interest in money, the messenger is permitted to attach other money owned and kept by the debtor at the place the original attachment was carried out. This is an exception to the normal rule in section 163(3) that a second money attachment in the same place is not allowed.

### **Section 180 – Procedure where money owned in common is disposed of**

544. Section 180 covers the situation where a third party claims common ownership of money with a debtor and does so before payment to the creditor under a payment order or realisation under an order for immediate realisation but the money is nevertheless paid to the creditor under the payment order or is transferred to another person under the provisions for realisation.

545. If the creditor subsequently admits that the third party was a common owner of the money or the third party gets an order from the sheriff stating that the third party was common owner then the creditor has to pay the third party an amount equal to the third party's share of the commonly owned money.

### **Section 181 – Unlawful acts after money attachment**

546. This section provides that a debtor who realises the value of an attached banking instrument or otherwise relinquishes the ownership of it is in breach of the money attachment. Anyone who assists the debtor to breach the money attachment (and who knew or ought to have known about the money attachment) is also treated as having breached the money attachment. Such a breach is to be treated as if the person was in contempt of court.

### **Section 182 – Appeals**

547. This section provides that an appeal against any decision of the sheriff (except decisions to grant an order for immediate realisation of an instrument under section 168) may be made to the sheriff principal only with the leave of the sheriff and on a point of law. There is no further right of appeal against the decision of the sheriff principal.

### **Section 183 – Recovery from debtor of expenses of money attachment**

548. Subsection (1) provides that any expenses of money attachment which can be recovered from the debtor can be recovered only by the money attachment to which those expenses relate. There is no other permissible method for recovering these expenses.

549. Subsection (2) provides that the expenses have to be recovered before the money attachment ceases to have effect or before the money attached is paid over to the creditor. Note that the amount of money attached is to include an amount to cover expenses (section 164(2)) so that when the money is paid over to the creditor there is an amount covering expenses (and under section 171(1) a messenger of court is entitled to retain an amount to cover the messengers fees and outlays before paying the money attached over to the creditor).

550. Where the debtor opposes a payment order or other application on frivolous grounds or makes an application under the provisions of this Part on frivolous grounds, the sheriff may award expenses relating to any such application, opposition or hearing against the debtor and in favour of the creditor (see paragraph 4 of schedule 3). Subsection (3) provides that in those circumstances decree for payment of those expenses is granted against the debtor and in favour of the creditor so that the creditor can recover those expenses (in other words recovery of those expenses does not have to be done by means of the original money attachment).

551. Subsection (4) lists circumstances (all of which being a type of insolvency process) which may prevent a money attachment from proceeding. In those circumstances the expenses of the money attachment are still chargeable against the debtor and if they are not dealt with in the insolvency process they can be recovered by a further money attachment.

### **Section 184 – Liability for expenses of money attachment**

552. Subsection (1) provides that schedule 3 to the Bill will determine the creditor's or debtor's liability for the expenses involved in serving a charge and in procedures for money attachment.

### **SCHEDULE 3 – EXPENSES OF MONEY ATTACHMENT (INTRODUCED BY SECTION 184)**

553. Paragraph 1 lists all the particular expenses in a money attachment that are to be chargeable against a debtor.

554. Paragraph 3 provides that the debtor and creditor are liable for their own expenses in relation to applications, objections, oppositions and hearings under this Part but paragraph 4 allows the sheriff to award expenses against one party in favour of the other if any of these actions are done on frivolous grounds.

#### **Section 185 – Ascription**

555. Section 185 sets out the order of allocating any sums paid by the debtor on account or attached by the money attachment while it is in force. The allocation is in the following order:

- the expenses of the money attachment which are chargeable against the debtor;
- any interest on the sum due under the decree accrued up to the date of the money attachment;
- the sum due under the decree (including interest on that sum running from the date of the money attachment).

#### **Section 186 – Interpretation**

556. Subsections (3) and (4) make provision for electronic signatures where any document that requires to be signed under this Part is submitted in electronic form. The signature has to be a certified electronic signature which complies with the requirements of the Electronic Communications Act 2000 (c.7).

### **PART 9 – DILIGENCE AGAINST EARNINGS**

#### **Section 187 – Simultaneous operation of arrestments against earnings where net earnings insufficient**

557. This section amends section 58 of the Debtors (Scotland) Act 1987 (the 1987 Act) so that, where a debtor is subject to both an earnings arrestment and a current maintenance arrestment, they will rank equally in the deductions from debtor's earnings if the debtor's net earnings are not sufficient to allow deduction of the full amounts due under each. Under section 58 as it currently stands, the earnings arrestment takes priority over the current maintenance arrestment.

558. Subsection (1) inserts new subsections (2) to (4) into section 58 in place of subsection (2). These subsections set out formulae which the employer must use to calculate an equal proportion of the available net earnings to satisfy both creditors when both types of arrestment are operating at the same time.

559. Schedule 3 to the 1987 Act makes provision for the disbursement by the sheriff clerk of deductions made by a debtor's employer under a conjoined arrestment order. Again, under the current law (contained in paragraph 4), where the sum deducted is not sufficient to allow the full amounts due to each creditor to be paid, priority is given to ordinary debts (i.e. debts which are recoverable by earnings arrestment).

560. Subsection (3) amends paragraph 4 and inserts a new paragraph 4A so that, where the deduction is not sufficient, it is divided proportionately among the various creditors rather than priority being given to ordinary debts.

### **Section 188 – Intimation of arrestment schedule**

561. This section amends section 70 of the 1987 Act. Subsection (2) amends section 70(1) to require the messenger of court, when serving an earnings arrestment schedule or a current maintenance arrestment schedule on the employer, to take all reasonably practicable steps to provide a copy of the schedule to the debtor.

562. Subsection (3) inserts new subsections (4A) and (4B) which place intimation and notification duties on employers on whom an earnings arrestment schedule, a current maintenance arrestment schedule or a conjoined arrestment order is served. An employer must provide the debtor with a copy of the earnings arrestment schedule or the current maintenance arrestment schedule and, in the case of each of those arrestments and in the case of a conjoined arrestment order, must notify the debtor of the date on which the first deduction from salary is to be made together with the amount to be deducted.

### **Section 189 – Provision of information**

563. Section 189 inserts new section 70A into the 1987 Act which specifies the information to be provided by the employer to the debtor, creditor and, in the case of a conjoined arrestment order, the sheriff clerk. It also specifies the dates on which the information is to be provided. The type of information covered is various details relating to the debtor's pay and information about a debtor who ceases to be employed by the employer. A power is given to the Scottish Ministers to prescribe, by regulations, other types of information to be provided under this section.

564. Section 189 also inserts new sections 70B, 70C and 70D into the 1987 Act.

#### *New section 70B – Failure to give notice under section 70A(5)*

565. This section provides that where an employer fails to notify creditors when a debtor's employment is terminated and provide details of any new employment, a creditor may apply to the sheriff for an order requiring the employer to provide certain information and to pay the creditor an amount not exceeding twice the amount recoverable by that creditor from the debtor. Subsection (2) provides that this amount will reduce the debt owed to the creditor by the same amount.

566. Under subsection (3) the employer may, before 14 days expire from the date the order is made, appeal, on point of law only, to the sheriff principal whose decision will be final.

567. By virtue of an amendment of section 105 of the 1987 Act by paragraph 16(10) of schedule 5 to this Bill, section 70B does not apply to Her Majesty as an employer.

*New section 70C – Creditor’s duty to provide information*

568. This section specifies the information to be provided by the creditor to the employer and the dates on which that information is to be supplied.

*New section 70D – Debtor’s duty to provide information*

569. This section provides that a debtor must notify a creditor of any change in their employment status.

**Section 190 – Conjoined arrestment orders: jurisdiction**

570. This section amends section 73(1)(c) of the 1987 Act to make it clear that the references to the sheriff in particular sections of the 1987 Act are to the sheriff who has jurisdiction over (a) the principal place of employment of the debtor, (b) where that principal place of employment is outside Scotland, any other place of employment in Scotland or (c) where neither of the foregoing apply, the debtor’s domicile.

**Section 191 – Arrestment of seamen’s wages**

571. By virtue of section 73(3)(c) of the 1987 Act, wages of seamen (other than fishermen) are not treated as earnings for the purposes of earnings arrestments under the 1987 Act. This section repeals section 73(3)(c) of the 1987 Act. This has the effect of removing this exemption. This section also repeals subsection (4) of section 73, which contains definitions of “seaman” and “fishing boat” (expressions used in section 73(3)(c)) which are no longer required.

**PART 10 – ARRESTMENT IN EXECUTION AND ACTION OF FURTHCOMING**

**Section 192 – Arrestment in execution**

572. Section 192 inserts new Part 3A into the Debtors (Scotland) Act 1987 (the “1987 Act”). This new Part contains 14 new sections dealing with the diligence of arrestment and the related action of furthcoming.

573. Arrestment is a diligence which allows a creditor to attach a debtor’s moveable property, such as goods or funds (for example, funds held in bank accounts). Arrestment can be used only where these assets are owed to the debtor but are in the possession of a third party. The third party is known as the “arrestee” and is often a bank or financial institution. If the assets are not in the possession of a third party the diligence of attachment (or, in the case of money, money attachment) may be available.

*These documents relate to the Bankruptcy and Diligence etc. (Scotland) Bill (SP Bill 50) as introduced in the Scottish Parliament on 21 November 2005*

574. Arrestment simply attaches the assets held by a third party, it does not transfer ownership of the assets to the creditor. To complete the diligence and have the assets handed over, the creditor can raise an action of furthcoming. In many cases the formal action of furthcoming is not necessary as the debtor completes a mandate permitting the third party to hand over the assets to the creditor in satisfaction of the debt.

*New section 73A – Arrestment and action of furthcoming to proceed only on decree or document of debt*

575. Subsection (1) provides that arrestment is permitted only to enforce a court decree (including a summary warrant) or a registered document of debt where the warrant or extract of the decree or document authorises arrestment. But if the decree is a summary warrant, arrestment can only be executed if the debtor has been charged to pay the debt and the period of the charge (14 days or 28 days if the debtor is outside the UK or the debtor's whereabouts are unknown) expires without the debt being paid (subsection (2)). In any other case, no prior charge is required before arrestment may be executed. Any existing rule of law relating to the types of decrees or documents on which arrestment can proceed is abolished if the rule is inconsistent with these provisions.

*New section 73B – Schedule of arrestment to be in prescribed form*

576. This section enables the Scottish Ministers to prescribe the form of schedule of arrestment to be used.

*New section 73C – Arrestment on the dependence followed by decree*

577. Where a creditor obtains a final decree in their favour at the conclusion of a court case and the creditor had arrested property of the debtor on the dependence of the outcome of the case that arrestment (known as “arrestment on the dependence”) then, under common law, becomes an arrestment in execution of the final decree. In these circumstances section 73C provides that the creditor will be required to serve a copy of the final decree, in the form prescribed in rules of court, on the arrestee. This gives the arrestee notice that the arrestment on the dependence has become an arrestment in execution and may be followed by an action of furthcoming, a mandate to release the assets held or by the automatic release of funds under new section 73H.

*New section 73D – Funds attached*

578. New section 73D provides rules to limit the sums that may be attached by an arrestment in execution which secures a sum of money held by the arrestee (for example, money held by a bank in an account in the debtor's name).

579. This section changes the common law under which the words “more or less” in the arrestment schedule of a validly executed arrestment in execution attach the whole of the debtor's moveable property in the possession of the arrestee rather than merely enough property to cover the value of the debt due by the debtor to the arresting creditor. That rule operates regardless of the size of the actual debt due.

580. Subsection (1) sets out the circumstances in which the rules in this section apply. For this section to apply to arrestment in execution of a decree there must not have been an arrestment on

the dependence of the action in which the decree is granted. The sum attached in those cases is determined at the point at which the arrestment on the dependence is granted (see section 15H of the 1987 Act inserted by section 156 of the Bill). Paragraph (b) clarifies that this section applies to an arrestment where the arrestee holds the debtor's funds, even where the arrestee also holds other moveable property belonging to the debtor.

581. Subsection (2) provides that the funds attached by the arrestment will be the lesser of:

- the amount of the money held by the arrestee on the debtor's behalf (referred to as the debt due to the debtor by the arrestee because sums of money held, for example, by a bank in a person's account is in fact a debt owed by the bank to the person for the balance in the account); or
- the sum arrived at by the formula set out in paragraph (b). The formula requires adding up the amount of the principal sum claimed in the decree or document, any expenses chargeable against the debtor under the decree or document, the expenses of carrying out the arrestment, interest on the principal sum up to and including the date of the arrestment plus interest that may accrue in the year following that and interest on the expenses of the arrestment itself plus an amount to be specified by the Scottish Ministers in regulations which approximates to the average expenses chargeable against a debtor in an action of furthcoming.

582. If the amount held by the arrestee is not enough to cover the sum arrived at under the subsection (2)(b) formula and the arrestee also holds other moveable property belonging to the debtor, subsection (4) provides that the arrestment will attach all the moveable property of the debtor held by the arrestee in addition to any amount of money due to the debtor and held by the arrestee. Subsection (5) provides that in any other case (in other words, where the amount of money held by the arrestee is enough to cover the amount arrived at in the subsection (2)(b) formula) the arrestment will not attach any other moveable property and attaches only the amount of money arrived at under subsection (2).

583. Note that any amount of money attached by this section may be reduced by the provisions of new section 73E.

*New section 73E – Protection of minimum balance in certain bank accounts*

584. New section 73E provides debtors with a minimum level of balance of funds within bank and other accounts which cannot be attached by an arrestment.

585. Section 73E applies to both arrestments in execution and arrestments on the dependence providing the arrestment attaches funds of a debtor held by a bank or similar financial institution. It applies only if the debtor is an individual (not a company, partnership or other body or organisation) and the account in question is not a trading account and is not in the name of a company, partnership or other association (subsections (1) and (2)).

586. Subsections (3) and (4) have the effect of preventing the attachment of an amount below the amount which, in an earnings arrestment, cannot be arrested when a person is paid monthly. This amount is currently £304. So where the sum held by the arrestee is more than that amount,

only the funds over that amount are available for arrestment. If the sum in the debtor's account is less than that amount, no funds are attached.

587. Subsection (5) defines what is meant by "bank or other financial institution".

588. Under subsection (6), the Scottish Ministers may, by regulations, modify the types of account or vary any descriptions of the types of account that section 73E applies to. Also the definition of "bank or other financial institution" may be modified by regulations to add or remove types of financial institution or vary any of the descriptions of the types of institution.

*New section 73F – Arrestee's duty of disclosure*

589. New section 73F provides for a new legal obligation to be placed on arrestees to disclose to an arresting creditor the existence of and the value of assets attached by an arrestment. Where nothing is arrested, there is no need for the arrestee to provide a "nil" return. The disclosure has to be submitted in the prescribed form within 3 weeks of the date on which the schedule of arrestment is served on the arrestee. A copy of the disclosure must be sent to the debtor.

*New section 73G – Failure to disclose information*

590. Subsection (1) provides that, where an arrestee fails to make a disclosure, the sheriff may, on the application of the creditor, order the arrestee to pay the creditor the lesser of either the sum due by the debtor to the creditor or the amount which represents the minimum protected balance in bank accounts which are subject to an arrestment (currently £304).

591. Subsection (2) provides that in the case of an arrestment on the dependence of an action, the sanction in subsection (1) cannot be applied until the creditor has served a copy of the final decree in the action (see section 73C). Alternatively, the failure to disclose information can be treated as a contempt of court in arrestment on the dependence cases.

592. Where the arrestee does pay over a sum ordered under subsection (1) following a failure to disclose information, subsection (3) provides that the amount paid reduces the debt owed by the debtor to the creditor by that amount and the arrestee is not allowed to recover that amount from the debtor.

593. Subsection (4) gives an arrestee a right of appeal against an order to pay money to the creditor following a failure to disclose information. The appeal must be made to the sheriff principal before 2 weeks expire from the date of the order and can only be on a point of law. There is no further right of appeal.

*New section 73H – Automatic release of arrested funds*

594. New section 73H provides for a new procedure by which a creditor can obtain arrested funds automatically after the expiry of defined period. Where funds are released under this procedure there is no need for an action of furthcoming or for the debtor to grant mandate to release funds.

595. Subsection (1) states that the automatic release of funds can apply only when the arrestment is an arrestment in execution (even if it originally was an arrestment on the dependence) and it attaches funds held by the arrestee and owing to the debtor.

596. The automatic release of funds under this section is to take place at the end of the period of 14 weeks starting on the date of the service of the schedule of arrestment or (if the arrestment was originally executed on the dependence) the date of service of the copy of the final decree. Automatic release may be prevented by any of the events mentioned in new section 73K(1).

*New section 73J – Sums released under section 73H(2)*

597. New section 73J states how to work out the amount which is to be released under the automatic release procedure. The sum to be released must be the lowest of:

- the sum attached by the arrestment (which is calculated under section 73D and may be limited by the protected minimum balance provisions in section 73E);
- the amount the arrestee holds on behalf of the debtor; or
- the sum calculated under a formula similar to that set out in section 73D(2)(b) but without any amount representing the average costs of an action of furthcoming (which is not needed if the funds are released) and limiting the interest charged to interest up to the date of release (rather than 1 year's interest as under section 73D(2)(b)).

*New section 73K – Circumstances preventing automatic release*

598. Subsection (1) sets out the circumstances which prevent an arrestee automatically releasing funds under section 73H. The circumstances are that the arrestee or debtor gives notice of objection, an action of multiplepointing is raised (which is an action where there are competing claims as to ownership of attached property held by an arrestee, for example more than one creditor of the debtor attempts to arrest the funds), the arrestment is recalled or restricted or otherwise ceases to have effect or the debtor has already granted a mandate to release the funds to the creditor.

599. There are several ways in which the arrestment may be recalled or restricted. It may be instigated by the debtor or a time to pay direction may have been granted in relation to the debt (see section 9 of the 1987 Act which provides that any arrestment may be recalled or restricted when a time to pay order is granted). An arrestment may also be recalled if a debt payment programme is approved under the 2002 Act and associated regulations (See regulation 35(1)(a) of the Debt Arrangement Scheme (Scotland) Regulations 2004 (SSI 2004/468)).

600. Any objection to automatic release must be on the grounds that the arrestment is invalid or has been executed improperly or irregularly (subsection (3)) and it must be made within 4 weeks of the schedule of arrestment (or, in the case of an arrestment which was originally on the dependence, the copy of the final decree) being served.

*Relevant consequential amendments in schedule 5*

601. It is appropriate to deal with some of the amendments made in schedule 5 to the Bill here.

602. Paragraph 13(3)(c)(ii) of schedule 5 amends section 37(4) of the 1985 Act which provides for the effects of sequestration on diligence. Section 37(4) of the 1985 Act prevents an arrestment or attachment of a debtor's estate which is executed either within 60 days before the date on which the debtor is sequestrated or on or after the sequestration date from creating a preference for the arresting or attaching creditor. The amendments made in paragraph 13(3)(c)(ii) ensure that any funds which are automatically released under section 73H in an arrestment executed within that time are handed over to the trustee in sequestration.

603. Paragraph 16(2) of schedule 5 amends section 2(2) of the 1987 Act to provide that arrested sums cannot be released under section 73H if the debt is subject to a time to pay direction.

604. Paragraph 16(4) of schedule 5 amends section 5 of the 1987 Act by inserting new subsection (5A). This new subsection restricts the sheriff to making a time to pay order within the first 8 weeks of the 14 week period set out in section 73H.

605. Paragraph 16(5) of schedule 5 amends section 9(4) of the 1987 Act to allow the sheriff to order that that no further steps are taken to release the sum attached by an arrestment if a time to pay order is in force.

*New section 73L – Hearings following notice of objection*

606. Subsection (1) provides that the sheriff must hold a hearing where the automatic release of attached funds is objected to by the debtor or arrestee. The hearing must be held within 8 weeks of the day the notice of objection was given to the interested parties.

607. Under subsection (2) the sheriff can make an order recalling or restricting the arrestment where the sheriff is satisfied that the objection is upheld. If the sheriff rejects the objection, the sheriff may stipulate by order that automatic release must occur at the end of the 14 week period set out in section 73H(3). Note that the debtor or arrestee has 4 weeks to object to automatic release and the hearing on an objection must be held within 8 weeks. There is therefore a minimum of 2 weeks between the latest date on which an objection must be dealt with and the date on which the automatic release is due to occur. There is no provision for the date of automatic release to be moved.

608. Further procedure on hearing objections will be set out in rules of court.

*New section 73M – Arrestee not liable for funds released in good faith*

609. New section 73M makes it clear that arrestees are not liable to the debtor where they release funds in good faith to a creditor because the arrestee was unaware that the arrestment was invalid or was incompetently or irregularly carried out.

*New section 73N – Mandate to be in prescribed form*

610. Section 73N formalises the voluntary mandate by which debtors enable the arrestee to release arrested funds or other property to creditors without having to proceed to an action of furthcoming. The mandate must now be in a form prescribed by the Scottish Ministers by

regulations. If a mandate is not in the prescribed form (or is not as nearly as possible in that form) it is invalid. Subsection (3) provides that where a mandate is invalid but the arrestee pays over funds or hands over property, the arrestee is not liable for financial loss caused by releasing the funds or property provided they acted in good faith (for example, the arrestee did not know and could not reasonably have known that the mandate was not in the proper form).

*New section 73P – Arrestment of ships etc.*

611. This section makes clear that the provisions of this part of the Bill do not apply to the arrestment of ships, cargo or other maritime property which are subject to special rules (see in particular Part V of the Administration of Justice Act 1956 which is amended by Part 14 of this Bill).

**PART 11 – MAILLS AND DUTIES, SEQUESTRATION OF RENT AND LANDLORD'S HYPOTHEC**

*Abolition of maills and duties*

**Section 193 – Abolition of maills and duties**

612. Subsection (1) abolishes the diligence of maills and duties which enabled creditors who had a security over heritable property to recover rents due from tenants of that property. For instance, where a creditor had a security over a debtor's land and the debtor lets the land to a tenant, the creditor could raise an action of maills and duties to attach the rent due from the debtor's tenant. Maills and duties was not available to creditors holding standard securities and was therefore not widely used.

613. Subsection (1) also ensures that any legislative provision or rule of law relating to maills and duties no longer has effect.

614. Subsection (2) limits the effect of the abolition by providing that it does not affect any action of maills and duties which has been commenced prior to this section coming into force.

615. Consequential repeals are set out in Schedule 6.

*Landlord's hypothec and sequestration for rent*

**Section 194 – Abolition of sequestration for rent and restriction of landlord's hypothec**

616. Under the common law a landlord has a right in security over certain moveable property situated in the subjects which the landlord has leased. The security is known as the landlord's hypothec and it secures 1 year's rent due from a tenant. The security could be enforced by an action of sequestration for rent which attached the goods secured by the hypothec and permitted the landlord to obtain warrant to sell the goods in satisfaction of the rent. This action was available to a landlord in addition to any other diligence such as attachment or arrestment which would also be available to the landlord as a creditor of a tenant.

617. This section abolishes the diligence of sequestration for rent and makes various changes to the law relating to the landlord's hypothec.

618. The abolition of sequestration for rent does not affect any action for sequestration for rent brought before this section comes into force but the provisions in subsections (5) to (7) limiting the property which is subject to the landlord's hypothec and therefore attachable by sequestration for rent will apply to existing actions (subsection 10).

619. Subsection (2) preserves the landlord's hypothec and makes clear the nature of the security it confers. It continues as a real right in security over corporeal moveable property and as a result it gives the landlord a preference in any ranking process relating to property over which it confers a security.

620. Subsection (3) limits the landlord's hypothec. It no longer confers any security over property kept in a dwellinghouse, on agricultural land or on a croft. A "dwellinghouse" for this purpose does not include a garage (even if built into a house), garden shed or other outbuildings but a mobile home, caravan or houseboat is considered to be a dwellinghouse.

621. Under subsection (4), the hypothec will no longer arise in relation to property owned by a person other than the tenant.

622. Subsection (5) provides that the hypothec does not affect any property which is acquired by a third party from the tenant in good faith, or, where a landlord has interdicted a tenant from disposing of property subject to the hypothec any property bought in good faith and for value by a third party from a tenant. But if property is sold by a tenant in breach of an interdict, the tenant remains liable for the breach despite the property no longer being subject to the hypothec due to subsection (5)(b).

623. Where property is in shared ownership by the tenant and a third party, the hypothec can secure only the tenant's interest in the property (subsection (7)).

624. Subsection (8) provides that the landlord's hypothec is security for any rent for which the date for payment has passed and payment has not been made (so it cannot be security for future rent due) and that it continues as long as the rent remains unpaid. This overrides the common law rule that the hypothec secures 1 year's rent and lapses if not enforced by sequestration for rent within 1 month of the date the rent was due.

625. Any landlord's right of hypothec which was created before this section comes into force is not affected by this section other than the provisions of subsections (5) to (7) regarding property acquired in good faith by a third party or owned in common.

## **PART 12 – SUMMARY WARRANTS, TIME TO PAY AND CHARGES TO PAY**

### **Section 195 – Summary warrants, time to pay and charges to pay**

626. Summary warrants are used by:

- local authorities to collect council tax, non-domestic rates, and community charge (poll tax) arrears;
- water authorities to collect water and sewerage charges; and

*These documents relate to the Bankruptcy and Diligence etc. (Scotland) Bill (SP Bill 50) as introduced in the Scottish Parliament on 21 November 2005*

- Her Majesty's Revenue and Customs to collect taxes and duties.

627. The 1987 Act introduced time to pay directions and time to pay orders, which if granted by the court on application by the debtor 'freeze':

- further diligence by the creditor; or
- an application by the creditor for sequestration of the debtor.

628. The 1987 Act also requires that a statutory form of charge to pay on 14 days' notice (28 days if the debtor's whereabouts are unknown or the debtor is outside the UK) is served on the debtor in some circumstances, and that certain diligences may be used only if the debtor has failed to pay as charged. Time to pay and charge to pay under the 1987 Act have not previously applied to debts enforced under a summary warrant.

629. Subsection (1) amends section 10 of the 2002 Act with the effect that attachment under the 2002 Act in respect of summary warrant debt is competent only after a charge to pay has been served on the debtor, and the days of the charge have expired without payment.

630. Subsection (2) amends section 1 of the 1987 Act with the effect that it is competent for the court when granting decree for payment in a court action to make a time to pay direction where the debt relates to:

- rates; or
- community charge, community water charge, council tax or council water charges.

631. Subsection (3) amends section 5 of the 1987 Act with the effect that the general bar against time to pay orders on summary warrant debt is repealed, and that it is competent for the court to make a time to pay order after decree in respect of the types of debt covered by section 195(2). Note that it remains incompetent to grant a time to pay order in relation to debts of the types listed in section 5(4)(d) and (f) of the 1987 Act (that is various taxes and duties and social security contributions) regardless of whether they are enforced under a summary warrant or an ordinary decree for payment. Subsection (4) contains amendments consequential on the changes made by subsections (2) and (3).

632. Paragraphs (a) and (c) of subsection (5) amend section 90 of the 1987 Act with the effect that a charge to pay is required before a creditor with a debt enforceable under a summary warrant can use the diligence of earnings arrestment. The reference to attachment under the 2002 Act is repealed in consequence of the effect of subsection (1) (which amends section 10 of the 2002 Act so that it has the same effect for attachment as these amendments have for earnings arrestments).

633. Paragraphs (b), (d) and (e) of subsection (5) amend section 90 of the 1987 Act with the effect that the provisions of section 90 relating to charges to pay (i.e. that it must be in the form set out in rules of court, that diligence must be executed within 2 years of the charge and that a further charge can be served to reconstitute the right to do diligence) apply to all diligences

where a charge to pay must be served and have expired before diligence is competent (this includes the new diligences of money attachment, land attachment and residual attachment).

## **PART 13 – AMENDMENTS OF THE DEBT ARRANGEMENT AND ATTACHMENT (SCOTLAND) ACT 2002**

### **Section 196 – Amendments of the Debt Arrangement and Attachment (Scotland) Act 2002**

634. Section 196 textually amends the Debt Arrangement and Attachment (Scotland) Act 2002 (the 2002 Act).

635. Subsection (2) repeals the requirement that a debtor signs an application for a debt payment programme. Subsection (3) repeals the requirement that a debtor or creditor, as appropriate, signs an application for a variation of a debt payment programme.

636. Subsection (4) amends the definition of “debt advice and information package” to give the Scottish Civil Enforcement Commission, established under section 43, the power to determine the content of that package of documents and removing the power of the Scottish Ministers to do so.

637. Subsections (5) and (7) to (10) make a number of amendments to the 2002 Act to facilitate certain aspects of the attachment process which require to be carried out by messengers of court. It is unclear under the Act as currently drafted whether the same messenger of court has to be used for certain stages of the attachment process or whether a different messenger can be used at each stage. The amendments make it clear that each step in the attachment process can be carried out by any messenger of court.

638. Subsection (6) inserts new section 19A into the 2002 Act which gives a new power to court officers in relation to the urgent removal of attached articles. The new section provides that a messenger of court may remove an attached article without notice if it is considered necessary to secure or preserve the value of the article and there is no time to obtain an order from a sheriff permitting the messenger to secure particular articles (see section 20(1)(a) of the 2002 Act). In these circumstances an article will be moved to the nearest convenient premises of the debtor or the person in possession of the items but if the debtor or person does not have any premises which are convenient or the messenger of court thinks those premises are unsuitable for storing the article the messenger can take the articles to other secure premises.

639. Subsection (11) inserts new subsections (1A) and (1B) into section 31 of the 2002 Act. Subsection (1A) provides that where an article is sold at auction at less than the value assigned to it when it was attached, the difference between that price and the value will be credited against the sum owed. In other words the debtor benefits from having the debt reduced by the amount the item was valued at even if it does not actually sell for that value at auction. Subsection (1B) provides that where an article has been damaged and revalued and the damage was not caused by the fault of the debtor and no sum has been consigned into the court by a third party to compensate for the damage, the revaluation is disregarded for the purposes of subsection (1A) and the original value is the value that is credited against the debt after the sale even if the sale price of the item was less than that.

640. Subsection (12) inserts new section 60A into the 2002 Act.

*New section 60A – Electronic signatures*

641. This section makes provision for electronic signatures where any document that requires to be signed under the 2002 Act is submitted in electronic form (regulations or rules of court made under the Act may permit certain documents to be submitted electronically). The signature has to be a certified electronic signature which complies with the requirements of the Electronic Communications Act 2000 (c.7).

642. Subsection (13)(a) inserts sub-paragraph (oa) into paragraph 1 of schedule 1 to the 2002 Act which provides for the expenses of serving a notice on the debtor setting out the date when an officer intends to enter a dwellinghouse to execute an exceptional attachment order to be chargeable against the debtor.

643. Subsection (13)(b) inserts new paragraph 1A into schedule 1 to the 2002 Act which provides that the expenses of removing attached articles, opening and shutting locked places for the purposes of removing the articles and storing those articles cannot be charged against the debtor if the articles are removed under the urgent removal provisions of new section 19A(1).

**PART 14 – ADMIRALTY ACTIONS AND ARRESTMENT OF SHIPS**

**Section 197 – Admiralty actions and the arrestment of ships: modification of enactments**

644. This section introduces schedule 4.

**SCHEDULE 4 – MODIFICATIONS OF ENACTMENTS RELATING TO ADMIRALTY ACTIONS AND THE ARRESTMENT OF SHIPS (INTRODUCED BY SECTION 197)**

645. Schedule 4, introduced by section 197, makes amendments to the law relating to admiralty actions and the arrestment of ships.

*Definition of “maritime lien”*

646. Paragraph 1(c) inserts a new subsection (2) into section 48 of the Administration of Justice Act 1956 (the “1956 Act”) defining the term “maritime lien” for the purposes of the 1956 Act and any other legislation where that term is used. In Scots law a “lien” is a right in security over property where that property is in the possession of the creditor. Where a creditor has a right in security over moveable property which is not in the creditor’s possession that right is known in Scots law as a “hypothec”. However, in international maritime conventions and in other jurisdictions, where a creditor in a maritime claim has a real right in security over a ship, cargo or other maritime property (such as wreck, flotsam or jetsam) which is not necessarily in the creditor’s possession, the right is referred to as a “maritime lien”. Strictly, a maritime lien is a type of hypothec in Scots law and the insertion of the definition in new subsection (2) makes this clear whilst retaining the usage of the term “maritime lien” to maintain consistency with international usage.

647. Paragraph 2 provides for consequential amendments arising from paragraph 1.

648. The list of claims in respect of which a vessel may be arrested is contained in section 47(2) of the 1956 Act (the “section 47(2) list”). Paragraph 3 extends section 47(2)(r) of the 1956 Act so that applies to claims arising out of any type of charge held over a ship.

*The term “admiralty action”*

649. Paragraph 4(a) inserts the term “respondentia” into paragraph (h) of the section 47(2) list. Respondentia is a security granted over the cargo contained in a ship for a loan advanced in consideration of a particular voyage.

650. Paragraph 4(b) inserts new subsection (2A) after the section 47(2) list. This gives the label “admiralty action” to any action (whether in the Court of Session or sheriff court) enforcing a claim in the section 47(2) list.

651. Paragraph 5 provides for 2 amendments consequential on the creation of the term “admiralty action”.

*Arrestment in rem granted by the sheriff*

652. Paragraph 6 inserts new section 47A after section 47 the 1956 Act to set out the jurisdictional limits of a warrant to arrest in rem a ship, cargo or other maritime property granted by a sheriff. It provides that the warrant may be executed either within the territorial jurisdiction of the sheriff court from which the warrant was granted, or anywhere in Scotland provided the ship, cargo or maritime property was within the territorial jurisdiction of the sheriff court which granted the warrant, when the warrant was granted.

*Arrestment on the dependence*

653. Paragraph 7(2) makes amendments to section 47(1) of the 1956 Act which provide that arrestment on the dependence of a ship, or other maritime property which is not cargo, is competent only if, when the ship in question is the ship with which the action is concerned, the defender is the owner of the ship or a share in the ship, or is the demise charterer of the ship, at the time when the arrestment is executed. It continues to be competent to arrest another ship on the dependence providing the defender owns all the shares in that ship.

654. Note that the restrictions imposed by section 47(1) do not apply to the arrestment of cargo which is specifically excluded from this provision by the amendment in paragraph 7(2)(a).

655. Paragraph 7(3) inserts new subsections (1A) and (1B) into section 47 of the 1956 Act. These subsections provide that when a ship has been arrested on the dependence of an action, a warrant cannot be granted to arrest on the dependence of the same action the same ship or any other ship which the defender owns at least a share in unless the pursuer can demonstrate good cause for the second arrestment. This is consistent with the wording in article 3(1) of the leading international convention on the arrestment of ships (the Brussels Arrest Convention of 1952).

656. Paragraph 7(4) amends section 47(3) of the 1956 Act (which provides for the arrestment of a ship to enforce a claim specified in paragraphs (p) to (s) of the section 47(2) list) making it

clear that an arrestment to which this provision applies may arrest a share in a ship rather than the whole ship.

*Liability for losses and expenses*

*New section 47B – Expenses*

657. Paragraph 8 inserts new section 47B into the 1956 Act.

658. Subsection (1) provides the court with the power to award the creditor the expenses of obtaining warrant for and executing an arrestment of a ship, cargo or other maritime property on the dependence. But the court may modify or refuse the creditor's right to these expenses if the pursuer was unreasonable in applying for a warrant or if the court thinks it is reasonable to modify or refuse the award of expenses (subsection (3)).

659. Subsection (2), entitles the defender to expenses in opposing the grant of the warrant where warrant is granted but the creditor was unreasonable in applying for the warrant. Again the court can modify or refuse these expenses if satisfied that it is reasonable to do so. In particular the court should take account of the outcome of the action.

660. If any other question arises in relation to the expenses of obtaining or opposing a warrant or of executing the arrestment, subsection (5) provides the court with the discretion to deal with it.

661. Subsection (6) provides that expenses of obtaining warrant for arrestment or opposing the warrant are to be treated as expenses of process.

662. Subsection (7) provides that any legislation or rule of law which deals with the recovery of expenses of executing an arrestment on the dependence of a court action which are chargeable against the debtor is not affected by the rules set down by subsections (1) to (4).

663. Subsection (8) provides the court with discretion to deal with the expenses incurred in obtaining a warrant granted for arrestment *in rem* in enforcing a claim listed in paragraphs (p) to (s) of the section 47(2) list or in opposing an application for it.

*Factors affecting arrestments*

664. Paragraph 9 inserts new section 47C into the 1956 Act. Subsection (1) of that new section provides that an arrestment of cargo can be executed only where the cargo is on board a ship when the arrestment is executed. Cargo which is not on board a ship is subject to the diligence of attachment (provided the nature of cargo does not make it exempt from attachment on some other ground). The amendment to section 11 of the Debt Arrangement and Attachment (Scotland) Act 2002 made by paragraph 10 prevents cargo from being attached when it is on board a ship.

665. Arrestment of moveable property is normally competent only when the property is in the hands of someone other than the debtor. Attachment is usually the appropriate diligence to use when moveable property is in the hands of the debtor. Subsection (2) of new section 47C makes

it clear that, as an exception to the normal position, cargo on board a ship can be arrested where it is in the hands of the debtor or a person acting the debtor's behalf .

666. Paragraph 9 also inserts new section 47D which has the effect that where cargo on board a ship is arrested, the ship is itself treated as if it has been arrested until the cargo is taken off the ship. The ship is therefore prevented from setting sail and the creditor can apply for ancillary warrants to dismantle the ship or have it brought into harbour providing it can be shown that this course of action is necessary.

*Cargo on board a ship exempt from attachment*

667. See paragraph 664.

*Location of a ship when arrestment executed*

668. Paragraph 11(a) inserts new subsections (5A) and (5B) into section 47 of the 1956 Act. The new subsections provide that an arrestment of a ship, cargo or other maritime property can be executed no matter where the ship or maritime property is situated so long as it is within the territorial jurisdiction of the court (note that cargo must be on board a ship if it is to be arrested). In other words, a ship is still treated as a ship even where it has run aground or is in a dry dock.

669. Paragraph 11(b) amends subsection (6) of section 47 to make it clear that a ship (or cargo on board it) cannot be arrested while the ship is on passage.

*Demise charterers*

670. Paragraph 12 inserts new sections 47E to 47H into the 1956 Act dealing with demise charterers. A demise charter is a type of lease of a ship (often including the services of the master and crew). A demise charterer takes possession of the ship and operates the ship. The length of demise charters can vary from short (1 or 2 years) to long (20 years or the lifespan of the ship). Often the charterer has an option to buy the ship outright at the end of the agreed term. In practice the demise charterer is treated as the owner of the ship as the charterer has control over the operation of the ship and over the master and crew. But the owner in the legal sense remains the person who granted the charter.

*New section 47E – Sale of a ship arrested on the dependence of an action against demise charterer*

671. New section 47E makes special provision to allow the pursuer in an admiralty action against a demise charterer to be entitled to complete diligence by judicial sale of a ship which has been arrested on the dependence of the action. The sale is competent even though the ship is likely to belong to a third party.

672. Subsection (2) provides for termination of the arrestment of the ship if the owner or the demise charterer either pays the debt due, or offers the sum in payment and that offer is not accepted within a reasonable time.

673. Under subsection (3) the court may make an order for the sale of the ship on behalf of the pursuer and under subsection (4) the court must rank any claims on the proceeds of the sale (but taking into account section 47G, see paragraph 676).

674. Subsection (5) provides that a ship so sold transfers to the buyer free from any other claim or encumbrance, including any claim of the previous owner who granted the demise charter. The buyer becomes the new owner of the ship and not just the new demise charterer of it.

*New section 47F – Ranking of arrestments on sale of ship chartered by demise*

675. New section 47F provides that in competitions in ranking in respect of the proceeds of the judicial sale of a ship, or a share of a ship, arrestment of the ship enforcing the ship owner's debts will be preferred to arrestment enforcing those of the demise charterer even if the arrestment relating to the owner was executed after the arrestment relating to the demise charterer.

*New section 47G – Ranking of arresting creditor of demise charterer in sequestration or winding up of owner*

676. New section 47G provides that a creditor of a demise charterer who has arrested the chartered ship on the dependence of an action against the demise charterer will be entitled to claim a dividend or preference (if any) resulting from the sale of the ship in the event of the ship's owner being sequestrated or wound up. The creditor has no rights over the proceeds of sale of any other asset belonging to the owner. Subsection (3) applies the provisions of the Bankruptcy (Scotland) Act 1985 and the Insolvency Act 1986 which have the effect of equalising diligences executed later than 60 days before a sequestration or winding up to an arrestment against a demise charterer where the ship owner is sequestrated or wound up.

*New section 47H – Arrestment to found jurisdiction in action against a demise charterer*

677. New section 47H has the effect that where a pursuer wishes to raise an action against a demise charterer to enforce a claim listed in the section 47(2) list but the demise charterer is not within the jurisdiction of the court, the pursuer can arrest the ship under demise charter (providing it is within the court's jurisdiction) to found jurisdiction for the action and allow it to be heard by that court.

678. Paragraph 13 amends section 6(c) of the Sheriff Courts (Scotland) Act 1907. It is linked with the provision in new section 47H and it makes clear that the arrestment of a ship within the jurisdiction of the sheriff and which is under demise charter will bring the demise charterer within the jurisdiction of the sheriff even though the charterer would not normally be subject to that jurisdiction.

## **PART 15 – DISCLOSURE OF INFORMATION**

### **Section 198 – Information disclosure**

679. Section 198 deals with the disclosure of information. Subsection (1) gives the Scottish Ministers a power to make provision by regulations for the obtaining of information by creditors

about debtors by making an application to the sheriff. These regulations may make provision about the disclosure of that information to creditors to assist diligence and enforcement of payment of debts due by decree and document of debt. Subsection (2) sets out some of the things that regulations under subsection (1) could cover.

680. Subsection (3) states that the regulations cannot provide for the debtor to be ordered to disclose information. Subsection (4) makes it clear that any regulations under subsection (1) do not affect (and do not override) any existing legislation or common law about the power to disclose or use information, or to order its disclosure or use.

681. Subsection (5) states that the disclosure or use of information under the regulations at subsection (1) is not to be regarded as a breach of any restriction on the disclosure or use of such information.

682. Subsection (6) states that the first set of regulations made under subsection (1) must be subject to the affirmative resolution procedure of the Scottish Parliament.

## **PART 16 – GENERAL AND MISCELLANEOUS**

### **Section 201 – Orders and regulations**

683. Section 201 has the effect that statutory instruments made under this Act are subject to the negative resolution procedure of the Scottish Parliament, unless the instrument modifies another enactment such as an Act (including this Bill) in which case it is subject to the affirmative resolution procedure. This provision does not apply to statutory instruments made under powers inserted by this Act into other legislation.

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## **FINANCIAL MEMORANDUM**

### **INTRODUCTION**

684. The Policy Memorandum which is published separately explains in detail the policy intention of the Bankruptcy and Diligence etc. (Scotland) Bill. The purpose of this Financial Memorandum is to set out the costs associated with the reform measures introduced by the Bill, and as such it should be read in conjunction with the Bill and the other accompanying documents.

685. This Memorandum considers the financial effect of the reforms in the Bill. In doing so, the approach taken has been to err towards a higher rather than a lower cost. The figures are based on:

- assumptions made by three Executive agencies—
  - Accountant in Bankruptcy (“AiB”),

*These documents relate to the Bankruptcy and Diligence etc. (Scotland) Bill (SP Bill 50) as introduced in the Scottish Parliament on 21 November 2005*

- Registers of Scotland (“RoS”), and
- the Scottish Court Service (“SCS”),
- estimates of demand made by the Scottish Executive, and
- estimates of demand made by third parties who would be affected by these proposals.

### **Areas of reform**

686. There are four main areas of reform:

- encouraging re-start and improve public protection by modernising the laws of bankruptcy,
- supporting business risk by modernising floating charges,
- creating a new public body, the Scottish Civil Enforcement Commission, to regulate the new court messenger profession, and
- striking a better balance between the needs of creditors and debtors by modernising the laws of diligence to create a modern approach.

### **Methodology and overview**

687. The Executive has consulted widely on the likely impact of reform, and responses have informed the estimated costs set out in this Memorandum.

688. The costs of this Bill will largely fall to the Scottish Administration as discussed below. Any new impact on creditors and debtors will not significantly affect such interests, as they already bear the costs of any formal enforcement (including sequestration) they choose to use. It was for that reason not considered necessary to undertake a regulatory impact assessment in relation to the bankruptcy, enforcement and diligence reforms.

689. The Scottish Executive will incur administrative costs when implementing the proposed reforms. Those costs include the production of guidance and regulations, publicity and debt advice materials, and research and consultancy costs. They will be met from existing and planned direct running cost and programme budgets. The Executive estimates these costs at £253,251 *per annum* for staff and administration, and £110,000 *per annum* in programme costs.

690. The Scottish Executive will redesign the debt advice and information package (DAIP) which will be used more widely in sequestration and diligence, with increased print runs. The estimated additional cost of producing the DAIP is £42,800 *per annum*, and that is included in the £110,000 estimate for programme costs.

### **BANKRUPTCY**

691. Our key proposals are to:

- reduce the bankruptcy period to 1 year for all bankruptcies,

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- protect the public and business interests through the introduction of bankruptcy restrictions orders and undertakings being placed on potentially fraudulent or culpable debtors,
- continue to require debtors to contribute towards their bankruptcy debts where possible,
- reform restrictions and disqualifications on debtors,
- streamline the bankruptcy process and reduce court involvement,
- take bankruptcy proceedings out of the Court of Session and consolidate them in the sheriff courts, and
- require creditors to provide debtors with a debt advice and information pack.

### **Costs on the Scottish Administration**

692. The AiB will lead on implementing the bankruptcy reforms. AiB estimate the cost to them in 2006/07 of £1.442 million. This comprises:

- £457,000 staffing costs for some 34 additional staff,
- Staff training is estimated at £20,000,
- £40,000 running costs, and
- £925,000 for IT capital investment.

693. Thereafter AiB anticipate an additional sum of £536,732 *per annum* will be required to administer the new regime made up of staffing costs of around £530,000 and training at around £7,000.

694. Student loans will no longer be written off in bankruptcy, and the Executive therefore expects to secure a receipt as a result of additional payments made by student loan debtors. Table 1 shows the amounts that have been written off on student loans in the period 1991 to 2004 for illustrative purposes.

**Table 1\***

Year	Number Bankrupt	Balance	Avg Debt
1991	2	£770.70	£385.35
1992	8	£6,870.65	£858.83
1993	13	£13,771.03	£1,059.31
1994	9	£25,903.32	£2,878.15
1995	15	£38,488.93	£2,565.93
1996	33	£68,002.61	£2,060.69
1997	49	£99,357.46	£2,027.70
1998	82	£157,002.66	£1,914.67
1999	132	£337,643.14	£2,557.90
2000	157	£438,053.06	£2,790.15
2001	182	£512,502.02	£2,815.95
2002	281	£977,600.53	£3,479.01
2003	432	£1,821,329.86	£4,216.04
2004	289	£1,333,752.64	£4,615.06
<b>Grand Total</b>	<b>1684</b>	<b>£5,831,048.61</b>	<b>£3,462.62</b>

\* Figures based on data in the SE “CLASS” case management system up to 30 August 2004, the latest available date.

695. The amount of the additional payments made in future to the student awards agency will vary according to circumstances, including:

- number of future sequestrations,
- amount borrowed, and
- the type of loan.

696. For example, payments are made over the agreed length of the loan, and that period is determined by the date and type of the loan agreement. It is therefore difficult to provide an accurate recovery figure. It is, however, possible to provide an estimate for additional future payments recovered over the length of loans using the amount of debt written off to 2004.

697. The Executive expects a recovery rate of 70% on each loan made since 2001 as these are repaid over 40 years, and 44% for each loan made on or before 2001 as these are repaid over 25 years. Applying these percentages to the above table gives us a total recovery of pre 2001 balances of £747,280 over 25 years and total recovery of post 2001 balances of £2,892,878 over 40 years. This represents an annual recovery rate of £102,213.

698. Bankruptcy reform will generate savings for the SCS as a result of business moving from the Court of Session to the sheriff courts, and from the sheriff courts to the AiB. Business moving from the Court of Session to the sheriff courts will not generate any significant saving, but business moving from SCS to AiB will. The Executive estimate an annual saving of £60,000

based on a reduction in the number of debtor petitions in the sheriff court. Current numbers are 1500 debtor petitions in the sheriff court *per annum*, but sequestrations are increasing and we have assumed 2000 petitions *per annum* in calculating this estimate.

### **Costs on local authorities**

699. The Executive's bankruptcy reforms will have no cost implications for local authorities.

### **Costs on other bodies, individuals and businesses**

700. The bankruptcy reforms will not have a detrimental financial impact on individuals and businesses. These are progressive measures which will improve the current position of those facing bankruptcy by reducing the bankruptcy period and reforming future restrictions on business and personal financial activity following a sequestration.

701. The Bill also extends the provision of the debt advice and information pack to improve debtor protection in bankruptcy as well as increase the chances of debt recovery. The cost of issuing this Pack will be met by local authorities and any other creditor. The Executive will meet the costs of the production of the pack and it will be the costs of postage that will be for local authorities and other creditors. It is not considered that this will be onerous, as most local authorities and other creditors issue debt information as part of good practice in debt recovery.

## **FLOATING CHARGES**

702. Our key proposals are to:

- introduce a new register of floating charges, and
- reduce the need for double registration of charges.

### **Costs on the Scottish Administration**

703. RoS will require to develop and then maintain the new Register of Floating Charges. The costs of this are detailed below in paragraphs 705 to 709. RoS currently maintain 15 public registers on a self-financing basis regulated by section 9 of the Public Finance and Accountability (Scotland) Act 2000. In terms of this section, income received (principally registration and information provision fees) is applied to meet the Agency's expenditure. The Keeper of the Registers of Scotland's financial objectives are subject to Ministers' directions on the basis that, taking one year with another, income is sufficient to meet expenditure. Registration and information provision fees for the current registers are set by statutory instrument and this is also proposed for the new register.

704. Given this operating basis, development and maintenance of the Register of Floating Charges will, over time, be financially neutral for RoS. Subject to Ministers' directions, the Keeper anticipates that the development and maintenance costs should be met from fee income generated by the new register, with development costs being recouped over the initial 5 years of operation.

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705. The main components of development costs will be firstly those of running a project to develop a detailed design and specification for the register and to take the initiative through to implementation; and, secondly, RoS' IT supplier's charges for developing the register system and interfaces. RoS advise that it will not be possible to put final figures to these costs until further work has been done on the outline format and requirements for the register. As an indicative range, they estimate that a figure between £500,000 and £750,000 is a realistic forecast.

706. It is anticipated that development work will begin as soon as the Bill is enacted and that the cost to RoS will be spread between financial years 2006/07 and 2007/08, with the new register being commenced either in the later part of calendar year 2007 or in 2008.

707. Ongoing maintenance of the register will involve IT support costs. Again, it is not possible at this stage to give a detailed cost as this is subject to commercial confidence as it is subject to an ongoing tendering process. These costs can be provided to the Committee on a confidential basis on request. Assuming the register is commenced part way through 2007/08 then (say) half that annual cost would be incurred in that year and a full year's support cost in each succeeding year.

708. Running costs other than IT support will include staff costs and also a contribution to RoS' general overheads. These will be partially dependent on registration volumes. At present Companies House in Edinburgh register approximately 7,000 floating charges and memoranda of satisfaction in respect of floating charges annually. The intake for the new register is likely to be higher for two reasons. First, in the new register, Notices of Proposed Charge – which have no current equivalent – will be registered in some instances. Second, in the situation where an English registered company grants a floating charge intended to extend to assets situated in Scotland, this will be registrable in the new register whereas at present it is not registered with Companies House in Edinburgh (although registrable in Cardiff). It is not possible to accurately forecast the effect of these two factors on register intakes however it thought that overall annual registration volume will be of the order of 10,000.

709. Until more detailed design of the registration process has taken place it will not be certain how labour intensive a typical registration will be and therefore the amount of staff resource required. Based on the experience of their other registers and an annual turnaround of around 10,000 notices and documents, RoS' best estimate at this point is a yearly running cost of around £75,000. This assumes that the notices and documents are created and communicated on paper. The possibilities of electronic communication of electronic documents and notices, and of automation of parts of the registration process will be considered and are likely to reduce administrative costs. As with IT support costs, it is anticipated that half of these costs will be incurred in the later part of 2007/08 and a full year's costs in each succeeding year.

### **Costs on local authorities**

710. The Executive's floating charge reforms will have no cost implications for local authorities.

### **Costs on other bodies, individuals and businesses**

711. The proposals have no cost implications for individuals.

712. The proposals have a minor impact on those bodies and businesses that provide finance and credit to companies on the security of floating charges. Positive impacts will arise from the actual document being registered in the new register – as opposed to the brief particulars currently registered at Companies House. This allows for authentic extracts to be produced from the register and so reduces the importance of preserving the original. The new registration process is also expected to assist in e-enabling the creation and registration of floating charges.

713. Registration fees will be payable for the registration of Notices of Proposed Charge, floating charges and other documents in the new register. It is expected that notices and new charges will normally be presented by the creditor although in many case the registration fee (together with other costs incurred in the creation of the charge, such as legal expenses) may be indirectly paid by the company. It is anticipated that a discharge of a floating charge will normally be presented by the company, which will pay the registration fee. As with memoranda of satisfaction at present, it will be at the company's option whether it procures and registers a discharge.

714. As the register will be run on a cost recovery basis, registration fees will be calculated once there is greater certainty as to the costs of developing and maintaining the register. Assuming indicative costs to RoS as discussed above and recovery of development expenditure, the registration fee would be of the order of £30. At present a registration fee of £13 is payable to Companies House. As indicated above the current and proposed registration processes are not directly comparable as at present only brief particulars of the charge are registered.

## **SCOTTISH CIVIL ENFORCEMENT COMMISSION**

### **Costs on the Scottish Administration**

715. The Bill will provide for a new non departmental public body (NDPB) called the Scottish Civil Enforcement Commission to oversee all enforcement matters. It will register, regulate and supervise the work of the new unified sheriff officer profession to be called “messengers of the court”. The Commission will also have a public education and research role to improve public awareness of enforcement issues including diligence and debt recovery.

716. We have estimated costs for the Commission based on an assumed launch date of April 2007. The anticipated costs of the new body have been calculated with that date in mind, taking into account the detailed budgets of recently established public bodies of comparable size and function. We estimate an annual running cost of £632,000 with an additional start up cost in year 1 of £248,500. Table 2 shows estimated costs.

**Table 2**

	<b>2006/07</b>	<b>2007/08</b>	<b>2007/08 One Off Start up costs</b>	<b>Annual thereafter</b>
Staffing costs	27,000	388,000	0	400,000
Recruitment, travel and expenses	0	31,000	31,000	31,000
Accommodation	0	66,000	35,000	66,000
Professional services	0	42,000	13,000	42,000
Printing, office equipment, stationery and IT	0	19,000	140,500	19,000
Research, education and training	0	74,000	29,000	74,000
<b>TOTAL</b>	<b>27,000</b>	<b>620,000</b>	<b>248,500</b>	<b>632,000</b>

717. Staffing costs assume a board of seven plus two ex officio members and a chief executive with 10 further staff comprising policy, professional services and administration. Salaries will be based on civil service pay scales and agreed remuneration arrangements for boards. We have assumed an initial staffing cost of £27,000 in 2006/07 to recruit the senior posts and admin support to assist in establishing the body. Staffing costs thereafter are £400,000 per annum with a lesser amount in 2007/08 as some staff will not be in place for the full financial year.

718. Recruitment, travel and expenses have been budgeted annually at £31,000 with additional start up recruitment costs of £31,000 in 2007/08. This also includes assumptions about the recruitment of messengers of the court on an annual basis by way of national advertising. Accommodation costs of £66,000 *per annum* are based on costs incurred by the Risk Management Authority, which is of a comparative size to the Scottish Civil Enforcement Commission. A full location review will be undertaken and it is assumed that there will be opportunities for sharing of services and costs with other organisations. We have made provision for some refitting of £35,000 in 2007/08 once accommodation has been secured.

719. It is envisaged that the Commission will buy in a number of services rather than employ staff directly. Such services include finance and audit, human resources, legal services and media monitoring. The annual cost of £42,000 includes payments to those asked to carry out inspection and investigation activities under the proposed disciplinary arrangements. In 2007/08, we have assumed an additional one off cost of £13,000 to pay for professional fees attributable to finding and securing accommodation.

720. Office running costs including printing, stationery and IT have been provided for at £19,000 per annum. However, significant start up costs of £140,500 will be incurred in 2007/08 to purchase office furniture, IT equipment, telecommunications and new identity cards for messengers of the court. Given the strong emphasis on equal opportunities for the Commission and its work, we have budgeted for comprehensive staff and Board training in this area as well as more general training and development amounting to £21,000. We have also made provision for

a significant research budget of £53,000. This is because the two key areas of research on informal debt collection and equality impact assessment will be challenging. Academic scrutiny of this area is new and will demand a challenging and more costly methodology to elicit results. This sum also includes provision for a public information campaign associated with the Commission's broader education role. Start up costs in this area of £29,000 have assumed an initial level of training for board and staff as well as the cost of an overhaul of the professional qualification.

721. The Commission is likely to generate some initial modest cost savings on the Scottish Court Service and courts group given the abolition of the existing Advisory Council and current judicial appointment and disciplinary arrangements. We estimate these savings as £15,000 *per annum*. The Commission will have powers to charge messengers of the court a registration fee, estimated to bring in an income of £17,000. This is an estimate based on a fee of £100 per commissioned officer *per annum*.

722. The costs of the Scottish Civil Enforcement Commission will be met from existing departmental resources.

#### **Costs on local authorities**

723. The Executive's enforcement reforms will have no cost implications for local authorities.

#### **Costs on other bodies, individuals and businesses**

724. Our proposals for the regulation of the court officer profession will have an impact on those currently practicing as officers. This will be a regulatory impact (through secondary legislation) rather than a financial cost. We expect that the content of any regulations will be a matter of good practice and will include standard arrangements for financial accounting and managing potential conflicts of interest, and most firms will be able to adopt the new arrangements with no difficulty.

725. Arguably, the improvements in regulation and the public work of the Commission will increase professional and public standing leading to new clients and a more profitable sector. Most officers are employed by firms whose business interests include debt recovery. Our proposals will impose new regulatory arrangements on businesses under which new messengers of the court can operate. These are not yet available but will be subject to separate regulations. We have planned for a transition period to enable any changes to be made and the profession and their associated business interest will be consulted as our proposals are implemented.

726. The proposals will have a positive financial impact on the professional body of Sheriff Officers and Messengers at Arms as compulsory membership will increase fee income. Many officers do not subscribe at present, but those officers who do, pay around £450 *per annum* to their professional body. It is hoped that the benefits of scale may result in a reduced fee overall, and a higher income for the body, meaning the actual financial impact on individual officers of the proposed Commission fee will be negligible.

## **DILIGENCE**

727. Our key proposals are:

- the abolition of adjudication for debt and its replacement with the new diligences of land attachment and residual attachment,
- the reform of inhibition,
- the reform of diligence on the dependence,
- new diligences of money attachment and interim attachment,
- reform of earnings arrestment,
- reform of arrestment and furthcoming,
- abolition of maills and duties and sequestration for rent,
- wider application of time to pay arrangements as part of diligence,
- to bring admiralty law in respect of arrestment in line with other UK law, and
- to facilitate the development of the information disclosure scheme in line with UK developments.

### **Costs on the Scottish Administration**

728. The reforms are likely to have a significant impact on the work of the SCS. A number of diligences are being abolished and created with resulting impacts on the number of cases coming before the courts. It is difficult to estimate the exact number of cases which will result as some of the arrangements, such as land attachment and money attachment, are being made available for the first time. Therefore the analysis is based on estimates and an underpinning assumption that our reforms will have the desired effect and make diligence more open and transparent, as well as easier to use for creditors.

729. For example, it is envisaged that the new diligence of land attachment will be popular, but will not lead to significant numbers of sale applications. Land attachment will be added to the remedies available following a warrant from the court and therefore will not impose an additional burden on the courts initially. An application at a second stage to sell attached property will place an increased workload on the court who will need to deliberate the merits or otherwise of the case. It is expected the new diligence of money attachment will be popular, but this will be available on a warrant and will not have an immediate increased impact on the courts. There is likely to be an increase in time to pay applications as these are being made more widely available. The reform of diligence on the dependence may lead to fewer applications, but an increase in the cost of these newly contested applications.

730. Table 3 sets out the estimated increase in staff and judicial time and costs associated with the diligence proposals *per annum* from 2008/09 with part year in 2007/08.

**Table 3**

<b>Bill Proposal</b>	<b>Assumed number of new applications</b>	<b>Additional staff costs (£)</b>	<b>Additional judicial costs (£)</b>
Land attachment	1000	87,000	62,000
Residual attachment	1000	62,000	44,000
Interim attachment	200	6,200	4,400
Money attachment	5000	155,000	110,000
Time to pay	4200	28,400	7,900
<b>Total</b>	<b>11,400</b>	<b>338,600</b>	<b>228,300</b>

731. Overall, the Executive has estimated costs to SCS of £566,900 *per annum* resulting from our proposals. This includes additional staff resources as well as training and other infrastructure requirements and there will be an additional one-off cost of £10,000 for reprogramming court IT systems. It is thought an implementation date for the majority of our diligence proposals will be summer 2007. However, the Executive is prepared to consider a more phased approach in the light of the complexity of the task involved and the resources available.

732. The most significant resource impact on the SCS will be the introduction at a later stage of an “Information Disclosure Scheme”. Whilst the information requests will themselves be self financing with creditors paying a small fee for the information, there will be significant costs in establishing the supporting infrastructure to operate a scheme. Detailed thinking on a scheme is at an early stage and implementation of any scheme will be informed by a working group of key interests across the UK. We will consult on the detail of any scheme and are likely to conclude that a limited pilot would be helpful in informing any final model.

733. It is difficult at this stage to estimate the costs of the scheme because of the differences in enforcement between Scotland and England. However, the Department for Constitutional Affairs (DCA) in their White Paper *Effective Enforcement* suggest an individual information request to cost in the region of £100 to £150. It is proposed that the creditor will meet the costs of the information disclosure request at the point of application, but this will be recoverable from the debtor against whom decree is granted when enforcement is successful. DCA expect the initial England and Wales infrastructure and set up costs in respect of the courts to be £500,000 with a similar sum attributable to Her Majesty’s Revenue & Customs and Department of Works and Pensions.

734. It is difficult to estimate the likely take up of the new scheme in Scotland and to consider the detailed cost implications. The Executive has considered that the costs to the courts in Scotland will be proportionately larger compared to England and Wales due to the number of different ways in which diligence operates. For example, demand for information disclosure will be higher in Scotland as warrants for recovery are available across a range of diligences and will be more popular than the English model where separate applications are required for each form of diligence. The court system in England and Wales has already been subject to a high degree of centralisation for the administration of diligence including shared information. The timescale for this is long term with a scheme not becoming established until 2009/2010. In the meantime, Table 4 shows potential costs based on 3 possible levels of take up to illustrate the impact of

proposals on the likely resources required. These potential costs will be offset at least in part by fees charged to applicants.

**Table 4**

<b>Take up – applications per month</b>	<b>Costs per application</b>	<b>Total cost of scheme</b>
1,000	£16.13	£193,500 p.a.
5,000	£16.13	£967,500 p.a.
10,000*	£16.13	£1,935,000 p.a.

\* Where demand exceeds 50,000 p.a. there will be one-off infrastructure set up costs of: £1.89 million and programme costs of £500,000 over 2-3 years.

### **Costs on local authorities**

735. Local authorities involved in the recovery of council tax and rent arrears will be an important creditor affected by the Bill proposals. However, as indicated under diligence more generally, the cost of action is recoverable through the diligence process where it is successful.

736. The Bill also extends the provision of the debt advice and information pack to improve debtor protection as well as to increase the chances of debt recovery. The cost of issuing this Pack will be for local authorities (and any other creditor). However, again the costs will be incurred only where a diligence route is adopted which is a matter of choice for local authorities and others. Such costs which are essentially postage costs are recoverable in the event of successful diligence.

737. The Bill extends the circumstances under which the debt advice and information pack will be issued to debtors before the process of diligence has begun. This is the case in all attachments currently and will be extended to the new diligences introduced by the Bill. Whilst these pre-decree costs are not recoverable, our proposals regularise good practice in this area. Most local authorities in practice issue a “final warning letter” to debtors prior to court action. Many also have partnership arrangements with the money advice sector whereby information and advice on debt management is already incorporated in materials being issued. Accordingly, we expect local authorities to incorporate this new requirement into existing arrangements or replace existing with reference to the pack. Therefore the costs to local authorities will be marginal over and above current costs. The Scottish Executive will meet the costs of the production of the Pack (see paragraph 690) and it will be the costs of postage that will be for local authorities and other creditors.

738. The proposal for an “information disclosure order” will also impact on local authorities who will make use of the new arrangements to recover debt. The Executive expects that the costs of any new arrangements for creditors to be recoverable and for the cost of seeking a disclosure to be modest given the scheme is self financing. The information provided will

improve the likelihood of a successful recovery. It is for local authorities and others as creditor to consider the costs of any diligence against the chances of successful recovery.

### **Costs on other bodies, individuals and businesses**

739. The diligence proposals aim to create a better balance between the interests of creditors and debtors in debt recovery. It is recognised that in some cases our proposals will increase the costs of recovery for creditors. For example, the introduction of new time to pay arrangements mean that there may be a small delay in creditors being able to execute diligence, but a final opportunity for debtors to make arrangements to pay before a court decree increases the chances of recovery for creditors. Similarly, the extension of the use of the debt advice and information packs means creditors will be required to post out advice to debtors at a small cost, but the availability of this advice may result in a realistic payment regime being agreed and sustained. These costs can however be recovered from debtors where diligence has been successful.

740. However, some proposals work in the interests of debtors more directly. For example protection of the minimum balance for debtors subject to bank arrestment reduces the amount available for creditors but also protects debtors from genuine hardship which could only exacerbate their situation. It is more likely to lead to the genuine “can’t pay” being supported via debt arrangement scheme solutions rather than diligence, which is our overall policy intention. Essentially, resort through the courts is not a compulsory or sole route to debt recovery. Individuals and businesses can choose not to pursue debts in this way but recover debts on a more informal basis or promote debt management arrangements like the Debt Arrangement Scheme.

741. We are aware that the proposed reform of bank arrestment arrangements will place new administrative arrangements on third parties including banks and employers who are required by the courts to co-operate in the debt recovery process. The Executive has consulted with representatives of these sectors to ensure that any impact is minimised and can be implemented in a planned way. Changes will be of a one off nature and be applicable to well established and tested administrative and IT based systems.

742. It is assumed that banks will be able to recover costs from their customer charging structure. The Committee of Scottish Clearing Banks estimate that the current cost to them of an arrestment is £42.00. They have further indicated that the Bill proposal for a calculation of minimum balance could increase this figure to £50.00 based on staff costs and new administrative arrangements. Longer term, there is likely to be an administrative gain for such bodies in relation to bank and earnings arrestment, through the operation of information disclosure orders.

**SUMMARY TABLE OF COSTS ON THE SCOTTISH ADMINISTRATION**

<b>Proposal</b>	<b>Reference</b>	<b>2006/07</b>	<b>2007/08</b>	<b>2008/09 and subsequent years</b>	<b>Comment</b>
<b>BANKRUPTCY</b> Accountant in Bankruptcy	Para 692	1.44m*	536,000*	536,000	
Student Award Agency	Para 697	-102,213	-102,213	-102,213	Based on assumptions using historic write off
Scottish Court Service	Para 698	-60,000	-60,000	-60,000	Saving on court costs
<b>FLOATING CHARGES</b> Registers of Scotland	Paras 705 to 709	375,000*	412,500*	75,000*	
<b>SCOTTISH CIVIL ENFORCEMENT COMMISSION</b>	Para 716	27,000*	868,000*	632,000*	
Scottish Court Service	Para 721		-15,000	-15,000	15,000 savings to SCS
Messengers of the court	Para 721		-17,000	-17,000	17,000 income from fees
<b>DILIGENCE</b> Scottish Court Service	Para 730	0	141,725*	566,900*	Based on quarter year 2007/08
	Para 731		10,000		Re- programming IT system
Information Disclosure Orders	Para 734	0	0	967,500	Based on middle range of applications
<b>Implementation by the Scottish Executive</b>	Paras 689 and 690	0	253,251* 110,000*	253,251* 110,000*	Staff costs Programme costs

\* Denotes resources secured

**SUMMARY TABLE OF COSTS ON LOCAL AUTHORITIES, OTHER BODIES, INDIVIDUALS AND BUSINESSES \***

**\* Based on illustrative figures only with some untested assumptions of usage and take up of diligence measures.**

<b>Proposal</b>	<b>Reference</b>	<b>Local authority</b>	<b>Other Bodies</b>	<b>Individuals &amp; Business</b>
<b>BANKRUPTCY</b> Creditor to issue debt advice and information pack	Para 701			Creditors to pay postage for pack – can be incorporated into existing arrangements offset against increased chance of recovery
<b>FLOATING CHARGES</b> Registration fee payable	Para 714			£30 per registration offset by enhanced security of information
<b>SCOTTISH CIVIL ENFORCEMENT COMMISSION</b> Messengers of the court to pay fee to SCEC  Professional body income increase	Para 721  Para 726		Increase in revenue from compulsory membership, fee level of £450	£100 per officer offset against reduced fee to the professional body
<b>DILIGENCE</b> Creditors and local authorities to issue debt advice and information pack  Impact on banking sector  Cost of application Information Disclosure Orders	Para 737  Para 742  Para 733	Creditors to pay postage for pack – can be incorporated into existing arrangements offset against increased chance of recovery		Creditors to pay postage for pack – can be incorporated into existing arrangements offset against increased chance of recovery  £8 increase in admin costs per bank arrestment offset by a reduced number of cases given the availability of information disclosure. Creditor pays £100 per application which is recoverable and offset against increase chance of recovery.

*These documents relate to the Bankruptcy and Diligence etc. (Scotland) Bill (SP Bill 50) as introduced in the Scottish Parliament on 21 November 2005*

## **EXECUTIVE STATEMENT ON LEGISLATIVE COMPETENCE**

743. On 21 November 2005, the Deputy First Minister and Minister for Enterprise and Lifelong Learning (Nicol Stephen MSP) made the following statement:

“In my view, the provisions of the Bankruptcy and Diligence etc. (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

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## **PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE**

744. On 18 November 2005, the Presiding Officer (Right Honourable George Reid MSP) made the following statement:

“In my view, the provisions of the Bankruptcy and Diligence etc. (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

*These documents relate to the Bankruptcy and Diligence etc. (Scotland) Bill (SP Bill 50) as introduced in the Scottish Parliament on 21 November 2005*

# **BANKRUPTCY AND DILIGENCE ETC. (SCOTLAND) BILL**

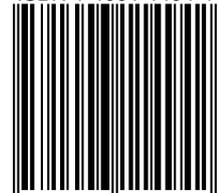
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