



# Bankruptcy (Scotland) Act 1985 (repealed)

## 1985 CHAPTER 66

### *Administration of bankruptcy*

#### [<sup>F1</sup>1 Accountant in Bankruptcy. **S**

- (1) The Accountant in Bankruptcy shall be appointed by the Scottish Ministers.
- (2) The Scottish Ministers may appoint a member of the staff of the Accountant in Bankruptcy to be Depute Accountant in Bankruptcy to exercise all of the functions of the Accountant in Bankruptcy at any time when the Accountant in Bankruptcy is unable to do so.]

#### Textual Amendments

- F1** S. 1 and sidenote substituted (1.7.1999) by 1998 c. 46, s. 125(1), **Sch. 8 para. 22** (with s. 126(3)-(11)); S.I. 1998/3178, **art. 2(1)**

#### 1A <sup>F2</sup>Supervisory functions of the Accountant in Bankruptcy. **S**

- (1) The Accountant in Bankruptcy shall have the following general functions in the administration of sequestration and personal insolvency—
  - (a) the supervision of the performance by—
    - (i) interim trustees (not being the Accountant in Bankruptcy);
    - (ii) permanent trustees; and
    - (iii) commissioners, of the functions conferred on them by this Act or any other enactment (including an enactment contained in subordinate legislation) or any rule of law and the investigation of any complaints made against them;

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- (b) the maintenance of a register (in this Act referred to as the “register of insolvencies”), in such form as may be prescribed by the Court of Session by act of sederunt, which shall contain particulars of—
- (i) estates which have been sequestrated; <sup>F3</sup> . . .
  - (ii) trust deeds which have been sent to him for registration under paragraph 5(1)(e) of Schedule 5 to this Act;
- [<sup>F4</sup>and
- (iii) the winding up and receivership of business associations which the Court of Session has jurisdiction to wind up.]
- (c) the preparation of an annual report which shall be presented to the Secretary of State and the Court of Session and shall contain—
- (i) statistical information relating to the state of all sequestrations [<sup>F5</sup>and the winding up and receivership of business associations]of which particulars have been registered in the register of insolvencies during the year to which the report relates;
  - (ii) particulars of trust deeds registered as protected trust deeds in that year; and
  - (iii) particulars of the performance of the Accountant in Bankruptcy’s functions under this Act; <sup>F6</sup> . . .
- (d) such other functions as may from time to time be conferred on him by the Secretary of State.
- [<sup>F7</sup>and
- (e) in this subsection “business association” has the meaning given in Section C2 of Part II of Schedule 5 to the Scotland Act 1998.]
- (2) If it appears to the Accountant in Bankruptcy that a person mentioned in paragraph (a) of subsection (1) above has failed without reasonable excuse to perform a duty imposed on him by any provision of this Act or by any other enactment (including an enactment contained in subordinate legislation) or by any rule of law, he shall report the matter to the court which, after hearing that person on the matter, may remove him from office or censure him or make such other order as the circumstances of the case may require.
- (3) Where the Accountant in Bankruptcy has reasonable grounds to suspect that an offence has been committed—
- (a) by a person mentioned in paragraph (a) of subsection (1) above in the performance of his functions under this Act or any other enactment (including an enactment contained in subordinate legislation) or any rule of law; or
  - (b) in relation to a sequestration, by the debtor in respect of his assets, his dealings with them or his conduct in relation to his business or financial affairs; or
  - (c) in relation to a sequestration, by a person other than the debtor in that person’s dealings with the debtor, the interim trustee or the permanent trustee in respect of the debtor’s assets, business or financial affairs,
- he shall report the matter to the Lord Advocate.
- (4) The Accountant in Bankruptcy shall—
- (a) make the register of insolvencies, at all reasonable times, available for inspection; and
  - (b) provide any person, on request, with a certified copy of any entry in the register.

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#### Textual Amendments

- F2** Ss. 1-1C substituted for s. 1 (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. **1(1)** (with s. 12(6)); S.I. 1993/438, **art. 3**
- F3** Word after s. 1A(1)(b)(i) omitted (1.7.1999) by virtue of S.I. 1999/1820, **art. 4, Sch. 2 Pt. I para. 82(2)(a)** (with **art. 5**)
- F4** Word and s. 1A(1)(b)(iii) inserted (1.7.1999) by S.I. 1999/1820, **art. 4, Sch. 2 Pt. I para. 82(2)(a)** (with **art. 5**)
- F5** Words in s. 1A(1)(c)(i) inserted (1.7.1999) by S.I. 1999/1820, **art. 4, Sch. 2 Pt. I para. 82(2)(b)** (with **art. 5**)
- F6** Word after s. 1A(1)(c) omitted (1.7.1999) by virtue of S.I. 1999/1820, **art. 4, Sch. 2 Pt. I para. 82(2)(c)** (with **art. 5**)
- F7** Word and s. 1A(1)(e) inserted (1.7.1999) by S.I. 1999/1820, **art. 4, Sch. 2 Pt. I para. 82(2)(c)** (with **art. 5**)

### 1B <sup>F8</sup>Performance of certain functions of the Accountant in Bankruptcy. **S**

- (1) The functions of the Accountant in Bankruptcy, other than functions conferred by section 1A of this Act, may be carried out on his behalf by any member of his staff authorised by him to do so.
- (2) Without prejudice to subsection (1) above, the Accountant in Bankruptcy may appoint on such terms and conditions as he considers appropriate such persons as he considers fit to perform on his behalf any of his functions in respect of the sequestration of the estate of any debtor.
- (3) A person appointed under subsection (2) above shall comply with such general or specific directions as the Accountant in Bankruptcy may from time to time give to such person as to the performance of his functions in relation to any sequestration.
- (4) The Accountant in Bankruptcy may pay to a person appointed under subsection (2) above such fee as he may consider appropriate.

#### Textual Amendments

- F8** Ss. 1-1C substituted for s. 1 (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. **1(1)** (with s. 12(6)); S.I. 1993/438, **art.3**

### 1C <sup>F9</sup>Directions. **S**

- (1) The Secretary of State may, after consultation with the Lord President of the Court of Session, give to the Accountant in Bankruptcy general directions as to the performance of his functions under this Act.
- (2) Directions under this section may be given in respect of all cases or any class or description of cases, but may not be given in respect of any particular case.
- (3) The Accountant in Bankruptcy shall comply with any directions given to him under this section.

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### Textual Amendments

**F9** Ss. 1-1C substituted for s. 1 (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 1(1) (with s. 12(6)); S.I. 1993/438, art.3

## [2] <sup>F10</sup> Appointment and functions of interim trustee. **S**

- (1) Where the court awards sequestration of the debtor's estate and the petition for the sequestration—
  - (a) nominates a person to be interim trustee;
  - (b) states that the person satisfies the conditions mentioned in subsection (3) below; and
  - (c) has annexed to it a copy of the undertaking mentioned in subsection (3)(c) below,

the court may, if it appears to the court that the person satisfies those conditions and if no interim trustee has been appointed in pursuance of subsection (5) below, appoint that person to be interim trustee in the sequestration.
- (2) Where the court awards sequestration of the debtor's estate and—
  - (a) it does not appoint a person to be interim trustee in pursuance of subsection (1) above; and
  - (b) no interim trustee has been appointed in pursuance of subsection (5) below,

the court shall appoint the Accountant in Bankruptcy to be interim trustee in the sequestration.
- (3) The conditions referred to in subsection (1) above are that the person—
  - (a) resides within the jurisdiction of the Court of Session;
  - (b) is qualified to act as an insolvency practitioner; and
  - (c) has given an undertaking, in writing, that he will act—
    - (i) as interim trustee; and
    - (ii) where no permanent trustee is elected, as permanent trustee, in the sequestration .
- (4) The interim trustee's general functions shall be—
  - (a) to safeguard the debtor's estate pending the appointment of a permanent trustee under this Act;
  - (b) to ascertain the reasons for the debtor's insolvency and the circumstances surrounding it;
  - (c) to ascertain the state of the debtor's liabilities and assets;
  - (d) to administer the sequestration process pending the appointment of a permanent trustee; and
  - (e) whether or not he is still acting in the sequestration, to supply the Accountant in Bankruptcy with such information as the Accountant in Bankruptcy considers necessary to enable him to discharge his functions under this Act.
- (5) Where a petition for sequestration is presented by a creditor or a trustee acting under a trust deed, the court may appoint an interim trustee before sequestration is awarded—
  - (a) if the debtor consents; or
  - (b) if the trustee acting under the trust deed or any creditor shows cause.

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- (6) For the purposes of the appointment of an interim trustee under subsection (5) above—
- (a) where a person is nominated as mentioned in subsection (1)(a) above and the provisions of that subsection apply, the court may appoint that person; and
  - (b) where such a person is not appointed, the court shall appoint the Accountant in Bankruptcy.
- (7) Where the petition for sequestration was presented by a creditor or the trustee acting under a trust deed, the interim trustee shall, as soon as practicable, notify the debtor of his appointment.]

#### Textual Amendments

**F10** S. 2 substituted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s.2 (with s. 12(6)); S.I. 1993/438, **art.3**

### 3 Permanent trustee. **S**

- (1) In every sequestration there shall be a permanent trustee whose general functions shall be—
- (a) to recover, manage and realise the debtor's estate, whether situated in Scotland or elsewhere;
  - (b) to distribute the estate among the debtor's creditors according to their respective entitlements;
  - (c) to ascertain the reasons for the debtor's insolvency and the circumstances surrounding it;
  - (d) to ascertain the state of the debtor's liabilities and assets;
  - (e) to maintain a sederunt book during his term of office for the purpose of providing an accurate record of the sequestration process;
  - (f) to keep regular accounts of his intromissions with the debtor's estate, such accounts being available for inspection at all reasonable times by the commissioners (if any), the creditors and the debtor; and
  - (g) whether or not he is still acting in the sequestration, to supply the Accountant in Bankruptcy with such information as the Accountant in Bankruptcy considers necessary to enable him to discharge his functions under this Act.
- (2) A permanent trustee in performing his functions under this Act shall have regard to advice offered to him by the commissioners (if any).
- (3) If the permanent trustee has reasonable grounds to suspect that an offence has been committed in relation to a sequestration—
- (a) by the debtor in respect of his assets, his dealings with them or his conduct in relation to his business or financial affairs; or
  - (b) by a person other than the debtor in that person's dealings with the debtor, the interim trustee or the permanent trustee in respect of the debtor's assets, business or financial affairs,
- he shall report the matter to the Accountant in Bankruptcy.
- (4) A report under subsection (3) above shall be absolutely privileged.
- [<sup>F11</sup>(5) Paragraph (g) of subsection (1) above and subsection (3) above shall not apply in any case where the permanent trustee is the Accountant in Bankruptcy.

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- (6) A permanent trustee may apply to the sheriff for directions in relation to any particular matter arising in the sequestration.
- (7) Where the debtor, a creditor or any other person having an interest is dissatisfied with any act, omission or decision of the permanent trustee, he may apply to the sheriff and, on such an application being made, the sheriff may confirm, annul or modify any act or decision of the permanent trustee or may give him directions or make such order as he thinks fit.]

#### Textual Amendments

**F11** S. 3(5)-(7) added (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para.1** (with s. 12(6)); S.I. 1993/438, **art.3**

#### 4 Commissioners. **S**

In any sequestration (other than one to which Schedule 2 to this Act applies) commissioners, whose general functions shall be to supervise the intromissions of the permanent trustee with the sequestrated estate and to advise him, may be elected in accordance with section 30 of this Act.

#### *Petitions for sequestration*

#### 5 Sequestration of the estate of living or deceased debtor. **S**

- (1) The estate of a debtor may be sequestrated in accordance with the provisions of this Act.
- [<sup>F12</sup>(2) The sequestration of the estate of a living debtor shall be on the petition of—
- (a) the debtor, if either subsection (2A) or (2B) below applies to him;
  - (b) a qualified creditor or qualified creditors, if the debtor is apparently insolvent;
    - [ a temporary administrator;
  - <sup>F13</sup>(ba) (bb) a member State liquidator appointed in main proceedings];or
  - (c) the trustee acting under a trust deed if, and only if, one or more of the conditions in subsection (2C) below is satisfied.
- (2A) This subsection applies to the debtor if a qualified creditor or qualified creditors concur in the petition.
- (2B) This subsection applies to the debtor where—
- (a) the total amount of his debts (including interest) at the date of presentation of the petition is not less than £1,500;
  - (b) an award of sequestration has not been made against him in the period of 5 years ending on the day before the date of presentation of the petition; and
  - (c) the debtor either—
    - (i) is apparently insolvent; or
    - (ii) has granted a trust deed and the trustee has complied with the requirements of sub-sub-paragraphs (a) to (c) of paragraph 5(1) of

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Schedule 5 to this Act but has received notification as mentioned in sub-sub-paragraph (d) of that paragraph,  
and for the purposes of this paragraph a debtor shall not be apparently insolvent by reason only that he has granted a trust deed or that he has given notice to his creditors as mentioned in paragraph (b) of section 7(1) of this Act.

- (2C) The conditions mentioned in subsection (2)(c) above are—
- (a) that the debtor has failed to comply—
    - (i) with any obligation imposed on him under the trust deed with which he could reasonably have complied; or
    - (ii) with any instruction or requirement reasonably given to or made of him by the trustee for the purposes of the trust deed; or
  - (b) that the trustee avers in his petition that it would be in the best interests of the creditors that an award of sequestration be made.]
- (3) The sequestration of the estate of a deceased debtor shall be on the petition of—
- (a) an executor or a person entitled to be appointed as executor on the estate;
  - (b) a qualified creditor or qualified creditors of the deceased debtor;
  - [<sup>F14</sup>(ba) a temporary administrator;
  - (bb) a member State liquidator appointed in main proceedings]; or
  - (c) the trustee acting under a trust deed.
- (4) In this Act “qualified creditor” means a creditor who, at the date of the presentation of the petition, is a creditor of the debtor in respect of liquid or illiquid debts (other than contingent or future debts [<sup>F15</sup>or amounts payable under a confiscation order]), whether secured or unsecured, which amount (or of one such debt which amounts) to not less than [<sup>F16</sup>£1,500] or such sum as may be prescribed; and “qualified creditors” means creditors who at the said date are creditors of the debtor in respect of such debts as aforesaid amounting in aggregate to not less than [<sup>F16</sup>£1,500] or such sum as may be prescribed [<sup>F17</sup>]; and in the foregoing provisions of this subsection “confiscation order” [<sup>F18</sup> means a confiscation order under Part 2, 3 or 4 of the Proceeds of Crime Act 2002]].
- [<sup>F19</sup>(4A) In this Act, “trust deed” means a voluntary trust deed granted by or on behalf of the debtor whereby his estate (other than such of his estate as would not, under section 33(1) of this Act, vest in the permanent trustee if his estate were sequestrated) is conveyed to the trustee for the benefit of his creditors generally.]
- (5) Paragraphs 1(1) and (3), 2(1)(a) and (2) and 6 of Schedule 1 to this Act shall apply in order to ascertain the amount of the debt or debts for the purposes of subsection (4) above as they apply in order to ascertain the amount which a creditor is entitled to claim, but as if for any reference to the date of sequestration there were substituted a reference to the date of presentation of the petition.
- (6) The petitioner shall [<sup>F20</sup>, on the day the petition for sequestration is presented under this section, send a copy of the petition] to the Accountant in Bankruptcy.
- [<sup>F21</sup>(6A) Where the petitioner is the debtor—
- (a) he shall lodge with the petition a statement of assets and liabilities; and
  - (b) he shall, on the day the petition is presented, send to the Accountant in Bankruptcy such statement of assets and liabilities as was lodged in court in pursuance of paragraph (a) above.]

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- (7) Where, after a petition for sequestration has been presented but before the sequestration has been awarded, the debtor dies then—
- (a) if the petitioner was the debtor, the petition shall fall;
  - (b) if the petitioner is a creditor, the proceedings shall continue in accordance with this Act so far as circumstances will permit.
- (8) Where, after a petition for sequestration has been presented under this section but before the sequestration has been awarded, a creditor who—
- (a) is the petitioner or concurs in a petition by the debtor; or
  - (b) has lodged answers to the petition,
- withdraws or dies, there may be sisted in the place of—
- (i) the creditor mentioned in paragraph (a) above, any creditor who was a qualified creditor at the date when the petition was presented and who remains so qualified at the date of the sist;
  - (ii) the creditor mentioned in paragraph (b) above, any other creditor.
- [<sup>F22</sup>(9) If the debtor—
- (a) fails to send to the Accountant in Bankruptcy in accordance with subsection (6A)(b) above such statement of assets and liabilities; or
  - (b) fails to disclose any material fact in such statement of assets and liabilities; or
  - (c) makes a material misstatement in such statement of assets and liabilities,
- he shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale or to imprisonment for a term not exceeding 3 months or to both such fine and imprisonment.
- (10) In any proceedings for an offence under subsection (9) above, it shall be a defence for the accused to show that he had a reasonable excuse for—
- (a) failing to send to the Accountant in Bankruptcy in accordance with subsection (6A)(b) above such statement of assets and liabilities; or
  - (b) failing to disclose a material fact; or
  - (c) making a material misstatement.]

#### Textual Amendments

- F12** S. 5(2)(2A)-(2C) substituted for s. 5(2) (1.4.1993, subject to savings in arts. 4,5 of S.I. 1993/438) by 1993 c. 6, s. 3(2) (with s. 12(6)); S.I. 1993/438, art. 3
- F13** S. 5(2)(ba)(bb) inserted (8.9.2003) by The Insolvency (Scotland) Regulations 2003 (S.I. 2003/2109), reg. 5(1)
- F14** S. 5(3)(ba)(bb) inserted (8.9.2003) by The Insolvency (Scotland) Regulations 2003 (S.I. 2003/2109), reg. 5(2)
- F15** Words inserted by Criminal Justice (Scotland) Act 1987 (c.41, SIF 39:1), ss. 45(5)(a)(i), 47(4)(a)
- F16** Words in s. 5(4) substituted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 3(3) (with s. 12(6)); S.I. 1993/438, art. 3
- F17** Words added by Criminal Justice (Scotland) Act 1987 (c. 41, 39:1), ss. 45(5)(ii), 47(4)(a)
- F18** Words in s. 5(4) substituted (24.3.2003) by Proceeds of Crime Act 2002 (c. 29), ss. 456, 458(1)(3), Sch. 11 para. 15(2); S.I. 2003/333, art. 2(1), Sch. (subject to transitional provisions in arts. 3-14) (as amended by S.I. 2003/531); S.S.I. 2003/210, art. 2(1)(b), Sch. (subject to transitional provisions in arts. 3-7)
- F19** S. 5(4A) inserted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 3(4) (with s. 12(6)); S.I. 1993/438, art. 3



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- F20** Words in s. 5(6) substituted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 3(5) (with s. 12(6)); S.I. 1993/438, art. 3
- F21** S. 5(6A) inserted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 3(6) (with s. 12(6)); S.I. 1993/438, art. 3
- F22** S. 5(9)(10) inserted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 3(7) (with s. 12(6)); S.I. 1993/438, art. 3

**Modifications etc. (not altering text)**

- C1** S. 5 amended (20.7.2001 for certain purposes and otherwise 1.12.2001) by 2000 c. 8, s. 372(1)(b); S.I. 2001/2632, art. 2, Sch. Pt. I; S.I. 2001/3538, art. 2(1)

VALID FROM 01/04/2008

**[<sup>F23</sup>5A Debtor applications by low income, low asset debtors S**

- (1) The conditions referred to in section 5(2B)(c)(ia) of this Act are as follows.
- (2) The debtor's weekly income (if any) on the date the debtor application is made does not exceed £100 or such other amount as may be prescribed.
- (3) The debtor does not own any land.
- (4) The total value of the debtor's assets (leaving out of account any liabilities) on the date the debtor application is made does not exceed £1000 or such other amount as may be prescribed.
- (5) The Scottish Ministers may by regulations—
  - (a) make provision as to how the debtor's weekly income is to be determined;
  - (b) provide that particular descriptions of income are to be excluded for the purposes of subsection (2) above;
  - (c) make provision as to how the value of the debtor's assets is to be determined;
  - (d) provide that particular descriptions of asset are to be excluded for the purposes of subsection (4) above;
  - (e) make different provision for different classes or description of debtor;
  - (f) add further conditions which must be met before a debtor application may be made by virtue of section 5(2B)(c)(ia) of this Act; and
  - (g) where such further conditions are added—
    - (i) remove; or
    - (ii) otherwise vary,those conditions.]

**Textual Amendments**

- F23** S. 5A inserted (S.) (1.4.2008) by Bankruptcy and Diligence etc. (Scotland) Act 2007 (asp 3), ss. 15(2), 227(3) (with s. 223); S.S.I. 2008/115, art. 3(1)(a) (with arts. 4-6, 10 (as amended (with effect from 31.1.2011) by S.S.I. 2011/31, art. 5))

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VALID FROM 15/11/2010

**[<sup>F24</sup>5B Certificate for sequestration S**

- (1) A certificate for sequestration of a debtor's estate is a certificate granted by an authorised person certifying that the debtor is unable to pay debts as they become due.
- (2) A certificate may be granted only on the application of the debtor.
- (3) An authorised person must grant a certificate if, and only if, the debtor can demonstrate that the debtor is unable to pay debts as they become due.
- (4) In this section “authorised person” means a person falling within a class prescribed under subsection (5)(a).
- (5) The Scottish Ministers may by regulations—
  - (a) prescribe classes of persons authorised to grant a certificate under this section;
  - (b) make provision about certification by an authorised person, including—
    - (i) the form and manner in which a certification must be made;
    - (ii) the fee, if any, which an authorised person is entitled to charge for or in connection with granting a certificate;
  - (c) prescribe a period for the purpose of section 5(2B)(c)(ib) of this Act;
  - (d) make different provision for different cases or classes of case.]

**Textual Amendments**

**F24** S. 5B inserted (S.) (15.11.2010) by [Home Owner and Debtor Protection \(Scotland\) Act 2010 \(asp 6\)](#), [ss. 9\(2\)](#), 17(3)(4) (with [s. 14](#)); [S.S.I. 2010/314](#), [art. 6](#) (subject to transitional provisions and savings in [S.S.I. 2010/316](#), [arts. 4-7](#))

**6 Sequestration of other estates. S**

- (1) Subject to subsection (2) below, the estate belonging to or held for or jointly by the members of any of the following entities may be sequestrated—
  - (a) a trust in respect of debts incurred by it;
  - (b) a partnership, including a dissolved partnership;
  - (c) a body corporate or an unincorporated body;
  - (d) a limited partnership (including a dissolved partnership) within the meaning of the <sup>M1</sup>Limited Partnerships Act 1907.
- (2) It shall not be competent to sequester the estate of any of the following entities—
  - (a) a company registered under the <sup>M2</sup>Companies Act 1985 or under the former Companies Acts (within the meaning of that Act); or
  - (b) an entity in respect of which an enactment provides, expressly or by implication, that sequestration is incompetent.
- (3) The sequestration of a trust estate in respect of debts incurred by the trust shall be on the petition of—

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- (a) a majority of the trustees, with the concurrence of a qualified creditor or qualified creditors; or
  - [<sup>F25</sup>(aa) a temporary administrator;
  - (ab) a member State liquidator appointed in main proceedings;]
  - (b) a qualified creditor or qualified creditors, if the trustees as such are apparently insolvent.
- (4) The sequestration of the estate of a partnership shall be on the petition of—
- (a) the partnership, with the concurrence of a qualified creditor or qualified creditors; or
  - [<sup>F26</sup>(aa) a temporary administrator;
  - (ab) a member State liquidator appointed in main proceedings;]
  - (b) a qualified creditor or qualified creditors, if the partnership is apparently insolvent.
- (5) A petition under [<sup>F27</sup>subsection (4)(aa) to (b)] above may be combined with a petition for the sequestration of the estate of any of the partners as an individual where that individual is apparently insolvent.
- (6) The sequestration of the estate of a body corporate or of an unincorporated body shall be on the petition of—
- (a) a person authorised to act on behalf of the body, with the concurrence of a qualified creditor or qualified creditors; or
  - [<sup>F28</sup>(aa) a temporary administrator;
  - (ab) a member State liquidator appointed in main proceedings;]
  - (b) a qualified creditor or qualified creditors, if the body is apparently insolvent.
- (7) The application of this Act to the sequestration of the estate of a limited partnership shall be subject to such modifications as may be prescribed.
- (8) Subsections (6) and (8) of section 5 of this Act shall apply for the purposes of this section as they apply for the purposes of that section.

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#### Textual Amendments

- F25** S. 6(3)(aa)(ab) inserted (8.9.2003) by [The Insolvency \(Scotland\) Regulations 2003 \(S.I. 2003/2109\)](#), **reg. 6(1)**
- F26** S. 6(4)(aa)(ab) inserted (8.9.2003) by [The Insolvency \(Scotland\) Regulations 2003 \(S.I. 2003/2109\)](#), **reg. 6(1)**
- F27** Words in s. 6(5) substituted (8.9.2003) by [The Insolvency \(Scotland\) Regulations 2003 \(S.I. 2003/2109\)](#), **reg. 6(2)**
- F28** S. 6(6)(aa)(ab) inserted (8.9.2003) by [The Insolvency \(Scotland\) Regulations 2003 \(S.I. 2003/2109\)](#), **reg. 6(1)**
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#### Marginal Citations

- M1** 1907 c. 24.  
**M2** 1985 c. 6.

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## [<sup>F29</sup>6A Petition for sequestration of estate: provision of information U.K.]

- (1) A petitioner for sequestration of a debtor's estate shall, insofar as it is within the petitioner's knowledge, state in the petition—
- (a) whether or not the debtor's centre of main interests is situated—
    - (i) in the United Kingdom; or
    - (ii) in another member State; and
  - (b) whether or not the debtor possesses an establishment—
    - (i) in the United Kingdom; or
    - (ii) in any other member State.
- (2) If, to the petitioner's knowledge, there is a member State liquidator appointed in main proceedings in relation to the debtor, the petitioner shall, as soon as reasonably practicable, send a copy of the petition to that member State liquidator.]

### Textual Amendments

**F29** S. 6A inserted (8.9.2003) by [The Insolvency \(Scotland\) Regulations 2003 \(S.I. 2003/2109\)](#), [reg. 7](#)

VALID FROM 01/04/2008

## [<sup>F30</sup>6B Debtor application: provision of information S]

- (1) Where a debtor application is made, the debtor shall state in the application—
- (a) whether or not the debtor's centre of main interests is situated—
    - (i) in the United Kingdom; or
    - (ii) in another member State; and
  - (b) whether not the debtor possesses an establishment—
    - (i) in the United Kingdom; or
    - (ii) in any other member State.
- (2) If, to the debtor's knowledge, there is a member State liquidator appointed in main proceedings in relation to the debtor, the debtor shall, as soon as reasonably practicable, send a copy of the debtor application to that member State liquidator.]

### Textual Amendments

**F30** S. 6B inserted (S.) (1.4.2008) by [Bankruptcy and Diligence etc. \(Scotland\) Act 2007 \(asp 3\)](#), [ss. 14\(5\), 227\(3\)](#) (with s. 223); [S.S.I. 2008/115](#), [art. 3\(1\)\(a\)](#) (with arts. 4-6, 10 (as amended (with effect from 31.1.2011) by [S.S.I. 2011/31](#), art. 5))

## 7 Meaning of apparent insolvency. S

- (1) A debtor's apparent insolvency shall be constituted (or, where he is already apparently insolvent, constituted anew) whenever—
- (a) his estate is sequestered, or he is adjudged bankrupt in England or Wales or Northern Ireland; or

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- (b) [<sup>F31</sup>not being a person whose property is for the time being affected by a restraint order or subject to a confiscation, or charging, order,] he gives written notice to his creditors that he has ceased to pay his debts in the ordinary course of business;
- [<sup>F32</sup>(ba) he becomes subject to main proceedings in a member State other than the United Kingdom;] or
- (c) any of the following circumstances occurs—
- (i) he grants a trust deed;
  - (ii) following the service on him of a duly executed charge for payment of a debt, the days of charge expire without payment;
  - (iii) following a [<sup>F33</sup>an attachment (or an attempt to attach)] or seizure of any of his moveable property in pursuance of a summary warrant for the recovery of rates or taxes, 14 days elapse without payment;
  - (iv) a decree of adjudication of any part of his estate is granted, either for payment or in security;
  - (v) his effects are sold under a sequestration for rent due by him; <sup>F34</sup> . . .
  - (vi) a receiving order is made against him in England or Wales [<sup>F35</sup>; or]
  - [<sup>F36</sup>(vii) a debt payment programme under the Debt Arrangement and Attachment (Scotland) Act 2002 is revoked, where any debt being paid under the programme is constituted by a decree or document of debt as defined in section 10 (attachment) of that Act,]
- unless it is shown that at the time when any such circumstances occurred, the debtor was able and willing to pay his debts as they became due [<sup>F37</sup>or that but for his property being affected by a restraint order or subject to a confiscation, or charging, order he would be able to do so]; or
- (d) a creditor of the debtor, in respect of a liquid debt which amounts (or liquid debts which in aggregate amount) to not less than £750 or such sum as may be prescribed, has served on the debtor, by personal service by an officer of court, a demand in the prescribed form requiring him either to pay the debt (or debts) or to find security for its (or their) payment, and within 3 weeks after the date of service of the demand the debtor has not—
- (i) complied with the demand; or
  - (ii) intimated to the creditor, by recorded delivery, that he denies that there is a debt or that the sum claimed by the creditor as the debt is immediately payable.

[<sup>F38</sup>In paragraph (d) above, “liquid debt” does not include a sum payable under a confiscation order; and in the foregoing provisions of this subsection—

“charging order” has the meaning assigned <sup>F39</sup> . . . [<sup>F40F39</sup> . . . by section 78(2) of the Criminal Justice Act 1988][<sup>F41</sup>or by section 27(2) of the Drug Trafficking Act 1994];

“confiscation order” [<sup>F42</sup> “confiscation order” and “restraint order” mean a confiscation order or a restraint order made under Part 2, 3 or 4 of the Proceeds of Crime Act 2002]].

- (2) A debtor’s apparent insolvency shall continue, if constituted under—
- (a) subsection (1)(a) above, until his discharge; <sup>F43</sup> . . .
  - (b) subsection (1)(b), (c) or (d) above, until he becomes able to pay his debts and pays them as they become due [<sup>F44</sup>; or
  - (c) subsection (1)(ba), when main proceedings have ended].

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- (3) The apparent insolvency of—
- (a) a partnership shall be constituted either in accordance with the foregoing provisions of this section or if any of the partners is apparently insolvent for a debt of the partnership;
  - (b) an unincorporated body shall be constituted if a person representing the body is apparently insolvent, or a person holding property of the body in a fiduciary capacity is apparently insolvent, for a debt of the body.
- (4) Notwithstanding subsection (2) of section 6 of this Act, the apparent insolvency of an entity such as is mentioned in paragraph (a) or (b) of that subsection may be constituted (or as the case may be constituted anew) under subsection (1) above; and any reference in the foregoing provisions of this section to a debtor shall, except where the context otherwise requires, be construed as including a reference to such an entity.

#### Textual Amendments

- F31** Words inserted by [Criminal Justice \(Scotland\) Act 1987 \(c. 41, SIF 39:1\)](#), **ss. 45(5)(b)(i)**, 47(4)(a)
- F32** S. 7(1)(ba) inserted (8.9.2003) by [The Insolvency \(Scotland\) Regulations 2003 \(S.I. 2003/2109\)](#), **reg. 8(1)**
- F33** Words in s. 7(1)(c) substituted (30.12.2002) by [Debt Arrangement and Attachment \(Scotland\) Act 2002 \(asp 17\)](#), ss. 61, 64, **Sch. 3 Pt. 1 para. 15(2)**
- F34** Word in s. 7(1)(c)(v) repealed (30.11.2004) by [The Debt Arrangement Scheme \(Scotland\) Regulations 2004 \(S.S.I. 2004/468\)](#), **regs. 1, 46(a)** (as amended by S.S.I. 2004/470 reg. 3)
- F35** S. 7(1)(c)(vii) and word inserted (30.11.2004) by [The Debt Arrangement Scheme \(Scotland\) Regulations 2004 \(S.S.I. 2004/468\)](#), **regs. 1, 46(b)** (as amended by S.S.I. 2004/470 reg. 3)
- F36** S. 7(1)(c)(vii) and word inserted (30.11.2004) by [The Debt Arrangement Scheme \(Scotland\) Regulations 2004 \(S.S.I. 2004/468\)](#), **regs. 1, 46(b)** (as amended by S.S.I. 2004/470, reg. 3)
- F37** Words inserted by [Criminal Justice \(Scotland\) Act 1987 \(c. 41, SIF 39:1\)](#), **ss. 45(5)(b)(ii)**, 47(4)(a)
- F38** Words added by [Criminal Justice \(Scotland\) Act 1987 \(c. 41, SIF 39:1\)](#), **ss. 45(5)(b)(iii)**, 47(4)(a)
- F39** S. 7(1): words in the definition of charging order omitted (3.2.1995) by 1994 c. 37, ss. 65(1), 69(2), **Sch. 1 para. 10(2)(a)**
- F40** Words inserted by [Criminal Justice Act 1988 \(c. 33, SIF 39:1\)](#), ss. 123, 170, Sch. 8 para. 16, **Sch. 15 para. 108(a)**
- F41** S. 7(1): words in the definition of charging order inserted (3.2.1995) by 1994 c. 37, ss. 65(1), 69(2), **Sch. 1 para. 10(2)(a)**
- F42** Words in s. 7(1) substituted (24.3.2003) by virtue of [Proceeds of Crime Act 2002 \(c. 29\)](#), ss. 456, 458(1)(3), **Sch. 11 para. 15(3)**; S.I. 2003/333, **art. 2(1)**, Sch. (subject to transitional provisions in arts. 3-14) (as amended by S.I. 2003/531); S.S.I. 2003/210, **art. 2(1)(b)**, Sch. (subject to transitional provisions in arts. 3-7)
- F43** Word in s. 7(2) repealed (8.9.2003) by [The Insolvency \(Scotland\) Regulations 2003 \(S.I. 2003/2109\)](#), **reg. 8(2)(a)**
- F44** S. 7(2)(c) and word inserted (8.9.2003) by [The Insolvency \(Scotland\) Regulations 2003 \(S.I. 2003/2109\)](#), **reg. 8(2)(b)**

## 8 Further provisions relating to presentation of petitions. **U.K.**

- (1) Subject to subsection (2) below, a petition for the sequestration of a debtor's estate (other than a deceased debtor's estate) may be presented—
- <sup>F45</sup>(a) at any time by—
- (i) the debtor;
  - (ii) a trustee acting under a trust deed;

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- (iii) a temporary administrator; or
    - (iv) a member State liquidator appointed in main proceedings;]
  - (b) by a qualified creditor or qualified creditors, only if the apparent insolvency founded on in the petition was constituted within 4 months before the petition is presented.
- (2) A petition for the sequestration of the estate of a limited partnership may be presented within such time as may be prescribed.
- (3) A petition for the sequestration of the estate of a deceased debtor may be presented—
  - [<sup>F46</sup>(a) at any time by—
    - (i) an executor;
    - (ii) a person entitled to be appointed as executor of the estate;
    - (iii) a trustee acting under a trust deed;
    - (iv) a temporary administrator; or
    - (v) a member State liquidator appointed in main proceedings;]
  - (b) by a qualified creditor or qualified creditors of the deceased debtor—
    - (i) in a case where the apparent insolvency of the debtor was constituted within 4 months before his death, at any time;
    - (ii) in any other case (whether or not apparent insolvency has been constituted), not earlier than 6 months after the debtor’s death.
- (4) If an executor does not petition for sequestration of the deceased debtor’s estate or for the appointment of a judicial factor to administer the estate within a reasonable period after he knew or ought to have known that the estate was absolutely insolvent and likely to remain so, any intromission by him with the estate after the expiry of that period shall be deemed to be an intromission without a title.
- (5) The presentation of, or the concurring in, a petition for sequestration shall bar the effect of any enactment or rule of law relating to the limitation of actions in any part of the United Kingdom.
- (6) Where before sequestration is awarded it becomes apparent that a petitioning or concurring creditor was ineligible so to petition or concur he shall withdraw, or as the case may be withdraw from, the petition but another creditor may be sisted in his place.

#### Textual Amendments

**F45** S. 8(1)(a) substituted (8.9.2003) by [The Insolvency \(Scotland\) Regulations 2003 \(S.I. 2003/2109\)](#), [reg. 9\(1\)](#)

**F46** S. 8(3)(a) substituted (8.9.2003) by [The Insolvency \(Scotland\) Regulations 2003 \(S.I. 2003/2109\)](#), [reg. 9\(2\)](#)

#### Modifications etc. (not altering text)

**C2** S. 8(5) applied with modifications by [S.I. 1986/1915](#), [Rule 4.76](#).

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VALID FROM 01/04/2008

## <sup>F47</sup>8A Further provisions relating to debtor applications **S**

- (1) Subject to subsection (2) below, a debtor application may be made at any time.
- (2) A debtor application made in relation to the estate of a limited partnership may be made within such time as may be prescribed.
- (3) The making of, or the concurring in, a debtor application shall bar the effect of any enactment or rule of law relating to the limitation of actions.
- (4) Where, before sequestration is awarded, it becomes apparent that a creditor concurring in a debtor application was ineligible to so concur the Accountant in Bankruptcy shall withdraw him from the application but another creditor may concur in the place of the ineligible creditor and that other creditor shall notify the Accountant in Bankruptcy of that fact.]

### Textual Amendments

**F47** S. 8A inserted (1.4.2008) by [Bankruptcy and Diligence etc. \(Scotland\) Act 2007 \(asp 3\)](#), **ss. 14(6), 227(3)** (with [s. 223](#)); [S.S.I. 2008/115](#), **art. 3(1)(a)** (with [arts. 4-6, 10](#)) (with [arts. 4-6, 10](#) (as amended (with effect from 31.1.2011) by [S.S.I. 2011/31](#), [art. 5](#)))

## 9 Jurisdiction. **S**

- (1) The Court of Session shall have jurisdiction in respect of the sequestration of the estate of a living debtor or of a deceased debtor if the debtor had an established place of business in Scotland, or was habitually resident there, at the relevant time.
- (2) The Court of Session shall have jurisdiction in respect of the sequestration of the estate of any entity which may be sequestrated by virtue of section 6 of this Act, if the entity—
  - (a) had an established place of business in Scotland at the relevant time; or
  - (b) was constituted or formed under Scots law, and at any time carried on business in Scotland.
- (3) Notwithstanding that the partner of a firm, whether alive or deceased, does not fall within subsection (1) above, the Court of Session shall have jurisdiction in respect of the sequestration of his estate if a petition has been presented for the sequestration of the estate of the firm of which he is, or was at the relevant time before his decease, a partner and the process of that sequestration is still current.
- (4) The provisions of this section shall apply to the sheriff as they apply to the Court of Session but as if for the word “Scotland” wherever it occurs there were substituted the words “the sheriffdom” and in subsection (3) after the word “presented” there were inserted the words “in the sheriffdom”.
- (5) In this section “the relevant time” means at any time in the year immediately preceding the date of presentation of the petition or the date of death, as the case may be.

<sup>F48</sup>(6) This section is subject to Article 3 of the EC Regulation.]



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### Textual Amendments

**F48** S. 9(6) inserted (8.9.2003) by [The Insolvency \(Scotland\) Regulations 2003 \(S.I. 2003/2109\)](#), **reg. 10**

## 10 Concurrent proceedings for sequestration or analogous remedy. **S**

- (1) If, in the course of sequestration proceedings, the petitioner for sequestration, the debtor or a creditor concurring in the petition (the petition in such proceedings being hereafter in this section referred to as the “instant petition”), is, or becomes, aware that—
- (a) another petition for sequestration of the debtor’s estate is before a court or such sequestration has been awarded; or
  - (b) a petition for the appointment of a judicial factor on the debtor’s estate is before a court or such a judicial factor has been appointed; or
  - <sup>F49</sup>(c) a petition is before a court for the winding up of the debtor under Part IV or V of the <sup>M3</sup> Insolvency Act 1986 or [<sup>F50</sup>section 372 of the Financial Services and Markets Act 2000];
  - (d) an application for an analogous remedy in respect of the debtor’s estate is proceeding or such an analogous remedy is in force,
- he shall as soon as possible bring that fact to the notice of the court to which the instant petition was presented.
- (2) If a petitioner (not being the debtor) or a creditor concurring in the petition fails to comply with subsection (1) above, he may be made liable for the expenses of presenting the petition for sequestration; and, if the debtor fails to comply with subsection (1) above, he shall be guilty of an offence and liable, on summary conviction, to a fine not exceeding level 5 on the standard scale.
- (3) Where in the course of sequestration proceedings any of the circumstances mentioned in paragraph (a), (b) or (c) of subsection (1) above exists then—
- (a) the court to which the instant petition was presented may, on its own motion or at the instance of the debtor or any creditor or other person having an interest, allow that petition to proceed or may sist or dismiss it; or
  - (b) without prejudice to paragraph (a) above, the Court of Session may, on its own motion or on application by the debtor or any creditor or other person having an interest, direct the sheriff before whom the instant petition is pending, or the court before which the other petition is pending, to sist or dismiss the instant petition or, as the case may be, the other petition, or may order the petitions to be heard together.
- (4) Where in respect of the same estate—
- (a) a petition for sequestration is pending before a court; and
  - (b) an application for an analogous remedy is proceeding or an analogous remedy is in force,
- the court, on its own motion or at the instance of the debtor or any creditor or other person having an interest, may allow the petition for sequestration to proceed or may sist or dismiss it.
- (5) In this section “analogous remedy” means a bankruptcy order under the <sup>M4</sup>Bankruptcy Act 1914 or under the <sup>M5</sup>Insolvency Act 1985 or an administration order under section 112 of the <sup>M6</sup>County Courts Act 1984 in England and Wales or under any

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enactment having the like effect in Northern Ireland or a remedy analogous to either of the aforesaid remedies, or to sequestration, in any other country.

#### Textual Amendments

**F49** S. 10(1)(c) substituted by [Financial Services Act 1986 \(c. 60, SIF 69\)](#), s. 212(2), [Sch. 16 para. 29](#)

**F50** Words in s. 10(1)(c) substituted (1.12.2001) by [S.I. 2001/3649](#), [art. 224](#)

#### Marginal Citations

**M3** 1986 c.45 (66).

**M4** 1914 c. 59.

**M5** 1985 c. 65.

**M6** 1984 c. 28.

VALID FROM 01/04/2008

### <sup>F51</sup>10A Powers in relation to concurrent proceedings for sequestration or analogous remedy **S**

- (1) Where, in the course of instant proceedings which are by petition, any of the circumstances mentioned in paragraphs (a) to (d) of section 10(2) of this Act exists, the sheriff to whom the petition in the instant proceedings was presented may, on his own motion or at the instance of the debtor or any creditor or other person having an interest, allow that petition to proceed or may sist or dismiss it.
- (2) Without prejudice to subsection (1) above, where, in the course of instant proceedings which are by petition, any of the circumstances mentioned in paragraphs (a), (c) or (d) of section 10(2) of this Act exists, the Court of Session may, on its own motion or on the application of the debtor or any creditor or other person having an interest, direct the sheriff before whom the petition in the instant proceedings is pending, or the sheriff before whom the other petition is pending, to sist or dismiss the petition in the instant proceedings or, as the case may be, the other petition, or may order the petitions to be heard together.
- (3) Without prejudice to subsection (1) above, where, in the course of instant proceedings which are by petition, the circumstance mentioned in paragraph (b) of section 10(2) of this Act exists, the sheriff to whom the petition in the instant proceedings was presented may, on his own motion or at the instance of the debtor or any creditor or other person having an interest, direct the Accountant in Bankruptcy to dismiss the debtor application.
- (4) Where, in the course of instant proceedings which are by debtor application, any of the circumstances mentioned in paragraphs (a) to (d) of section 10(2) of this Act exists, the Accountant in Bankruptcy may dismiss the debtor application in the instant proceedings.
- (5) Where, in respect of the same estate—
  - (a) a petition for sequestration is pending before a sheriff; and
  - (b) an application for an analogous remedy is proceeding or an analogous remedy is in force,

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the sheriff, on his own motion or at the instance of the debtor or any creditor or other person having an interest, may allow the petition for sequestration to proceed or may sist or dismiss it.

- (6) Where, in respect of the same estate—
- (a) a debtor application has been made and has not been determined; and
  - (b) an application for an analogous remedy is proceeding or an analogous remedy is in force,
- the Accountant in Bankruptcy may proceed to determine the application or may dismiss it.]

#### Textual Amendments

**F51** Ss. 10, 10A substituted (1.4.2008) for s. 10 by [Bankruptcy and Diligence etc. \(Scotland\) Act 2007 \(asp 3\)](#), ss. 36, 227(3), Sch. 1 para. 8 (with s. 223); S.S.I. 2008/115, [art. 3\(1\)\(i\)](#) (with arts. 4-6, 10 (as amended (with effect from 31.1.2011) by S.S.I. 2011/31, [art. 5](#)))

## 11 Creditor's oath. **S**

- (1) Every creditor, being a petitioner for sequestration, a creditor who concurs in a petition by a debtor or a qualified creditor who becomes sisted under subsection (8)(i) of section 5 of this Act or under that subsection as applied by section 6(8) of this Act, shall produce an oath in the prescribed form made by him or on his behalf.
- (2) The oath may be made—
  - (a) in the United Kingdom, before any person entitled to administer an oath there;
  - (b) outwith the United Kingdom, before a British diplomatic or consular officer or any person authorised to administer an oath or affirmation under the law of the place where the oath is made.
- (3) The identity of the person making the oath and the identity of the person before whom the oath is made and their authority to make and to administer the oath respectively shall be presumed to be correctly stated, and any seal or signature on the oath shall be presumed to be authentic, unless the contrary is established.
- (4) If the oath contains any error or has omitted any fact, the court to which the petition for sequestration was presented may, at any time before sequestration is awarded, allow another oath to be produced rectifying the original oath; and this section shall apply to the making of that other oath as it applies to the making of the original oath.
- (5) Every creditor must produce along with the oath an account or voucher (according to the nature of the debt) which constitutes *prima facie* evidence of the debt; and a petitioning creditor shall in addition produce such evidence as is available to him to show the apparent insolvency of the debtor.

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*Award of sequestration and appointment and resignation of interim trustee*

**12 When sequestration is awarded. S**

[<sup>F52</sup>(1) Where a petition for the sequestration of his estate is presented by the debtor, unless cause is shown why sequestration cannot competently be awarded, the court shall award sequestration forthwith if it is satisfied—

- (a) that the petition has been presented in accordance with the provisions of this Act;
- (b) that either subsection (2A) or (2B) of section 5 of this Act applies to the debtor; and
- (c) that the provisions of subsections (6) and (6A) of that section have been complied with.]

[<sup>F53</sup>(1A) Where a petition is presented as mentioned in subsection (1) above, the Accountant in Bankruptcy may, not later than 7 days after the date on which sequestration is awarded, apply to the court for the grant of a certificate for the summary administration of the sequestration of the debtor's estate.]

(2) Where a petition for sequestration of a debtor's estate is presented by a creditor or a trustee acting under a trust deed, the court to which the petition is presented shall grant warrant to cite the debtor to appear before it on such date as shall be specified in the warrant, being a date not less than 6 nor more than 14 days after the date of citation, to show cause why sequestration should not be awarded.

[<sup>F54</sup>(3) Where, on a petition for sequestration presented by a creditor or a trustee acting under a trust deed, the court is satisfied—

- (a) that, if the debtor has not appeared, proper citation has been made of the debtor;
- (b) that the petition has been presented in accordance with the provisions of this Act;
- (c) that the provisions of subsection (6) of section 5 of this Act have been complied with;
- (d) that, in the case of a petition by a creditor, the requirements of this Act relating to apparent insolvency have been fulfilled; and
- (e) that, in the case of a petition by a trustee, the averments in his petition as to any of the conditions in subsection (2C) of the said section 5 are true,

it shall, subject to subsection (3A) below, award sequestration forthwith.

(3A) Sequestration shall not be awarded in pursuance of subsection (3) above if—

- (a) cause is shown why sequestration cannot competently be awarded; or
- (b) the debtor forthwith pays or satisfies, or produces written evidence of the payment or satisfaction of, or gives or shows that there is sufficient security for the payment of—
  - (i) the debt in respect of which he became apparently insolvent; and
  - (ii) any other debt due by him to the petitioner and any creditor concurring in the petition.]

[<sup>F52</sup>(4) In this Act “the date of sequestration” means—

- (a) where the petition for sequestration is presented by the debtor, the date on which sequestration is awarded;

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- (b) where the petition for sequestration is presented by a creditor or a trustee acting under a trust deed—
  - (i) the date on which the court grants warrant under subsection (2) above to cite the debtor; or
  - (ii) where more than one such warrant is granted, the date on which the first such warrant is granted.]

#### Textual Amendments

- F52** S. 12(1) substituted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 4(2) (with s. 12(6)); S.I. 1993/438, art.3
- S. 12(4) substituted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 4(5) (with s. 12(6)); S.I. 1993/438, art.3
- F53** S. 12(1A) inserted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 4(3) (with s. 12(6)); S.I. 1993/438, art.3
- F54** S. 12(3)(3A) substituted for s. 12(3) (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 4(4) (with s. 12(6)); S.I. 1993/438, art.3

### [13] <sup>F55</sup> Resignation, removal etc. of interim trustee. **S**

- (1) Where, under section 1A(2) of this Act, the court removes from office an interim trustee, the court shall, on the application of the Accountant in Bankruptcy, appoint a new interim trustee.
- (2) Without prejudice to section 1A(2) of this Act or to subsection (1) above, where the court is satisfied that an interim trustee—
  - (a) is unable to act (whether by, under or by virtue of a provision of this Act or from any other cause whatsoever); or
  - (b) has so conducted himself that he should no longer continue to act in the sequestration,the court, on the application of the debtor, a creditor or the Accountant in Bankruptcy, shall remove from office the interim trustee and appoint a new interim trustee.
- (3) An interim trustee (not being the Accountant in Bankruptcy) may apply to the court for authority to resign office; and if the court is satisfied that the grounds mentioned in paragraph (a) or (b) of subsection (2) above apply in relation to the interim trustee, it shall grant the application.
- (4) Where, following an application under subsection (3) above, the interim trustee resigns office, the court shall appoint a new interim trustee.
- (5) Where the interim trustee has died, the court, on the application of the debtor, a creditor or the Accountant in Bankruptcy, shall appoint a new interim trustee.
- (6) No one (other than the Accountant in Bankruptcy) shall act as interim trustee in a sequestration if he would, by virtue of section 24(2) of this Act, be disqualified from acting as permanent trustee in that sequestration; but where an interim trustee is, by virtue of this subsection, prohibited from so acting, he shall forthwith make an application under subsection (3) above.
- (7) Subsections (1) and (2) of section 2 of this Act shall apply as regards the appointment of an interim trustee under this section as if for any reference to—

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- (a) the court awarding sequestration of the debtor's estate, there was substituted a reference to the court appointing a new interim trustee; and
- (b) the petition for sequestration there was substituted a reference to the application under this section for the appointment of a new interim trustee.]

#### Textual Amendments

**F55** S. 13 substituted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para.2** (with s. 12(6)); S.I. 1993/438, **art.3**

VALID FROM 01/04/2008

#### <sup>F56</sup>13A Termination of interim trustee's functions where not appointed as trustee **S**

- (1) This section applies where an interim trustee (not being the Accountant in Bankruptcy) is appointed under section 2(5) of this Act and the sheriff—
  - (a) awards sequestration and appoints another person as trustee under subsection (2A) or (2C) of section 2 of this Act; or
  - (b) refuses to award sequestration.
- (2) Where the sheriff awards sequestration and appoints another person as trustee, the interim trustee shall hand over to the trustee everything in his possession which relates to the sequestration and shall thereupon cease to act in the sequestration.
- (3) The sheriff may make such order in relation to liability for the outlays and remuneration of the interim trustee as may be appropriate.
- (4) Within 3 months of the sheriff awarding or, as the case may be, refusing to award sequestration, the interim trustee shall—
  - (a) submit to the Accountant in Bankruptcy—
    - (i) his accounts of his intrusions (if any) with the debtor's estate; and
    - (ii) a claim for outlays reasonably incurred, and for remuneration for work reasonably undertaken, by him; and
  - (b) send a copy of his accounts and the claim to—
    - (i) the debtor;
    - (ii) the petitioner; and
    - (iii) in a case where sequestration is awarded, the trustee and all creditors known to the interim trustee.
- (5) On a submission being made to him under subsection (4)(a) above, the Accountant in Bankruptcy shall—
  - (a) audit the accounts;
  - (b) issue a determination fixing the amount of the outlays and remuneration payable to the interim trustee;
  - (c) send a copy of the determination to—
    - (i) the interim trustee; and
    - (ii) the persons mentioned in subsection (4)(b) above; and

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- (d) where a trustee (not being the Accountant in Bankruptcy) has been appointed in the sequestration, send a copy of the audited accounts and of the determination to the trustee, who shall insert them in the sederunt book.
- (6) Where the Accountant in Bankruptcy has been appointed as the trustee in the sequestration, the Accountant in Bankruptcy shall insert a copy of the audited accounts and the determination in the sederunt book.
- (7) The interim trustee or any person mentioned in subsection (4)(b) above may, within 14 days after the issuing of the determination under subsection (5)(b) above, appeal to the sheriff against the determination.
- (8) On receiving a copy of the Accountant in Bankruptcy's determination sent under subsection (5)(c)(i) above the interim trustee may apply to him for a certificate of discharge.
- (9) The interim trustee shall send notice of an application under subsection (8) above to the persons mentioned in subsection (4)(b) above and shall inform them—
  - (a) that they may make written representations relating to the application to the Accountant in Bankruptcy within the period of 14 days after such notification; and
  - (b) of the effect mentioned in subsection (16) below.
- (10) On the expiry of the period mentioned in subsection (9)(a) above the Accountant in Bankruptcy, after considering any representations duly made to him, shall—
  - (a) grant or refuse to grant the certificate of discharge; and
  - (b) notify the persons mentioned in subsection (4)(b) above accordingly.
- (11) The interim trustee or any person mentioned in subsection (4)(b) above may, within 14 days after the issuing of the determination under subsection (10) above, appeal therefrom to the sheriff.
- (12) If, following an appeal under subsection (11) above, the sheriff determines that a certificate of discharge which has been refused should be granted he shall order the Accountant in Bankruptcy to grant it.
- (13) If, following an appeal under subsection (11) above, the sheriff determines that a certificate of discharge which has been granted should have been refused he shall revoke the certificate.
- (14) The sheriff clerk shall send a copy of the decree of the sheriff following an appeal under subsection (11) above to the Accountant in Bankruptcy.
- (15) The decision of the sheriff in an appeal under subsection (7) or (11) above shall be final.
- (16) The grant of a certificate of discharge under this section by the Accountant in Bankruptcy shall have the effect of discharging the interim trustee from all liability (other than any liability arising from fraud) to the debtor, to the petitioner or to the creditors in respect of any act or omission of the interim trustee in exercising the functions conferred on him by this Act.

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### Textual Amendments

**F56** Ss. 13A, 13B inserted (1.4.2008) by [Bankruptcy and Diligence etc. \(Scotland\) Act 2007 \(asp 3\)](#), ss. 10, 227(3) (with s. 223); S.S.I. 2008/115, art. 3(1)(a) (with arts. 4-6, 10 (as amended (with effect from 31.1.2011) by S.S.I. 2011/31, art. 5))

VALID FROM 01/04/2008

### 13B Termination of Accountant in Bankruptcy's functions as interim trustee where not appointed as trustee **S**

- (1) This section applies where the Accountant in Bankruptcy is appointed as interim trustee under section 2(5) of this Act and the sheriff —
  - (a) awards sequestration and appoints another person as trustee under section 2(2A) of this Act; or
  - (b) refuses to award sequestration.
- (2) Where the sheriff awards sequestration and appoints another person as trustee, the Accountant in Bankruptcy shall hand over to the trustee everything in his possession which relates to the sequestration and shall thereupon cease to act in the sequestration.
- (3) The sheriff may make such order in relation to liability for the outlays and remuneration of the Accountant in Bankruptcy as may be appropriate.
- (4) Within 3 months of the sheriff awarding or, as the case may be, refusing to award sequestration, the Accountant in Bankruptcy shall—
  - (a) send to the debtor and the petitioner—
    - (i) his accounts of his intromissions (if any) with the debtor's estate;
    - (ii) a determination of his fees and outlays calculated in accordance with regulations made under section 69A of this Act; and
    - (iii) the notice mentioned in subsection (5) below; and
  - (b) in a case where sequestration is awarded, send a copy of his accounts, the claim and the notice to all creditors known to him.
- (5) The notice referred to in subsection (4)(a)(iii) above is a notice in writing stating—
  - (a) that the Accountant in Bankruptcy has commenced procedure under this Act leading to discharge in respect of his acting as interim trustee;
  - (b) that an appeal may be made to the sheriff under subsection (7) below; and
  - (c) the effect mentioned in subsection (9) below.
- (6) The Accountant in Bankruptcy shall, unless the sheriff refuses to award sequestration, insert a copy of the accounts and the determination in the sederunt book.
- (7) The debtor, the petitioner and any creditor may, within 14 days after the sending of the notice under subsection (4)(a)(iii) or, as the case may be, subsection (4)(b) above, appeal to the sheriff against—
  - (a) the determination of the Accountant in Bankruptcy mentioned in subsection (4)(a)(ii) above;



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- (b) the discharge of the Accountant in Bankruptcy in respect of his actings as interim trustee;
  - (c) both such determination and discharge,
- and the sheriff clerk shall send a copy of the decree of the sheriff to the Accountant in Bankruptcy.
- (8) The decision of the sheriff in an appeal under subsection (7) above shall be final.
- (9) Where—
- (a) the requirements of this section have been complied with; and
  - (b) no appeal is made to the sheriff under subsection (7) above or such an appeal is made but is refused as regards the discharge of the Accountant in Bankruptcy,
- the Accountant in Bankruptcy shall be discharged from all liability (other than any liability arising from fraud) to the debtor, to the petitioner or to the creditors in respect of any act or omission of the Accountant in Bankruptcy in exercising the functions of interim trustee conferred on him by this Act.]

#### Textual Amendments

**F56** Ss. 13A, 13B inserted (1.4.2008) by [Bankruptcy and Diligence etc. \(Scotland\) Act 2007 \(asp 3\)](#), ss. 10, 227(3) (with s. 223); S.S.I. 2008/115, art. 3(1)(a) (with arts. 4-6, 10 (as amended (with effect from 31.1.2011) by S.S.I. 2011/31, art. 5))

## 14 Registration of court order. **S**

- (1) The clerk of the court shall forthwith after the date of sequestration send—
- (a) a certified copy of the relevant court order to the keeper of the register of inhibitions and adjudications for recording in that register; and
  - (b) a copy of the order to the Accountant in Bankruptcy
- [<sup>F57</sup>(c) a copy of the order to the DAS administrator (as defined in regulation 2(1) of the Debt Arrangement Scheme (Scotland) Regulations 2004), where the debtor is taking part in a debt payment programme under Part 1 of the Debt Arrangement and Attachment (Scotland) Act 2002.]
- (2) Recording under subsection (1)(a) above shall have the effect as from the date of sequestration of an inhibition and of a citation in an adjudication of the debtor's heritable estate at the instance of the creditors who subsequently have claims in the sequestration accepted under section 49 of this Act.
- (3) The effect mentioned in subsection (2) above shall expire—
- (a) on the recording under section 15(5)(a) or 17(8)(a) of, or by virtue of paragraph 11 of Schedule 4 to, this Act or a certified copy of an order; or
  - (b) subject to subsection (4) below, if the effect has not expired by virtue of paragraph (a) above, at the end of the period of 3 years beginning with the date of sequestration.
- (4) The permanent trustee, if not discharged, [<sup>F58</sup>may] before the end of the period of 3 years mentioned in subsection (3)(b) above send a memorandum in a form prescribed by the Court of Session by act of sederunt to the keeper of the register of inhibitions

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and adjudications for recording in that register, and such recording shall renew the effect mentioned in subsection (2) above; and thereafter the said effect shall continue to be preserved only if such a memorandum is so recorded before the expiry of every subsequent period of 3 years.

- (5) In this section “relevant court order” means, if the petition for sequestration is presented by—
- (a) the debtor, the order of the court awarding sequestration; or
  - (b) a creditor or the trustee acting under a trust deed, the order of the court granting warrant under section 12(2) of this Act.

#### Textual Amendments

**F57** S. 14(1)(c) inserted (30.11.2004) by [The Debt Arrangement Scheme \(Scotland\) Regulations 2004](#) (S.S.I. 2004/468), regs. 1, 5, **Sch. 3 para. 1** (as amended by S.S.I. 2004/470, reg. 3)

**F58** Words in s. 14(4) substituted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para.3** (with s. 12(6)); S.I. 1993/438, **art.3**

## 15 Further provisions relating to award of sequestration. **S**

- (1) Where sequestration has been awarded by the Court of Session, it shall remit the sequestration to such sheriff as in all the circumstances of the case it considers appropriate.
- (2) The Court of Session may at any time after sequestration has been awarded, on application being made to it, transfer the sequestration from the sheriff before whom it is depending or to whom it has been remitted to any other sheriff.
- (3) Where the court makes an order refusing to award sequestration, the petitioner or a creditor concurring in the petition for sequestration may appeal against the order within 14 days of the date of making of the order.
- (4) Without prejudice to any right to bring an action of reduction of an award of sequestration, such an award shall not be subject to review otherwise than by recall under sections 16 and 17 of this Act.
- (5) Where a petition for sequestration is presented by a creditor or a trustee acting under a trust deed, the clerk of the court shall—
  - (a) on the final determination or abandonment of any appeal under subsection (3) above in relation to the petition, or if there is no such appeal on the expiry of the 14 days mentioned in that subsection, send a certified copy of an order refusing to award sequestration to the keeper of the register of inhibitions and adjudications for recording in that register;
  - <sup>F59</sup>(b) forthwith send a copy of the order refusing or awarding sequestration to—
    - (i) the Accountant in Bankruptcy;
    - (ii) the DAS administrator (as defined in regulation 2(1) of the Debt Arrangement Scheme (Scotland) Regulations 2004), where the debtor is taking part in a debt payment programme under Part 1 of the Debt Arrangement and Attachment (Scotland) Act 2002].
- <sup>F60</sup>(6) The interim trustee shall, as soon as an award of sequestration has been granted, publish in the Edinburgh Gazette a notice—
  - (a) stating that sequestration of the debtor’s estate has been awarded;

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- (b) inviting the submission of claims to him; and
  - (c) giving such other information as may be prescribed.]
- (7) Where sequestration has been awarded, the process of sequestration shall not fall asleep.
- (8) Where a debtor learns, whether before or after the date of sequestration, that he may derive benefit from another estate, he shall as soon as practicable after that date inform—
- (a) the permanent trustee or, if the permanent trustee has not yet been elected or appointed, the interim trustee of that fact; and
  - (b) the person who is administering that other estate of the sequestration.
- (9) If the debtor fails to comply with subsection (8) above, he shall be guilty of an offence and liable, on summary conviction, to a fine not exceeding level 5 on the standard scale.

#### Textual Amendments

- F59** S. 15(5)(b) substituted (30.11.2004) by [The Debt Arrangement Scheme \(Scotland\) Regulations 2004 \(S.S.I. 2004/468\)](#), [regs. 1, 5](#), {Sch. 3 para. 2.} (as amended by [S.S.I. 2004/470](#), [reg. 3](#))
- F60** S. 15(6) substituted (1.4.1993, subject to savings in arts. 4, 5 of [S.I. 1993/438](#)) by [1993 c. 6, s. 11\(3\)](#), [Sch. 1 para.4](#) (with [s. 12\(6\)](#)); [S.I. 1993/438](#), [art.3](#)

## 16 Petitions for recall of sequestration. **S**

- (1) A petition for recall of an award of sequestration may be presented to the Court of Session by—
- (a) the debtor, any creditor or any other person having an interest (notwithstanding that he was a petitioner, or concurred in the petition, for the sequestration);
  - (b) the interim trustee, the permanent trustee, or the Accountant in Bankruptcy.
- (2) The petitioner shall serve upon the debtor, any person who was a petitioner, or concurred in the petition, for the sequestration, the interim trustee or permanent trustee and the Accountant in Bankruptcy, a copy of the petition along with a notice stating that the recipient of the notice may lodge answers to the petition within 14 days of the service of the notice.
- (3) At the same time as service is made under subsection (2) above, the petitioner shall publish a notice in the Edinburgh Gazette stating that a petition has been presented under this section and that any person having an interest may lodge answers to the petition within 14 days of the publication of the notice.
- (4) Subject to <sup>F61</sup>sections 41(1)(b) and 41A(1)(b)] of this Act, a petition under this section may be presented—
- (a) within 10 weeks after the date of <sup>F62</sup>the award of]sequestration; but
  - (b) at any time if the petition is presented on any of the grounds mentioned in paragraphs (a) to (c) of section 17(1) of this Act.
- (5) Notwithstanding that a petition has been presented under this section, the proceedings in the sequestration shall continue (subject to section 17(6) of this Act) as if that petition had not been presented until the recall is granted.

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- (6) Where—
- (a) a petitioner under this section; or
  - (b) a person who has lodged answers to the petition,
- withdraws or dies, any person entitled to present or, as the case may be, lodge answers to a petition under this section may be sisted in his place.

#### Textual Amendments

- F61** Words in s. 16(4) substituted (5.12.2005) by [Civil Partnership Act 2004 \(c. 33\)](#), ss. 261(2), 263, [Sch. 28 para. 31](#); [S.S.I. 2005/604](#), [art. 2\(c\)](#)
- F62** Words in s. 16(4)(a) inserted (1.4.1993, subject to savings in arts. 4, 5 of [S.I. 1993/438](#)) by [1993 c. 6](#), s. 11(3), [Sch. 1 para.5](#) (with s. 12(6)); [S.I. 1993/438](#), [art.3](#)

## 17 Recall of sequestration. **S**

- (1) The Court of Session may recall an award of sequestration if it is satisfied that in all the circumstances of the case (including those arising after the date of the award of sequestration) it is appropriate to do so and, without prejudice to the foregoing generality, may recall the award if it is satisfied that—
  - (a) the debtor has paid his debts in full or has given sufficient security for their payment;
  - (b) a majority in value of the creditors reside in a country other than Scotland and that it is more appropriate for the debtor's estate to be administered in that other country; or
  - (c) one or more other awards of sequestration of the estate or analogous remedies (as defined in section 10(5) of this Act) have been granted.
- (2) Where one or more awards of sequestration of the debtor's estate have been granted, the Court may, after such intimation as it considers necessary, recall an award whether or not the one in respect of which the petition for recall was presented.
- (3) On recalling an award of sequestration, the Court—
  - (a) shall make provision for the payment of the outlays and remuneration of the interim trustee and permanent trustee by directing that such payment shall be made out of the debtor's estate or by requiring any person who was a party to the petition for sequestration to pay the whole or any part of the said outlays and remuneration;
  - (b) without prejudice to subsection (7) below, may direct that payment of the expenses of a creditor who was a petitioner, or concurred in the petition, for sequestration shall be made out of the debtor's estate;
  - (c) may make any further order that it considers necessary or reasonable in all the circumstances of the case.
- (4) Subject to subsection (5) below, the effect of the recall of an award of sequestration shall be, so far as practicable, to restore the debtor and any other person affected by the sequestration to the position he would have been in if the sequestration had not been awarded.
- (5) A recall of an award of sequestration shall not—

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- (a) affect the interruption of prescription caused by the presentation of the petition for sequestration or the submission of a claim under section 22 or 48 of this Act;
  - (b) invalidate any transaction entered into before such recall by the interim trustee or permanent trustee with a person acting in good faith.
- (6) Where the Court considers that it is inappropriate to recall or to refuse to recall an award of sequestration forthwith, it may order that the proceedings in the sequestration shall continue but shall be subject to such conditions as it may think fit.
- (7) The Court may make such order in relation to the expenses in a petition for recall as it thinks fit.
- (8) The clerk of the court shall send—
- (a) a certified copy of any order recalling an award of sequestration to the keeper of the register of inhibitions and adjudications for recording in that register; and
  - (b) a copy of any order recalling or refusing to recall an award of sequestration, or of any order under section 41(1)(b)(ii) [<sup>F63</sup>or 41A(1)(b)(ii)] of this Act, to—
    - (i) the Accountant in Bankruptcy; and
    - (ii) the permanent trustee (if any) who shall insert it in the sederunt book.

#### Textual Amendments

**F63** Words in s. 17(8)(b) inserted (5.12.2005) by [Civil Partnership Act 2004 \(c. 33\)](#), ss. 261(2), 263, [Sch. 28 para. 32](#); [S.S.I. 2005/604](#), [art. 2\(c\)](#)

*Period between award of sequestration and statutory meeting of creditors*

## 18 Interim preservation of estate. **S**

- (1) The interim trustee may give general or particular directions to the debtor relating to the management of the debtor's estate.
- (2) In exercising the functions conferred on him by section [<sup>F64</sup>2(4)(a)] of this Act, an interim trustee may—
  - (a) require the debtor to deliver up to him any money or valuables, or any document relating to the debtor's business or financial affairs, belonging to or in the possession of the debtor or under his control;
  - (b) place in safe custody anything mentioned in paragraph (a) above;
  - (c) require the debtor to deliver up to him any perishable goods belonging to the debtor or under his control and may arrange for the sale or disposal of such goods;
  - (d) make or cause to be made an inventory or valuation of any property belonging to the debtor;
  - (e) require the debtor to implement any transaction entered into by the debtor;
  - (f) effect or maintain insurance policies in respect of the business or property of the debtor;
  - (g) close down the debtor's business.

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- [<sup>F65</sup>(h) carry on any business of the debtor or borrow money in so far as it is necessary for the interim trustee to do so to safeguard the debtor's estate.]
- (3) The court, on the application of the interim trustee, may—
- <sup>F66</sup>(a) . . . . .
- (b) on cause shown, grant a warrant authorising the interim trustee to enter the house where the debtor resides or his business premises and to search for and take possession of anything mentioned in paragraphs (a) and (c) of subsection (2) above, if need be by opening shut and lock-fast places; or
- (c) make such other order to safeguard the debtor's estate as it thinks appropriate.
- (4) The court, on an application by the debtor on the grounds that a direction under subsection (1) above is unreasonable, may—
- (a) if it considers the direction to be unreasonable, set aside the direction; and
- (b) in any event, give such directions to the debtor regarding the management of his estate as it considers appropriate;
- but, subject to any interim order of the court, the debtor shall comply with the direction appealed against pending the final determination of the appeal.
- (5) The debtor shall be guilty of an offence if—
- (a) he fails without reasonable excuse to comply with—
- (i) a direction under subsection (1) or (4)(b) above; or
- (ii) a requirement under subsection (2)(a), (c) or (e) above; or
- (b) he obstructs the interim trustee where the interim trustee is acting in pursuance of subsection (3)(b) above.
- (6) A person convicted of an offence under subsection (5) above shall be liable—
- (a) on summary conviction to a fine not exceeding the statutory maximum or—
- (i) to imprisonment for a term not exceeding 3 months; or
- (ii) if he has previously been convicted of an offence inferring dishonest appropriation of property or an attempt at such appropriation, to imprisonment for a term not exceeding 6 months,
- or (in the case of either sub-paragraph) to both such fine and such imprisonment; or
- (b) on conviction on indictment to a fine or to imprisonment for a term not exceeding 2 years or to both.

#### Textual Amendments

**F64** Words in s. 18(2) substituted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 6(a)** (with s. 12(6)); S.I. 1993/438, **art.3**

**F65** S. 18(2)(h) added (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 6(b)** (with s. 12(6)); S.I. 1993/438, **art.3**

**F66** S. 18(3)(a) repealed (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(4), **Sch.2** (with s. 12(6)); S.I. 1993/438, **art.3**

#### [19] <sup>F67</sup>Statement of assets and liabilities etc. **S**

- (1) Where the petitioner for sequestration is the debtor he shall, not later than 7 days after the appointment of the interim trustee (where he is not the Accountant in Bankruptcy),

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send to the interim trustee such statement of assets and liabilities as was lodged in court in pursuance of section 5(6A)(a) of this Act.

- (2) Where the petitioner for sequestration is a creditor or a trustee acting under a trust deed, the debtor shall, not later than 7 days after having been notified by the interim trustee as mentioned in section 2(7) of this Act, send to the interim trustee a statement of assets and liabilities.
- (3) If the debtor—
  - (a) fails to send to the interim trustee in accordance with subsection (1) or (2) above such statement of assets and liabilities; or
  - (b) fails to disclose any material fact in such statement of assets and liabilities; or
  - (c) makes a material misstatement in such statement of assets and liabilities,he shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale or to imprisonment for a term not exceeding 3 months or to both such fine and imprisonment.
- (4) In any proceedings for an offence under subsection (3) above, it shall be a defence for the accused to show that he had a reasonable excuse for—
  - (a) failing to send to the interim trustee in accordance with subsection (1) or (2) above such statement of assets and liabilities; or
  - (b) failing to disclose a material fact; or
  - (c) making a material misstatement.]

#### Textual Amendments

**F67** S. 19 substituted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para.7** (with s. 12(6)); S.I. 1993/438, **art.3**

## 20 Trustee's duties on receipt of list of assets and liabilities. **S**

- <sup>F68</sup>(1) When the interim trustee has received the statement of assets and liabilities, he shall, as soon as practicable, prepare a statement of the debtor's affairs so far as within the knowledge of the interim trustee and shall indicate in the statement of the debtor's affairs whether, in his opinion, the debtor's assets are unlikely to be sufficient to pay any dividend whatsoever in respect of the debts mentioned in paragraphs (e) to (h) of section 51(1) of this Act.]
- (2) The interim trustee shall, not later than 4 days before the date fixed for the statutory meeting, send to the Accountant in Bankruptcy—
  - (a) [<sup>F68</sup>the statement] of assets and liabilities; and
  - (b) a copy of the <sup>F69</sup> . . . statement of the debtor's affairs; and
  - (c) written comments by the interim trustee indicating what in his opinion are the causes of the insolvency and to what extent the conduct of the debtor may have contributed to the insolvency.
- (3) The written comments made under subsection (2)(c) above shall be absolutely privileged.
- (4) The interim trustee may request—

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- (a) the debtor to appear before him and to give information relating to his assets, his dealings with them or his conduct in relation to his business or financial affairs; or
- (b) the debtor's spouse [<sup>F70</sup>or civil partner] or any other person who the interim trustee believes can give such information to give that information,

and if the interim trustee considers it necessary he may apply to the sheriff for an order requiring the debtor, spouse [<sup>F71</sup>, civil partner] or other person to appear before the sheriff for private examination.

- (5) Subsections (2) to (4) of section 44 and sections 46 and 47 of this Act shall apply, subject to any necessary modifications, in respect of private examination under subsection (4) above as they apply in respect of private examination under the said subsection (2).

[<sup>F72</sup>(5A) Subsections (2) and (3) above do not apply in any case where the Accountant in Bankruptcy is the interim trustee.]

#### Textual Amendments

- F68** S. 20(1) substituted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 8(2)** (with s. 12(6)); S.I. 1993/438, **art.3**  
Words in s. 20(2)(a) substituted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 8(3)** (with s. 12(6)); S.I. 1993/438, **art.3**
- F69** Word “preliminary” in s. 20(2)(b) repealed (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(4), **Sch.2** (with s. 12(6)); S.I. 1993/438, **art.3**
- F70** Words in s. 20(4)(b) inserted (5.12.2005) by Civil Partnership Act 2004 (c. 33), ss. 261(2), 263, **Sch. 28 para. 33(a)**; S.S.I. 2005/604, **art. 2(c)**
- F71** Words in s. 20(4) inserted (5.12.2005) by Civil Partnership Act 2004 (c. 33), ss. 261(2), 263, **Sch. 28 para. 33(b)**; S.S.I. 2005/604, **art. 2(c)**
- F72** S. 20(5A) inserted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 8(4)** (with s. 12(6)); S.I. 1993/438, **art.3**

#### [20A] <sup>F73</sup>Statutory meeting. **S**

A meeting of creditors called by the interim trustee under section 21 or 21A of this Act shall, in this Act, be referred to as “the statutory meeting”.]

#### Textual Amendments

- F73** S. 20A inserted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para.9** (with s. 12(6)); S.I. 1993/438, **art.3**

*Statutory meeting of creditors and confirmation of permanent trustee*

#### 21 Calling of statutory meeting. **S**

- (1) [<sup>F74</sup>Where the interim trustee is not the Accountant in Bankruptcy he shall call the statutory meeting] to be held within 28 days, or such longer period as the sheriff on cause shown may allow, after the date of the award of sequestration.



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- [<sup>F75</sup>(1A) The statutory meeting shall be held at such time and place as the interim trustee determines.]
- (2) Not less than 7 days before the date fixed for the statutory meeting, the interim trustee shall notify—
- (a) every creditor known to him; and
  - (b) the Accountancy in Bankruptcy,
- of the date, time and place of the meeting, and shall in the notification to creditors invite the submission of such claims as have not already been submitted and inform them of his duties under section 23(3) and (5) of this Act.
- (3) The creditors may continue the statutory meeting to a date not later than 7 days after the end of the period—
- (a) of 28 days mentioned in subsection (1) above; or (as the case may be),
  - (b) allowed by the sheriff under that subsection.
- [<sup>F75</sup>(4) This section does not apply in any case where the Accountant in Bankruptcy is the interim trustee.]

#### Textual Amendments

- F74** Words in s. 21(1) substituted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 10(2)** (with s. 12(6)); S.I. 1993/438, **art.3**
- F75** S. 21(1A) inserted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 10(3)** (with s. 12(6)); S.I. 1993/438, **art.3**  
S. 21(4) inserted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 10(4)** (with s. 12(6)); S.I. 1993/438, **art.3**

#### [21A <sup>F76</sup>Calling of statutory meeting where interim trustee is Accountant in Bankruptcy. **S**

- (1) Subject to subsections (5) and (6) below, where the interim trustee is the Accountant in Bankruptcy, the statutory meeting may be held at such time and place as the interim trustee may determine.
- (2) Not later than 60 days after the date of the sequestration, or such longer period as the sheriff may on cause shown allow, the interim trustee shall give notice to every creditor known to him of whether he intends to call the statutory meeting.
- (3) A notice given under subsection (2) above shall—
- (a) be accompanied by a copy of the interim trustee's statement of the debtor's affairs; and
  - (b) where the interim trustee is notifying his intention not to hold the statutory meeting, inform creditors—
    - (i) of the effect of subsections (4) and (5) below; and
    - (ii) whether he intends to apply for the grant of a certificate for the summary administration of the sequestration of the debtor's estate.
- (4) Within 7 days of the giving of notice under subsection (2) above, any creditor may request the interim trustee to call the statutory meeting.

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- (5) Where a request or requests under subsection (4) above are made by not less than one quarter in value of the debtor's creditors, the interim trustee shall call the statutory meeting not later than 28 days, or such other period as the sheriff may on cause shown allow, after the giving of notice under subsection (2) above.
- (6) Where the interim trustee gives notice under subsection (2) above that he intends to call the statutory meeting, such meeting shall be called not later than 28 days after the giving of such notice.
- (7) Not less than 7 days before the date fixed for the statutory meeting, the interim trustee shall notify every creditor known to him of the date, time and place of the meeting, and shall in such notice invite the submission of such claims as have not already been submitted and inform them of his duties under section 23(3) of this Act.
- (8) The creditors may continue the statutory meeting to a date not later than 7 days after the end of the period mentioned in subsection (6) above or such longer period as the sheriff may on cause shown allow.
- (9) This section applies in any case where the Accountant in Bankruptcy is the interim trustee.]

#### Textual Amendments

**F76** Ss. 21A, 21B inserted (1.4.1993, subject to savings in arts. 4, 5 of [S.I. 1993/438](#)) by [1993 c. 6, s.5](#) (with [s. 12\(6\)](#)); [S.I. 1993/438, art.3](#)

#### 21B <sup>F77</sup> Procedure where no statutory meeting called. **S**

- (1) Where the interim trustee does not call the statutory meeting and the period mentioned in section 21A(4) of this Act has expired, he shall—
  - (a) forthwith make a report to the sheriff on the circumstances of the sequestration; and
  - (b) provide to the sheriff a copy of the interim trustee's statement of the debtor's affairs.
- (2) In the case of a sequestration which falls within subsection (1) above—
  - (a) section 25A of this Act shall apply; and
  - (b) the interim trustee may apply to the sheriff for the grant of a certificate for the summary administration of the sequestration of the debtor's estate.

#### Textual Amendments

**F77** Ss. 21A, 21B inserted (1.4.1993, subject to savings in arts. 4, 5 of [S.I. 1993/438](#)) by [1993 c. 6, s.5](#) (with [s. 12\(6\)](#)); [S.I. 1993/438, art.3](#)

#### 22 Submission of claims for voting purposes at statutory meeting. **U.K.**

- (1) For the purposes of voting at the statutory meeting, a creditor shall submit a claim in accordance with this section to the interim trustee at or before the meeting.
- (2) A creditor shall submit a claim under this section by producing to the interim trustee—

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- (a) a statement of claim in the prescribed form; and
- (b) an account or voucher (according to the nature of the debt) which constitutes *prima facie* evidence of the debt:

Provided that the interim trustee may dispense with any requirement under this subsection in respect of any debt or any class of debt.

- (3) Where a creditor neither resides nor has a place of business in the United Kingdom, the interim trustee—
  - (a) shall, if he knows where the creditor resides or has a place of business and if no notification has been given to that creditor under section 21(2) of this Act, write to him informing him that he may submit a claim under this section;
  - (b) may allow the creditor to submit an informal claim in writing.
- (4) A creditor who has produced a statement of claim in accordance with subsection (2) above may at any time before the statutory meeting produce in place of that statement of claim another such statement of claim specifying a different amount for his claim.
- (5) If a creditor produces under this section a statement of claim, account, voucher or other evidence which is false—
  - (a) the creditor shall be guilty of an offence unless he shows that he neither knew nor had reason to believe that the statement of claim, account, voucher or other evidence was false;
  - (b) the debtor shall be guilty of an offence if he—
    - (i) knew or became aware that the statement of claim, account, voucher or other evidence was false; and
    - (ii) failed as soon as practicable after acquiring such knowledge to report it to the interim trustee or permanent trustee.
- (6) A creditor may, in such circumstances as may be prescribed, state the amount of his claim in foreign currency.
- (7) The interim trustee shall, on production of any document to him under this section, initial the document and keep a record of it stating the date when it was produced to him, and, if requested by the sender, shall return it (if it is not a statement of claim) to him.
- (8) The submission of a claim under this section shall bar the effect of any enactment or rule of law relating to the limitation of actions in any part of the United Kingdom.
- (9) Schedule 1 to this Act shall have effect for determining the amount in respect of which a creditor shall be entitled to claim.
- (10) A person convicted of an offence under subsection (5) above shall be liable—
  - (a) on summary conviction to a fine not exceeding the statutory maximum or—
    - (i) to imprisonment for a term not exceeding 3 months; or
    - (ii) if he has previously been convicted of an offence inferring dishonest appropriation of property or an attempt at such appropriation, to imprisonment for a term not exceeding 6 months,or (in the case of either sub-paragraph) to both such fine and such imprisonment; or
  - (b) on conviction on indictment to a fine or to imprisonment for a term not exceeding 2 years or to both.

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#### Modifications etc. (not altering text)

- C3** S. 22 restricted (S.) (17.12.2001) by 2001 asp 13, s. 20, **Sch. 6 para. 8(2)** (with s. 29); S.I. 2001/456, **art. 2**
- C4** S. 22(5)(10) applied (with modifications) by S.I. 1986/1915, **Rules 4.16(1)(a), 7.9(4)** and by Rule 2.41(2) (as substituted (15.9.2003) by **The Insolvency (Scotland) Amendment Rules 2003** (S.I. 2003/2111), **Rule 3, Sch. 1 Pt. 1**)
- C5** S. 22(8) applied with modifications by S.I. 1986/1915, **Rule 4.76**.
- C6** S. 22(10) applied (with modifications) by S.I. 1986/1915, **Rules 4.16(1)(a), 7.9(4)** and by Rule 2.41(2) (as substituted (15.9.2003) by **The Insolvency (Scotland) Amendment Rules 2003** (S.I. 2003/2111), **Rule 3, Sch. 1 Pt. 1**)

### 23 Proceedings at statutory meeting before election of permanent trustee. **S**

- (1) At the commencement of the statutory meeting, the chairman shall be the interim trustee who as chairman shall—
- for the purposes of subsection (2) below, accept or reject in whole or in part the claim of each creditor, and, if the amount of a claim is stated in foreign currency, he shall convert that amount into sterling, in such manner as may be prescribed, at the rate of exchange prevailing at the close of business on the date of sequestration;
  - invite the creditors thereupon to elect one of their number as chairman in his place and shall preside over the election:

Provided that if a chairman is not elected in pursuance of this paragraph, the interim trustee shall remain the chairman throughout the meeting; and

- arrange for a record to be made of the proceedings at the meeting.
- (2) The acceptance of a claim in whole or in part under subsection (1) above shall, subject to section 24(3) of this Act, determine the entitlement of a creditor to vote at the statutory meeting.
- (3) On the conclusion of the proceedings under subsection (1) above, the interim trustee—
- <sup>F78</sup>(a) shall make available for inspection—
    - the statement of assets and liabilities; and
    - his statement of the debtor's affairs prepared under section 20(1) of this Act;
  - shall answer to the best of his ability any questions, and shall consider any representations, put to him by the creditors relating to the debtor's assets, business or financial affairs or his conduct in relation thereto;
  - shall, after considering any such representations as are mentioned in paragraph (b) above, indicate whether, in his opinion, the debtor's assets are unlikely to be sufficient as mentioned in section 20(1) of this Act; and
  - <sup>F78</sup>(d) shall determine whether it is necessary to revise his statement of the debtor's affairs and, if he determines that it is necessary to revise the statement, he shall do so either at, or as soon as possible after, the statutory meeting.]

<sup>F79</sup>(4) . . . . .

- <sup>F78</sup>(5) Where the interim trustee has revised his statement of the debtor's affairs, he shall, as soon as possible after the statutory meeting, send a copy of the revised statement to every creditor known to him.]

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### Textual Amendments

- F78** S. 23(3)(a) substituted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 11(2)(a)** (with s. 12(6)); S.I. 1993/438, **art.3**
- S. 23(3)(d) substituted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 11(2)(b)** (with s. 12(6)); S.I. 1993/438, **art.3**
- S. 23(5) substituted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 11(3)** (with s. 12(6)); S.I. 1993/438, **art.3**
- F79** S. 23(4) repealed (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(4), **Sch.2** (with s. 12(6)); S.I. 1993/438, **art.3**

### [23A] <sup>F80</sup> Summary administration. **S**

- (1) Where an application is made to the court under this Act for the grant of a certificate for the summary administration of the sequestration of the debtor's estate, the court shall, subject to subsection (9) below, grant such a certificate where it appears to the court that—
- the aggregate amount of the debtor's liabilities does not exceed £20,000; and
  - the aggregate amount of the debtor's assets does not exceed £2,000.
- (2) In calculating—
- the aggregate amount of the debtor's liabilities under paragraph (a) of subsection (1) above, no account shall be taken of any debt to the extent that a creditor holds a security for that debt; and
  - the aggregate amount of the debtor's assets under paragraph (b) of that subsection, no account shall be taken of—
    - any heritable property of his; or
    - any property of his which, under section 33(1) of this Act, does not vest in the permanent trustee.
- (3) For the purposes of an application under subsection (1) above made by—
- the Accountant in Bankruptcy; or
  - an interim trustee who is not the Accountant in Bankruptcy,
- a certificate by the Accountant in Bankruptcy or, as the case may be, the interim trustee as to the aggregate amounts of the debtor's liabilities and assets shall be sufficient evidence of such aggregate amounts.
- (4) Where a certificate for the summary administration of the sequestration of the debtor's estate is granted—
- in any case where the application for the certificate was made by the Accountant in Bankruptcy, section 25A of this Act; and
  - in every case, Schedule 2A to this Act (which modifies the duties of the permanent trustee),
- shall apply to the sequestration.
- (5) The debtor, a creditor, the permanent trustee or the Accountant in Bankruptcy may, at any time, apply to the sheriff to withdraw the certificate for the summary administration of the sequestration of the debtor's estate.
- (6) Where an application is made under subsection (5) above by a person who is not the permanent trustee, the applicant shall send a copy of the application to the permanent

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trustee who shall prepare and present to the sheriff a report on all of the circumstances of the sequestration.

- (7) If it appears to the sheriff, on considering an application under subsection (5) above and any report under subsection (6) above, that it is no longer appropriate for the sequestration to be subject to summary administration, he shall withdraw the certificate and the sequestration of the estate shall proceed as if the certificate had not been granted.
- (8) The sheriff clerk shall send to the permanent trustee and, where he is not the permanent trustee, the Accountant in Bankruptcy a copy of the sheriff's decision on any application under subsection (5) above.
- (9) The court shall not grant an application as mentioned in subsection (1) above—
- (a) in any case where the application is made by the Accountant in Bankruptcy and the court has appointed as interim trustee a person who is not the Accountant in Bankruptcy; or
  - (b) in any other case—
    - (i) where a person has been elected as permanent trustee, before the sheriff has confirmed the election of that person as permanent trustee; or
    - (ii) where no such person has been elected, unless the court at the same time appoints the interim trustee as permanent trustee.]

#### Textual Amendments

**F80** S. 23A inserted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s.6 (with s. 12(6)); S.I. 1993/438, art.3

## 24 Election of permanent trustee. **S**

- [<sup>F81</sup>(1) At the statutory meeting, the creditors shall, at the conclusion of the proceedings under section 23(3) of this Act, proceed to the election of the permanent trustee.]
- (2) None of the following persons shall be eligible for election as permanent trustee, nor shall anyone who becomes such a person after having been elected as permanent trustee be qualified to continue to act as permanent trustee—
- (a) the debtor;
  - (b) a person who is not qualified to act as an insolvency practitioner or who, though qualified to act as an insolvency practitioner, is not qualified to act as such in relation to the debtor;
  - (c) a person who holds an interest opposed to the general interests of the creditors;
  - (d) a person who resides outwith the jurisdiction of the Court of Session.
  - [<sup>F82</sup>(e) a person who has not given an undertaking, in writing, to act as permanent trustee;
  - (f) the Accountant in Bankruptcy.]
- (3) The following persons shall not be entitled to vote in the election of the permanent trustee—
- (a) anyone acquiring a debt due by the debtor, otherwise than by succession, after the date of sequestration;

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**Changes to legislation:** Bankruptcy (Scotland) Act 1985 (repealed) is up to date with all changes known to be in force on or before 13 June 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details)

(b) any creditor to the extent that his debt is a postponed debt.

[<sup>F82</sup>(3A) In any case where the Accountant in Bankruptcy is the interim trustee, if—

- (a) no creditor entitled to vote in the election of the permanent trustee attends the statutory meeting; or
- (b) no permanent trustee is elected,

the Accountant in Bankruptcy shall forthwith report the proceedings at the statutory meeting to the sheriff and section 25A of this Act shall apply.

(3B) Where a report is made in pursuance of subsection (3A) above, the Accountant in Bankruptcy may apply to the sheriff for the grant of a certificate for the summary administration of the sequestration of the debtor's estate.]

(4) [<sup>F82</sup>In any case where the Accountant in Bankruptcy is not the interim trustee,]if no creditor entitled to vote in the election of the permanent trustee attends the statutory meeting or if no permanent trustee is elected, the interim trustee shall forthwith—

- (a) so notify the Accountant in Bankruptcy; and
- (b) report the proceedings at the statutory meeting to the sheriff, who shall thereupon appoint the interim trustee as the permanent trustee.

[<sup>F82</sup>(4A) Where a report is made in pursuance of subsection (4) above, the interim trustee may apply to the sheriff for the grant of a certificate for the summary administration of the sequestration of the debtor's estate.]

(5) Where subsection (4) above applies, the provisions of this Act shall have effect as regards the sequestration subject to such modifications, and with such further provisions, as are set out in Schedule 2 to this Act.

#### Textual Amendments

**F81** S. 24(1) substituted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), [Sch. 1 para. 12\(2\)](#) (with s. 12(6)); S.I. 1993/438, [art.3](#)

**F82** S. 24(2)(e)(f) inserted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), [Sch. 1 para. 12\(3\)](#) (with s. 12(6)); S.I. 1993/438, [art.3](#)

S. 24(3A)(3B) inserted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), [Sch. 1 para. 12\(4\)](#) (with s. 12(6)); S.I. 1993/438, [art.3](#)

Words in s. 24(4) inserted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), [Sch. 1 para. 12\(5\)](#) (with s. 12(6)); S.I. 1993/438, [art.3](#)

S. 24(4A) inserted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), [Sch. 1 para. 12\(6\)](#) (with s. 12(6)); S.I. 1993/438, [art.3](#)

## 25 Confirmation of permanent trustee. **S**

(1) On the election of the permanent trustee—

- (a) the interim trustee shall forthwith make a report of the proceedings at the statutory meeting to the sheriff; and
- (b) the debtor, a creditor, the interim trustee, the permanent trustee or the Accountant in Bankruptcy may, within 4 days after the statutory meeting, object to any matter connected with the election; and such objection shall be by summary application to the sheriff, specifying the grounds on which the objection is taken.

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- (2) If there is no timeous objection under subsection (1)(b) above, the sheriff shall forthwith declare the elected person to be the permanent trustee; and the sheriff shall confirm his election and the sheriff clerk shall issue to him an act and warrant in a form prescribed by the Court of Session by act of sederunt and send a copy of the act and warrant to the Accountant in Bankruptcy.
- [<sup>F83</sup>(2A) Where a report is made in pursuance of subsection (1) above, the interim trustee may apply to the sheriff for the grant of a certificate for the summary administration of the sequestration of the debtor's estate.]
- (3) If there is a timeous objection under subsection (1)(b) above, the sheriff shall forthwith give parties an opportunity to be heard thereon and shall give his decision.
- (4) If in his decision under subsection (3) above the sheriff—
- (a) rejects the objection, subsection (2) above shall apply as if there had been no timeous objection;
  - (b) sustains the objection, he shall order the interim trustee to arrange a new meeting for the election of a permanent trustee; and sections 23 and 24 of this Act and this section shall apply in relation to such a meeting.
- (5) Any declaration, confirmation or decision of the sheriff under this section shall be final, and no expense in objecting under this section shall fall on the debtor's estate.
- (6) The permanent trustee shall—
- (a) insert a copy of the said act and warrant in the sederunt book; and
  - (b) where he is not the same person as the interim trustee, publish a notice in the Edinburgh Gazette <sup>F84</sup> . . . stating that he has been confirmed in office as permanent trustee [<sup>F83</sup>and giving such other information as may be prescribed].

#### Textual Amendments

- F83** S. 25(2A) inserted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 13(2)** (with s. 12(6)); S.I. 1993/438, **art.3**  
Words at the end of s. 26(6)(b) added (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 13(3)** (with s. 12(6)); S.I. 1993/438, **art.3**
- F84** Words in s. 25(6)(b) repealed (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch.2** (with s. 12(6)); S.I. 1993/438, **art.3**

#### [25A <sup>F85</sup>Appointment of permanent trustee in certain cases. **S**

- (1) Where this section applies as mentioned in section 21B(2), 23A(4) or 24(3A) of this Act, the court shall appoint as permanent trustee—
- (a) the Accountant in Bankruptcy; or
  - (b) such person as may be nominated by the Accountant in Bankruptcy (being a person who is not ineligible for election as permanent trustee under section 24(2) of this Act) if that person consents to the nomination.
- (2) Where this section applies as mentioned in section 28(5) of this Act, if either of the persons mentioned in paragraphs (a) and (b) of subsection (1) above applies to the sheriff for appointment as permanent trustee, the sheriff shall so appoint such person.



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- (3) Where a person is appointed to be permanent trustee under this section, the provisions of this Act shall apply to the sequestration subject to such modifications, and with such further provisions, as are set out in Schedule 2 to this Act.]

#### Textual Amendments

**F85** S. 25A inserted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s.7 (with s. 12(6)); S.I. 1993/438, **art.3**

## 26 Provisions relating to termination of interim trustee's functions. **S**

- (1) Where the interim trustee does not himself become the permanent trustee, he shall, on confirmation of the permanent trustee in office, hand over to him everything in his possession which relates to the sequestration (including [<sup>F86</sup>the statement of assets and liabilities, and a copy], of the statement prepared under section 23(3)(d), and of the written comments sent under section 20(2)(c) of this Act) and shall thereupon cease to act in the sequestration.
- (2) Within 3 months of the confirmation in office of the permanent trustee, the interim trustee shall—
- (a) submit to the Accountant in Bankruptcy—
    - (i) his accounts of his intromissions (if any) with the debtor's estate; and
    - (ii) a claim for outlays reasonably incurred, and for remuneration for work reasonably undertaken, by him; and
  - (b) send to the permanent trustee (unless the interim trustee has himself become the permanent trustee), a copy of what is submitted to the Accountant in Bankruptcy under paragraph (a) above.
- (3) On a submission being made to him under subsection (2) above, the Accountant in Bankruptcy—
- (a) shall—
    - (i) audit the accounts; and
    - (ii) issue a determination fixing the amount of the outlays and remuneration payable to the interim trustee; and
  - (b) shall send a copy of—
    - (i) the said determination to the interim trustee (except where the interim trustee has himself become the permanent trustee); and
    - (ii) the interim trustee's audited accounts and of the said determination to the permanent trustee, who shall insert the copies in the sederunt book.
- (4) The interim trustee, the permanent trustee, the debtor or any creditor may appeal to the sheriff against a determination under subsection (3)(a)(ii) above within 14 days of its issue [<sup>F87</sup>; and the decision of the sheriff on such an appeal shall be final].
- (5) The permanent trustee, on being confirmed in office, shall make such insertions in the sederunt book as are appropriate to provide a record of the sequestration process before his confirmation, but he shall make no insertion therein relating to the written comments made by the interim trustee under section 20(2)(c) of this Act.

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[<sup>F87</sup>(5A) This section does not apply in any case where the Accountant in Bankruptcy is the interim trustee.]

#### Textual Amendments

- F86** Words in s. 26(1) substituted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 14(2)** (with s. 12(6)); S.I. 1993/438, **art.3**
- F87** Words in s. 26(4) inserted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 14(3)** (with s. 12(6)); S.I. 1993/438, **art.3**
- S. 26(5A) inserted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 14(4)** (with s. 12(6)); S.I. 1993/438, **art.3**

#### [26A] <sup>F88</sup>**Accountant in Bankruptcy to account for intromissions.** **S**

- (1) This section applies in any case where the Accountant in Bankruptcy was the interim trustee and some other person becomes the permanent trustee.
- (2) The Accountant in Bankruptcy shall, on confirmation of the permanent trustee in office, hand over to the permanent trustee everything in his possession which relates to the sequestration and which he obtained in his capacity as interim trustee (including the statement of assets and liabilities); and thereupon he shall cease to act as interim trustee.
- (3) The Accountant in Bankruptcy shall, not later than 3 months after the confirmation in office of the permanent trustee, supply to the permanent trustee—
  - (a) his accounts of his intromissions (if any) as interim trustee with the debtor's estate;
  - (b) a determination of his fees and outlays calculated in accordance with regulations made under section 69A of this Act; and
  - (c) a copy of the notice mentioned in subsection (4)(b) below.
- (4) The Accountant in Bankruptcy shall send to the debtor and to all creditors known to him—
  - (a) a copy of the determination mentioned in subsection (3)(b) above; and
  - (b) a notice in writing stating—
    - (i) that the Accountant in Bankruptcy has commenced the procedure under this Act leading to discharge in respect of his acting as interim trustee;
    - (ii) that the accounts of his intromissions (if any) with the debtor's estate are available for inspection at such address as the Accountant in Bankruptcy may determine;
    - (iii) that an appeal may be made to the sheriff under subsection (5) below; and
    - (iv) the effect of subsection (7) below.
- (5) The permanent trustee, the debtor and any creditor may appeal to the sheriff against—
  - (a) the determination of the Accountant in Bankruptcy mentioned in subsection (3)(b) above;
  - (b) the discharge of the Accountant in Bankruptcy in respect of his acting as interim trustee; or

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- (c) both such determination and discharge.
- (6) An appeal under subsection (5) above shall be made not more than 14 days after the issue of the notice mentioned in subsection (4)(b) above; and the decision of the sheriff on such an appeal shall be final.
- (7) Where—
  - (a) the requirements of this section have been complied with; and
  - (b) no appeal is made to the sheriff under subsection (5) above or such an appeal is made but is refused as regards the discharge of the Accountant in Bankruptcy, the Accountant in Bankruptcy shall be discharged from all liability (other than any liability arising from fraud) to the creditors or to the debtor in respect of any act or omission of the Accountant in Bankruptcy in exercising the functions of interim trustee in the sequestration.
- (8) The permanent trustee, on being confirmed in office, shall make such insertions in the sederunt book as are appropriate to provide a record of the sequestration process before his confirmation.]

#### Textual Amendments

- F88** S. 26A inserted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para.15** (with s. 12(6)); S.I. 1993/438, **art.3**

## 27 Discharge of interim trustee. **S**

- (1) On receiving a copy of the Accountant in Bankruptcy's determination sent under subsection (3)(b)(i) of section 26 of this Act the interim trustee may apply to him for a certificate of discharge.
- (2) The interim trustee shall send notice of an application under subsection (1) above to the debtor and to the permanent trustee and shall inform the debtor—
  - (a) that he, the permanent trustee or any creditor may make written representations relating to the application to the Accountant in Bankruptcy within a period of 14 days after such notification;
  - (b) that the audited accounts of his intromissions (if any) with the debtor's estate are available for inspection at the office of the interim trustee and that a copy of those accounts has been sent to the permanent trustee for insertion in the sederunt book; and
  - (c) of the effect mentioned in subsection (5) below.
- (3) On the expiry of the period mentioned in subsection (2)(a) above the Accountant in Bankruptcy, after considering any representations duly made to him, shall—
  - (a) grant or refuse to grant the certificate of discharge; and
  - (b) notify (in addition to the interim trustee) the debtor, the permanent trustee, and all creditors who have made such representations, accordingly.
- (4) The interim trustee, the permanent trustee, the debtor or any creditor who has made representations under subsection (2)(a) above may, within 14 days after the issuing of the determination under subsection (3) above, appeal therefrom to the sheriff and if the sheriff determines that a certificate of discharge which has been refused should be

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granted he shall order the Accountant in Bankruptcy to grant it; and the sheriff clerk shall send a copy of the decree of the sheriff to the Accountant in Bankruptcy.

[<sup>F89</sup>(4A) The decision of the sheriff in an appeal under subsection (4) above shall be final.]

- (5) The grant of a certificate of discharge under this section by the Accountant in Bankruptcy shall have the effect of discharging the interim trustee from all liability (other than any liability arising from fraud) to the creditors or to the debtor in respect of any act or omission of the interim trustee in exercising the functions conferred on him by this Act.
- (6) Where a certificate of discharge is granted under this section, the permanent trustee shall make an appropriate entry in the sederunt book.
- (7) Where the interim trustee has died, resigned office or been removed from office, then once the accounts of his intromissions (if any) with the debtor's estate are or have been submitted to and audited by the Accountant in Bankruptcy, the Accountant in Bankruptcy shall issue a determination fixing the amount of the outlays and remuneration payable to the interim trustee and the provisions of subsection (4) of section 26 of this Act and the foregoing provisions of this section shall, subject to any necessary modifications, apply in relation to that interim trustee or, if he has died, to his executor as they apply in relation to an interim trustee receiving a copy of such a determination under subsection (3)(b)(i) of that section.

[<sup>F89</sup>(7A) This section does not apply in any case where the Accountant in Bankruptcy is the interim trustee.]

#### Textual Amendments

- F89** S. 27(4A) inserted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), [Sch. 1 para. 16\(2\)](#) (with [s. 12\(6\)](#)); S.I. 1993/438, [art.3](#)
- S. 27(7A) inserted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), [Sch. 1 para. 16\(3\)](#) (with [s. 12\(6\)](#)); S.I. 1993/438, [art.3](#)

### *Replacement of permanent trustee*

## 28 Resignation and death of permanent trustee. **S**

[<sup>F90</sup>(1) The permanent trustee may apply to the sheriff for authority to resign office and, where the sheriff is satisfied that either of the grounds mentioned in paragraphs (a) and (b) of section 13(2) of this Act applies to the permanent trustee, he shall grant the application.

(1A) The sheriff may make the granting of an application under subsection (1) above subject to the election of a new permanent trustee and to such conditions as he thinks appropriate in all the circumstances of the case.]

- (2) Where the sheriff grants an application under <sup>F91</sup> . . . subsection (1) above—
  - (a) except where paragraph (b) below applies, the commissioners, or if there are no commissioners, the Accountant in Bankruptcy, shall call a meeting of the creditors, to be held not more than 28 days after the permanent trustee has resigned, for the election by them of a new permanent trustee;
  - (b) if the application has been granted subject to the election of a new permanent trustee, the resigning permanent trustee shall himself call a meeting of the

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creditors, to be held not more than 28 days after the granting of the application, for the purpose referred to in paragraph (a) above.

- (3) Where the commissioners become, or if there are no commissioners the Accountant in Bankruptcy becomes, aware that the permanent trustee has died, they or as the case may be the Accountant in Bankruptcy shall as soon as practicable after becoming so aware call a meeting of creditors for the election by the creditors of a new permanent trustee.
- (4) The foregoing provisions of this Act relating to the election and confirmation in office of the permanent trustee shall, subject to any necessary modifications, apply in relation to the election and confirmation in office of a new permanent trustee in pursuance of subsection (1), [F92(1A),] (2) or (3) above.
- [F93(5) Where no new permanent trustee is elected in pursuance of subsection (2) or (3) above, the provisions of section 25A of this Act shall apply.]
- (6) The new permanent trustee may require—
- (a) delivery to him of all documents relating to the sequestration in the possession of the former trustee or his representatives, except the former trustee's accounts of which he shall be entitled to delivery of only a copy;
  - (b) the former trustee or his representatives to submit the trustee's accounts for audit to the commissioners or, if there are no commissioners, to the Accountant in Bankruptcy, and the commissioners or the Accountant in Bankruptcy shall issue a determination fixing the amount of the outlays and remuneration payable to the trustee or representatives in accordance with section 53 of this Act.
- (7) The former trustee or his representatives, the new permanent trustee, the debtor or any creditor may appeal against a determination issued under subsection (6)(b) above within 14 days after it is issued—
- (a) where it is a determination of the commissioners, to the Accountant in Bankruptcy; and
  - (b) where it is a determination of the Accountant in Bankruptcy, to the sheriff;
- and the determination of the Accountant in Bankruptcy under paragraph (a) above shall be appealable to the sheriff.
- [F92(8) The decision of the sheriff on an appeal under subsection (7) above shall be final.]

#### Textual Amendments

- F90** S. 28(1)(1A) substituted for s. 28(1) (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 17(2)** (with s. 12(6)); S.I. 1993/438, **art.3**
- F91** Words in s. 28(2) repealed (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(4), **Sch.2** (with s. 12(6)); S.I. 1993/438, **art.3**
- F92** Word in s. 28(4) inserted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 17(3)** (with s. 12(6)); S.I. 1993/438, **art.3**  
S. 28(8) inserted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 17(5)** (with s. 12(6)); S.I. 1993/438, **art.3**
- F93** S. 28(5) substituted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 17(4)** (with s. 12(6)); S.I. 1993/438, **art.3**

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VALID FROM 01/04/2008

**[<sup>F94</sup>28A Replacement of trustee acting in more than one sequestration S**

- (1) This section applies where a trustee acting as such in two or more sequestrations—
  - (a) dies; or
  - (b) ceases to be qualified to continue to act as trustee by virtue of section 24(2) of this Act.
- (2) The Accountant in Bankruptcy may, by a single petition to the Court of Session, apply—
  - (a) in a case where subsection (1)(b) above applies, for the removal of the trustee from office in each sequestration in which he has so ceased to be qualified; and
  - (b) for the appointment of—
    - (i) the Accountant in Bankruptcy; or
    - (ii) such person as may be nominated by the Accountant in Bankruptcy (being a person who is not ineligible for election as replacement trustee under section 24(2) of this Act) if that person consents to the nomination,
 as the trustee in each sequestration in which the trustee was acting.
- (3) The procedure in a petition under subsection (2) above shall be as the Court of Session may, by act of sederunt, prescribe.
- (4) An act of sederunt made under subsection (3) above may, in particular, make provision as to the intimation to each sheriff who awarded sequestration or to whom sequestration was transferred under section 15(2) of this Act of the appointment by the Court of Session of a trustee in that sequestration.]

**Textual Amendments**

**F94** S. 28A inserted (1.4.2008) by [Bankruptcy and Diligence etc. \(Scotland\) Act 2007 \(asp 3\), ss. 12, 227\(3\)](#) (with s. 223); [S.S.I. 2008/115, art. 3\(1\)\(a\)](#) (with arts. 4-6, 10 (as amended (with effect from 31.1.2011) by [S.S.I. 2011/31, art. 5](#)))

**29 Removal of permanent trustee and trustee not acting. S**

- (1) The permanent trustee may be removed from office—
  - (a) by the creditors (other than any such person as is mentioned in section 24(3) of this Act) at a meeting called for the purpose if they also elect forthwith a new permanent trustee; or
  - (b) without prejudice to section [<sup>F95</sup>1A(2)] of this Act, by order of the sheriff, on the application of—
    - (i) the Accountant in Bankruptcy;
    - (ii) the commissioners; or
    - (iii) a person representing not less than one quarter in value of the creditors,

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if the sheriff is satisfied that cause has been shown on the basis of circumstances other than those to which subsection (9) below applies.

- (2) The sheriff shall order any application under subsection (1)(b) above to be served on the permanent trustee and intimated in the Edinburgh Gazette, and before disposing of the application shall give the permanent trustee an opportunity of being heard.
- (3) On an application under subsection (1)(b) above, the sheriff may, in ordering the removal of the permanent trustee from office, make such further order as he thinks fit or may, instead of removing the permanent trustee from office, make such other order as he thinks fit.
- (4) The permanent trustee, the Accountant in Bankruptcy, the commissioners or any creditor may appeal against the decision of the sheriff on an application under subsection (1)(b) above within 14 days after the date of that decision.
- (5) If the permanent trustee has been removed from office under subsection (1)(b) above or under section [F95 1A(2)] of this Act or following an appeal under subsection (4) above, the commissioners or, if there are no commissioners, the Accountant in Bankruptcy shall call a meeting of creditors, to be held not more than 28 days after such removal, for the election by them of a new permanent trustee.
- (6) Without prejudice to section [F95 1A(2)] of this Act, where the sheriff is satisfied of any of the circumstances to which subsection (9) below applies he may, on the application of a commissioner, the debtor, a creditor or the Accountant in Bankruptcy, and after such intimation as the sheriff considers necessary—
  - (a) declare the office of permanent trustee to have become or to be vacant; and
  - (b) make any necessary order to enable the sequestration to proceed or to safeguard the estate pending the election of a new permanent trustee;and thereafter the commissioners or, if there are no commissioners, the Accountant in Bankruptcy shall call a meeting of creditors, to be held not more than 28 days after such declaration, for the election by them of a new permanent trustee.
- (7) The foregoing provisions of this Act relating to the election and confirmation in office of the permanent trustee shall, subject to any necessary modifications, apply in relation to the election and confirmation in office of a new permanent trustee in pursuance of subsection (5) or (6) above.
- (8) Subsections (5) to (7) of section 28 of this Act shall apply for the purposes of this section as they apply for the purposes of that section.
- (9) The circumstances to which this subsection applies are that the permanent trustee—
  - (a) is unable to act (whether by, under or by virtue of a provision of this Act or from any other cause whatsoever other than death); or
  - (b) has so conducted himself that he should no longer continue to act in the sequestration.

#### Textual Amendments

**F95** Words in s. 29(1)(b)(5)(6) substituted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para.18** (with s. 12(6)); S.I. 1993/438, **art.3**

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**Changes to legislation:** Bankruptcy (Scotland) Act 1985 (repealed) is up to date with all changes known to be in force on or before 13 June 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details)

### *Election, resignation and removal of commissioners*

## **30 Election, resignation and removal of commissioners. S**

- (1) At the statutory meeting or any subsequent meeting of creditors, the creditors (other than any such person as is mentioned in section 24(3) of this Act) may, from among the creditors or their mandatories, elect one or more commissioners (or new or additional commissioners); but not more than 5 commissioners shall hold office in any sequestration at any one time.
- (2) None of the following persons shall be eligible for election as a commissioner, nor shall anyone who becomes such a person after having been elected as a commissioner be entitled to continue to act as a commissioner—
  - (a) any person mentioned in paragraph (a) or (c) of section 24(2) of this Act as not being eligible for election;
  - (b) a person who is an associate of the debtor or of the permanent trustee.
- (3) A commissioner may resign office at any time.
- (4) Without prejudice to section [<sup>F96</sup>1A(2)] of this Act, a commissioner may be removed from office—
  - (a) if he is a mandatory of a creditor, by the creditor recalling the mandate and intimating in writing its recall to the permanent trustee;
  - (b) by the creditors (other than any such person as is mentioned in section 24(3) of this Act) at a meeting called for the purpose.

#### **Textual Amendments**

**F96** Words in s. 30(4) substituted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para.19** (with s. 12(6)); S.I. 1993/438, **art.3**

#### **Modifications etc. (not altering text)**

**C7** S. 30 modified (9.6.1997) by 1986 c. 53, **s. 27A(3)(c)** (as inserted (9.6.1997) by 1995 c. 26, s. 43, **Sch. 7 para. 8**; S.I. 1997/1427, **art. 2(k)(n)(i)**)

### *Vesting of estate in permanent trustee*

## **31 Vesting of estate at date of sequestration. S**

- (1) Subject to section 33 of this Act [<sup>F97</sup>and section 91(3) of the Pensions Act 1995], the whole estate of the debtor shall vest as at the date of sequestration in the permanent trustee for the benefit of the creditors; and—
  - (a) the estate shall so vest by virtue of the act and warrant issued on confirmation of the permanent trustee's appointment; and
  - (b) the act and warrant shall, in respect of the heritable estate in Scotland of the debtor, have the same effect as if a decree of adjudication in implement of sale, as well as a decree of adjudication for payment and in security of debt, subject to no legal reversion, had been pronounced in favour of the permanent trustee.
- (2) The exercise by the permanent trustee of any power conferred on him by this Act in respect of any heritable estate vested in him by virtue of the act and warrant shall not



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be challengeable on the ground of any prior inhibition (reserving any effect of such inhibition on ranking).

(3) Where the debtor has an uncompleted title to any heritable estate in Scotland, the permanent trustee may complete title thereto either in his own name or in the name of the debtor, but completion of title in the name of the debtor shall not validate by accretion any unperfected right in favour of any person other than the permanent trustee.

(4) Any moveable property, in respect of which but for this subsection—

- (a) delivery or possession; or
- (b) intimation of its assignation,

would be required in order to complete title to it, shall vest in the permanent trustee by virtue of the act and warrant as if at the date of sequestration the permanent trustee had taken delivery or possession of the property or had made intimation of its assignation to him, as the case may be.

(5) Any non-vested contingent interest which the debtor has shall vest in the permanent trustee as if an assignation of that interest had been executed by the debtor and intimation thereof made at the date of sequestration.

(6) Any person claiming a right to any estate claimed by the permanent trustee may apply to the court for the estate to be excluded from such vesting, a copy of the application being served on the permanent trustee; and the court shall grant the application if it is satisfied that the estate should not be so vested.

(7) Where any successor of a deceased debtor whose estate has been sequestrated has made up title to, or is in possession of, any part of that estate, the court may, on the application of the permanent trustee, order the successor to convey such estate to him.

(8) In subsection (1) above [F98, subject to section 31A of this Act,] the “whole estate of the debtor” means [F99, subject to subsection (9) below [F100[F101 and to [F102]sections 71(10B), 78(3B) and 89(2)]of the Social Security Administration Act 1992]],] his whole estate at the date of sequestration, wherever situated, including—

- (a) any income or estate vesting in the debtor on that date; and
- (b) the capacity to exercise and to take proceedings for exercising, all such powers in, over, or in respect of any property as might have been exercised by the debtor for his own benefit as at, or on, the date of sequestration or might be exercised on a relevant date (within the meaning of section 32(10) of this Act).

[F103(9) Subject to subsection (10) below, the “whole estate of the debtor” does not include any interest of the debtor as tenant under any of the following tenancies—

- (a) a tenancy which is an assured tenancy within the meaning of Part II of the M7 Housing (Scotland) Act 1988, or
- (b) a protected tenancy within the meaning of the M8 Rent (Scotland) Act 1984 in respect of which, by virtue of any provision of Part VIII of that Act, no premium can lawfully be required as a condition of the assignation, or

[ F104(c) a Scottish secure tenancy within the meaning of the Housing (Scotland) Act 2001 (asp 10).]

(10) On the date on which the permanent trustee serves notice to that effect on the debtor, the interest of the debtor as tenant under any of the tenancies referred to in subsection (9) above shall form part of his estate and vest in the permanent trustee as if it had vested in him under section 32(6) of this Act.]

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#### Textual Amendments

- F97** Words in s. 31(1) inserted (6.4.1997) by 1995 c. 26, s. 122, **Sch. 3 para. 13**; S.I. 1997/664, art. 2(3), **Sch. Pt. II**
- F98** Words in s. 31(8) inserted (8.9.2003) by **The Insolvency (Scotland) Regulations 2003** (S.I. 2003/2109), **reg. 11**
- F99** Words inserted by **Housing Act 1988** (c. 50, SIF 75:1), **s. 118(1)**
- F100** S. 31(8): by 1997 c. 27, s. 33(2), **Sch. 4** (with ss. 1, 2, 28); S.I. 1997/2085, **art. 2(2)** it is provided (6.10.1997) that the words “and to section 89(2) of the Social Security Administration Act 1992” are repealed
- F101** Words in s. 31(8) substituted (1.7.1992) by **Social Security (Consequential Provisions) Act 1992** (c. 6), ss. 4, 7(2), **Sch. 2 para.69**.
- F102** Words in s. 31(8) substituted (7.10.1996) by 1995, c. 18, s. 41(4), Sch. 2 para. 8; S.I. 1996/2208, **art. 2(b)**
- F103** S. 31(9)(10) added by **Housing Act 1988** (c. 50, SIF 75:1), **s. 118(2)**
- F104** S. 31(9)(c) substituted (30.9.2002) by 2001 asp 10, s. 112, Sch. 10 para. 10; S.S.I. 2002/321, **art. 2**, Sch. (subject to arts. 3-5)

#### Modifications etc. (not altering text)

- C8** S. 31(8) excluded by **Social Security Act 1989** (c.24, SIF 113:1), s. 22, **Sch. 4 Pt. II para. 8(2)**
- C9** S. 31(8) restricted (1.7.1992) by **Social Security Administration Act 1992** (c. 5), **s. 89(2)** (with s. 93(1)).

#### Marginal Citations

- M7** 1988 c.43  
**M8** 1984 c.58

### [<sup>F105</sup>31A Proceedings under EC Regulation: modified definition of “estate” **S**

In the application of this Act to insolvency proceedings under the EC Regulation, a reference to “estate” is a reference to estate which may be dealt with in those proceedings.]

#### Textual Amendments

- F105** S. 31A inserted (8.9.2003) by **The Insolvency (Scotland) Regulations 2003** (S.I. 2003/2109), **reg. 12**

### [<sup>F106</sup>31A Property subject to restraint order **S**

- (1) This section applies where—
- (a) property is excluded from the debtor’s estate by virtue of section 420(2)(a) of the Proceeds of Crime Act 2002 (property subject to a restraint order),
  - (b) an order under section 50, 52, 128, 198 or 200 of that Act has not been made in respect of the property, and
  - (c) the restraint order is discharged.
- (2) On the discharge of the restraint order the property vests in the permanent trustee as part of the debtor’s estate.

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- (3) But subsection (2) does not apply to the proceeds of property realised by a management receiver under section 49(2)(d) or 197(2)(d) of that Act (realisation of property to meet receiver's remuneration and expenses).]

#### Textual Amendments

**F106** Ss. 31A-31C inserted (24.3.2003) by [Proceeds of Crime Act 2002 \(c. 29\)](#), [Ss. 456, 458\(1\)\(3\)](#), [Sch. 11 para. 15\(4\)](#); [S.I. 2003/333](#), [art. 2\(1\)](#) Sch. (subject to transitional provisions in arts. 3-14) (as amended by [S.I. 2003/531](#)); [S.S.I. 2003/210](#), [art. 2\(1\)\(b\)](#), Sch. (subject to transitional provisions in arts. 3-7)

### [<sup>F106</sup>31B Property in respect of which receivership or administration order is made **S**

- (1) This section applies where—
- (a) property is excluded from the debtor's estate by virtue of section 420(2)(b), (c) or (d) of the Proceeds of Crime Act 2002 (property in respect of which an order for the appointment of a receiver or administrator under certain provisions of that Act is in force), and
  - (b) a confiscation order is made under section 6, 92 or 156 of that Act,
  - (c) the amount payable under the confiscation order is fully paid, and
  - (d) any of the property remains in the hands of the receiver or administrator (as the case may be).
- (2) The property vests in the permanent trustee as part of the debtor's estate.]

#### Textual Amendments

**F106** Ss. 31A-31C inserted (24.3.2003) by [Proceeds of Crime Act 2002 \(c. 29\)](#), [Ss. 456, 458\(1\)\(3\)](#), [Sch. 11 para. 15\(4\)](#); [S.I. 2003/333](#), [art. 2\(1\)](#) Sch. (subject to transitional provisions in arts. 3-14) (as amended by [S.I. 2003/531](#)); [S.S.I. 2003/210](#), [art. 2\(1\)\(b\)](#), Sch. (subject to transitional provisions in arts. 3-7)

### [<sup>F106</sup>31C Property subject to certain orders where confiscation order discharged or quashed **S**

- (1) This section applies where—
- (a) property is excluded from the debtor's estate by virtue of section 420(2)(a), (b), (c) or (d) of the Proceeds of Crime Act 2002 (property in respect of which a restraint order or an order for the appointment of a receiver or administrator under that Act is in force),
  - (b) a confiscation order is made under section 6, 92 or 156 of that Act, and
  - (c) the confiscation order is discharged under section 30, 114 or 180 of that Act (as the case may be) or quashed under that Act or in pursuance of any enactment relating to appeals against conviction or sentence.
- (2) Any property in the hands of a receiver appointed under Part 2 or 4 of that Act or an administrator appointed under Part 3 of that Act vests in the permanent trustee as part of the debtor's estate.
- (3) But subsection (2) does not apply to the proceeds of property realised by a management receiver under section 49(2)(d) or 197(2)(d) of that Act (realisation of property to meet receiver's remuneration and expenses).]

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### Textual Amendments

**F106** Ss. 31A-31C inserted (24.3.2003) by **Proceeds of Crime Act 2002 (c. 29)**, Ss. 456, 458(1)(3), **Sch. 11 para. 15(4)**; S.I. 2003/333, **art. 2(1)** Sch. (subject to transitional provisions in arts. 3-14) (as amended by S.I. 2003/531); S.S.I. 2003/210, **art. 2(1)(b)**, Sch. (subject to transitional provisions in arts. 3-7)

## 32 Vesting of estate, and dealings of debtor, after sequestration. **S**

- (1) Subject to subsection (2) below, any income of whatever nature received by the debtor on a relevant date, other than income arising from the estate which is vested in the permanent trustee, shall vest in the debtor.
- (2) <sup>F107</sup>Notwithstanding anything in section 11 or 12 of the Welfare Reform and Pensions Act 1999,]The sheriff, on the application of the permanent trustee, may, after having regard to all the circumstances, determine a suitable amount to allow for—
  - (a) aliment for the debtor; and
  - (b) the debtor’s relevant obligations;
 and if the debtor’s income is in excess of the total amount so allowed the sheriff shall fix the amount of the excess and order it to be paid to the permanent trustee.
- <sup>F108</sup>(2A) The amount allowed for the purposes specified in paragraphs (a) and (b) of subsection (2) above shall not be less than the total amount of any income received by the debtor—
  - (a) by way of guaranteed minimum pension; and
  - (b) in respect of his protected rights as a member of a pension scheme, “guaranteed minimum pension” and “protected rights” having the same meanings as in the Pension Schemes Act 1993.]
- (3) The debtor’s relevant obligations referred to in paragraph (b) of subsection (2) above are—
  - (a) any obligation of aliment owed by him (“obligation of aliment” having the same meaning as in the <sup>M9</sup>Family Law (Scotland) Act 1985);
  - (b) any obligation of his to make a periodical allowance to a former spouse <sup>F109</sup>or former civil partner] ;
  - <sup>F110</sup>(c) any obligation of his to pay child support maintenance under the Child Support Act 1991,]
 

but any amount allowed under that subsection for the relevant obligations <sup>F111</sup>referred to in paragraphs (a) and (b) above] need not be sufficient for compliance with a subsisting order or agreement as regards such aliment or periodical allowance.
- (4) In the event of any change in the debtor’s circumstances, the sheriff, on the application of the permanent trustee, the debtor or any other interested person, may vary or recall any order under subsection (2) above.
- (5) Diligence <sup>F112</sup>(which, for the purposes of this section, includes the making of a deduction from earnings order under the Child Support Act 1991)]in respect of a debt or obligation of which the debtor would be discharged under section 55 of this Act were he discharged under section 54 thereof shall not be competent against income vesting in him under subsection (1) above.
- (6) Without prejudice to subsection (1) above, any estate, wherever situated, which—
  - (a) is acquired by the debtor on a relevant date; and

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(b) would have vested in the permanent trustee if it had been part of the debtor's estate on the date of sequestration,

shall vest in the permanent trustee for the benefit of the creditors as at the date of acquisition; and any person who holds any such estate shall, on production to him of a copy of the act and warrant certified by the sheriff clerk confirming the permanent trustee's appointment, convey or deliver the estate to the permanent trustee:

Provided that—

- (i) if such a person has in good faith and without knowledge of the sequestration conveyed the estate to the debtor or to anyone on the instructions of the debtor, he shall incur no liability to the permanent trustee except to account for any proceeds of the conveyance which are in his hands; and
- (ii) this subsection shall be without prejudice to any right or interest acquired in the estate in good faith and for value.

(7) The debtor shall immediately notify the permanent trustee of any assets acquired by him on a relevant date or of any other substantial change in his financial circumstances; and, if the debtor fails to comply with this subsection, he shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale or to imprisonment for a term not exceeding 3 months or to both.

(8) Subject to subsection (9) below, any dealing of or with the debtor relating to his estate vested in the permanent trustee under section 31 of this Act shall be of no effect in a question with the permanent trustee.

(9) Subsection (8) above shall not apply where the person seeking to uphold the dealing establishes—

- (a) that the permanent trustee—
  - (i) has abandoned to the debtor the property to which the dealing relates;
  - (ii) has expressly or impliedly authorised the dealing; or
  - (iii) is otherwise personally barred from challenging the dealing, or
- (b) that the dealing is—
  - (i) the performance of an obligation undertaken before the date of sequestration by a person obliged to the debtor in the obligation;
  - (ii) the purchase from the debtor of goods for which the purchaser has given value to the debtor or is willing to give value to the permanent trustee; or
  - (iii) a banking transaction in the ordinary course of business between the banker and the debtor,

and that the person dealing with the debtor was, at the time when the dealing occurred, unaware of the sequestration and had at that time no reason to believe that the debtor's estate had been sequestrated or was the subject of sequestration proceedings.

(10) In this section “a relevant date” means a date after the date of sequestration and before the date on which the debtor's discharge becomes effective.

#### Textual Amendments

**F107** Words in s. 32(2) inserted (29.5.2000) by 1999 c. 30, s. 18, **Sch. 2 para. 1**; S.I. 2000/1382, **art. 2(c)(e)**

**F108** S. 32(2A) inserted (6.4.1997) by 1995 c. 26, s. 122, **Sch. 3 para. 14**; S.I. 1997/664, **art. 2(3)**, **Sch. Pt.**

**II**

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- F109** Words in s. 32(3)(b) inserted (5.12.2005) by Civil Partnership Act 2004 (c. 33), ss. 261(2), 263, **Sch. 28 para. 34**; S.S.I. 2005/604, **art. 2(c)**
- F110** S. 32(3)(c) inserted (4.4.1993) by Child Support Act 1991 (c. 48, SIF 20), s. 58(13), **Sch. 5 para. 6(2)(a)(i)** (with s. 9(2)); S.I. 1992/2644, **art. 2**.
- F111** Words in s. 32(3) inserted (4.4.1993) by Child Support Act 1991 (c. 48, SIF 20), s. 58(13), **Sch. 5 para. 6(2)(a)(ii)** (with s. 9(2)); S.I. 1992/2644, **art. 2**.
- F112** Words in s. 32(5) inserted (4.4.1993) by Child Support Act 1991 (c. 48, SIF 20), s. 58(13), **Sch. 5 para. 6(2)(b)** (with s. 9(2)); S.I. 1992/2644, **art. 2**.

#### Modifications etc. (not altering text)

- C10** S. 32(2) amended by Education (Student Loans) Act 1990 (c. 6, SIF 41:1, 2), s. 1(5), **Sch. 2 para. 6(a)**  
S. 32(2) restricted (12.8.1998) by 1998/2003, art. 13(2)(a)  
S. 32(2) restricted (7.7.2000) by S.S.I. 2000/200, **art. 16**
- C11** S. 32(6) amended by Education (Student Loans) Act 1990 (c. 6, SIF 41:1, 2), s. 1(5), **Sch. 2 para. 6(b)**
- C12** S. 32(8) excluded (25.4.1991) by Companies Act 1989 (c. 40, SIF 27), **ss. 154, 155, 164(3), 175(4)**;  
S.I. 1991/878, **art. 2, Sch.**
- C13** S. 32(8) excluded (11.12.1999) by S.I. 1999/2979, **reg. 16(3)**  
S. 32(8) excluded (11.12.1999) by S.I. 1999/2979, **reg. 19(3)**

#### Marginal Citations

- M9** 1985 c. 37.

### 33 Limitations on vesting. **S**

- (1) The following property of the debtor shall not vest in the permanent trustee—
- [<sup>F113</sup>(a) any property kept outwith a dwellinghouse in respect of which attachment is, by virtue of section 11(1) of the Debt Arrangement and Attachment (Scotland) Act 2002 (asp 17), incompetent;]
- [<sup>F114</sup>(aa) any property kept in a dwellinghouse which is not a non-essential asset for the purposes of Part 3 of that Act;]
- (b) property held on trust by the debtor for any other person.
- (2) The vesting of a debtor's estate in a permanent trustee shall not affect the right of hypothec of a landlord.
- (3) Sections 31 and 32 of this Act are without prejudice to the right of any secured creditor which is preferable to the rights of the permanent trustee.

#### Textual Amendments

- F113** S. 33(1)(a)(aa) substituted (30.12.2002) for s. 33(1)(a) by Debt Arrangement and Attachment (Scotland) Act 2002 (asp 17), ss. 61, 64(2), **Sch. 3 Pt. 1 para. 15(3)**
- F114** S. 33(1)(a) substituted (30.12.2002) for s. 33(1)(a) (aa) by Debt Arrangement and Attachment (Scotland) Act 2002 (asp 17), ss. 61, 64(2), **Sch. 3 Pt. 1 para. 15(3)**

#### Modifications etc. (not altering text)

- C14** S. 33(1)(a) continued (31.12.2002 or such earlier date as the Scottish Ministers may appoint) by 2001 asp 1, ss. 2(1)(a), 4(1) (with s. 2) (which amending Act was repealed (30.12.2002) by Debt Arrangement and Attachment (Scotland) Act 2002 (asp 17), s. 61, **Sch. 3 Pt. 1 para. 27** (with s. 63))

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### *Safeguarding of interests of creditors of insolvent persons*

#### **34 Gratuitous alienations. S**

- (1) Where this subsection applies, an alienation by a debtor shall be challengeable by—
- (a) any creditor who is a creditor by virtue of a debt incurred on or before the date of sequestration, or before the granting of the trust deed or the debtor's death, as the case may be; or
  - (b) the permanent trustee, the trustee acting under the trust deed or the judicial factor, as the case may be.
- (2) Subsection (1) above applies where—
- (a) by the alienation, whether before or after the coming into force of this section, any of the debtor's property has been transferred or any claim or right of the debtor has been discharged or renounced; and
  - (b) any of the following has occurred—
    - (i) his estate has been sequestrated (other than, in the case of a natural person, after his death); or
    - (ii) he has granted a trust deed which has become a protected trust deed; or
    - (iii) he has died and within 12 months after his death, his estate has been sequestrated; or
    - (iv) he has died and within the said 12 months, a judicial factor has been appointed under section 11A of the <sup>M10</sup>Judicial Factors (Scotland) Act 1889 to administer his estate and the estate was absolutely insolvent at the date of death; and
  - (c) the alienation took place on a relevant day.
- (3) For the purposes of paragraph (c) of subsection (2) above, the day on which an alienation took place shall be the day on which the alienation became completely effectual; and in that paragraph "relevant day" means, if the alienation has the effect of favouring—
- (a) a person who is an associate of the debtor, a day not earlier than 5 years before the date of sequestration, the granting of the trust deed or the debtor's death, as the case may be; or
  - (b) any other person, a day not earlier than 2 years before the said date.
- (4) On a challenge being brought under subsection (1) above, the court shall grant decree of reduction or for such restoration of property to the debtor's estate or other redress as may be appropriate, but the court shall not grant such a decree if the person seeking to uphold the alienation establishes—
- (a) that immediately, or at any other time, after the alienation the debtor's assets were greater than his liabilities; or
  - (b) that the alienation was made for adequate consideration; or
  - (c) that the alienation—
    - (i) was a birthday, Christmas or other conventional gift; or
    - (ii) was a gift made, for a charitable purpose, to a person who is not an associate of the debtor,which having regard to all the circumstances, it was reasonable for the debtor to make:

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Provided that this subsection shall be without prejudice to any right or interest acquired in good faith and for value from or through the transferee in the alienation.

- (5) In subsection (4) above, “charitable purpose” means any charitable, benevolent or philanthropic purpose whether or not it is charitable within the meaning of any rule of law.
- (6) For the purposes of the foregoing provisions of this section, an alienation in implementation of a prior obligation shall be deemed to be one for which there was no consideration or no adequate consideration to the extent that the prior obligation was undertaken for no consideration or no adequate consideration.
- (7) This section is without prejudice to the operation of section 2 of the <sup>M11</sup>Married Women’s Policies of Assurance (Scotland) Act 1880 (policy of assurance may be effected in trust for spouse, future spouse and children) [<sup>F115</sup>including the operation of that section as applied by section 132 of the Civil Partnership Act 2004] .
- (8) A permanent trustee, the trustee acting under a protected trust deed and a judicial factor appointed under section 11A of the <sup>M12</sup>Judicial Factors (Scotland) Act 1889 shall have the same right as a creditor has under any rule of law to challenge an alienation of a debtor made for no consideration or for no adequate consideration.
- (9) The permanent trustee shall insert in the sederunt book a copy of any decree under this section affecting the sequestrated estate.

#### Textual Amendments

**F115** Words in s. 34(7) inserted (5.12.2005) by [Civil Partnership Act 2004 \(c. 33\)](#), ss. 261(2), 263, **Sch. 28 para. 35**; S.I. 2005/604 {art. 2(c)}

#### Modifications etc. (not altering text)

- C15** S. 34 restricted by [Drug Trafficking Offences Act 1986 \(c. 32, SIF 39:1\)](#), s. **16(6)(a)**
- C16** S. 34 excluded (25.4.1991) by [Companies Act 1989 \(c. 40, SIF 27\)](#), ss. **154**, 155, 165(2)(a); S.I. 1991/878, **art. 2**, Sch.
- C17** S. 34 restricted (25.4.1991) by [Companies Act 1989 \(c. 40, SIF 27\)](#), s. 182(4), **Sch. 22 para. 8(2)(a)**; S.I. 1991/878, **art. 2**, Sch.
- C18** S. 34 restricted by [Criminal Justice Act 1988 \(c. 33, SIF 39:1\)](#), ss. 85(6)(a), 123, **Sch. 8 para. 16**
- C19** S. 34 amended by [Criminal Justice Act 1988 \(c. 33, SIF 39:1\)](#), ss. 85(6)(b), 123, **Sch. 8 para. 16**
- C20** S. 34 restricted (3.2.1995) by 1994 c. 37, ss. **33(6)(a)**, 69(2) (with s. 66(2))
- S. 34 restricted (1.4.1996) by 1995 c. 43, ss. 44(1), 50(2), **Sch. 2 para. 1(5)**
- C21** S. 34 applied (with modifications) (4.4.2006) by [The Cross-Border Insolvency Regulations 2006 \(S.I.2006/1030\)](#), reg. 2(1), **Sch. 1 Article 23 paras. 1-3** (subject to paras. 6, 9)
- C22** S. 34 restricted (24.3.2003) by [Proceeds of Crime Act 2002 \(c. 29\)](#), ss. **422(2)**, 458(1); S.I. 2003/333, **art. 2(1)**, Sch. (subject to transitional provisions and savings in arts. 3-14) (as amended by S.I. 2003/531, art. 2)
- C23** S. 34 restricted (11.12.1999) by S.I. 1999/2979, **reg. 17(2)(a)**

#### Marginal Citations

- M10** 1889 c. 39.
- M11** 1880 c. 26.
- M12** 1889 c. 39.



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**Changes to legislation:** Bankruptcy (Scotland) Act 1985 (repealed) is up to date with all changes known to be in force on or before 13 June 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details)

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### 35 Recalling of order for payment of capital sum on divorce. **S**

(1) This section applies where—

- (a) a court has made an order, whether before or after the coming into force of this section, under section 5 of the <sup>M13</sup>Divorce (Scotland) Act 1976 or section 8(2) of the <sup>M14</sup>Family Law (Scotland) Act 1985, for the payment by a debtor of a capital sum or [<sup>F116</sup>a court has, under the said section 8(2), made an order for the transfer of property by him or made a pension sharing order];
- (b) on the date of the making of the order the debtor was absolutely insolvent or was rendered so by implementation of the order; and
- (c) within 5 years after the making of the order—
  - (i) the debtor's estate has been sequestrated other than after his death; or
  - (ii) he has granted a trust deed which has (whether or not within the 5 years) become a protected trust deed; or
  - (iii) he has died and, within 12 months after his death, his estate has been sequestrated; or
  - (iv) he has died and, within the said 12 months, a judicial factor has been appointed under section 11A of the Judicial Factors (Scotland) Act 1889 to administer his estate.

(2) Where this section applies, the court, on an application brought by the permanent trustee, the trustee acting under the trust deed or the judicial factor, may make an order for recall of the order made under the said section 5 or 8(2) and for the repayment to the applicant of the whole or part of any sum already paid, or as the case may be for the return to the applicant of all or part of any property already transferred, under that order, or, where such property has been sold, for payment to the applicant of all or part of the proceeds of sale:

Provided that before making an order under this subsection the court shall have regard to all the circumstances including, without prejudice to the generality of this proviso, the financial, and other, circumstances (in so far as made known to the court) of the person against whom the order would be made.

(3) Where an application is brought under this section in a case where the debtor's estate has been sequestrated, the permanent trustee shall insert a copy of the decree of recall in the sederunt book.

#### Textual Amendments

**F116** Words in s. 35(1)(a) substituted (26.3.2002 for certain purposes and otherwise 6.4.2002) by 1999 c. 30, ss. 84, 89(1), Sch. 12 Pt. II para. 68; S.I. 2002/818, art. 3(b)

#### Modifications etc. (not altering text)

**C24** S. 35 applied (with modifications) (4.4.2006) by The Cross-Border Insolvency Regulations 2006 (S.I. 2006/1030), reg. 2(1), Sch. 1 Article 23 paras. 1-3 (subject to paras. 6, 9)

#### Marginal Citations

**M13** 1976 c. 39.

**M14** 1985 c. 37.

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### 36 Unfair preferences. **S**

- (1) Subject to subsection (2) below, subsection (4) below applies to a transaction entered into by a debtor, whether before or after the coming into force of this section, which has the effect of creating a preference in favour of a creditor to the prejudice of the general body of creditors, being a preference created not earlier than 6 months before—
- (a) the date of sequestration of the debtor's estate (if, in the case of a natural person, a date within his lifetime); or
  - (b) the granting by him of a trust deed which has become a protected trust deed; or
  - (c) his death where, within 12 months after his death—
    - (i) his estate has been sequestrated, or
    - (ii) a judicial factor has been appointed under section 11A of the <sup>M15</sup>Judicial Factors (Scotland) Act 1889 to administer his estate and his estate was absolutely insolvent at the date of death.
- (2) Subsection (4) below shall not apply to any of the following transactions—
- (a) a transaction in the ordinary course of trade or business;
  - (b) a payment in cash for a debt which when it was paid had become payable unless the transaction was collusive with the purpose of prejudicing the general body of creditors;
  - (c) a transaction whereby the parties thereto undertake reciprocal obligations (whether the performance by the parties of their respective obligations occurs at the same time or at different times) unless the transaction was collusive as aforesaid;
  - (d) the granting of a mandate by a debtor authorising an arrestee to pay over the arrested funds or part thereof to the arrester where—
    - (i) there has been a decree for payment or a warrant for summary diligence; and
    - (ii) the decree or warrant has been preceded by an arrestment on the dependence of the action or followed by an arrestment in execution.
- (3) For the purposes of subsection (1) above, the day on which a preference was created shall be the day on which the preference became completely effectual.
- (4) A transaction to which this subsection applies shall be challengeable by—
- (a) any creditor who is a creditor by virtue of a debt incurred on or before the date of sequestration, the granting of the protected trust deed or the debtor's death, as the case may be; or
  - (b) the permanent trustee, the trustee acting under the protected trust deed, or the judicial factor, as the case may be.
- (5) On a challenge being brought under subsection (4) above, the court, if satisfied that the transaction challenged is a transaction to which this section applies, shall grant decree of reduction or for such restoration of property to the debtor's estate or other redress as may be appropriate:
- Provided that this subsection shall be without prejudice to any right or interest acquired in good faith and for value from or through the creditor in whose favour the preference was created.
- (6) A permanent trustee, the trustee acting under a protected trust deed and a judicial factor appointed under section 11A of the <sup>M16</sup>Judicial Factors (Scotland) Act 1889 shall have

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the same right as a creditor has under any rule of law to challenge a preference created by a debtor.

- (7) The permanent trustee shall insert in the sederunt book a copy of any decree under this section affecting the sequestrated estate.

**Modifications etc. (not altering text)**

- C25** S. 36 restricted (24.3.2003) by [Proceeds of Crime Act 2002 \(c. 29\)](#), **ss. 422(2)**, 458(1); S.I. 2003/333, **art. 2(1)**, **Sch.** (subject to transitional provisions and savings in arts. 3-14) (as amended by S.I. 2003/531, art. 2)
- C26** S. 36 restricted by [Drug Trafficking Offences Act 1986 \(c. 32, SIF 39:1\)](#), **s. 16(6)(a)**
- C27** S. 36 excluded (25.4.1991) by [Companies Act 1989 \(c. 40, SIF 27\)](#), **ss. 154**, 155, 165(2)(a); S.I. 1991/878, **art. 2**, **Sch.**
- C28** S. 36 restricted (25.4.1991) by [Companies Act 1989 \(c. 40, SIF 27\)](#), **ss. 182(4)**, **Sch. 22 para. 8(2)(a)**; S.I. 1991/878, **art. 2**, **Sch.**
- C29** S. 36 restricted by [Criminal Justice Act 1988 \(c. 33, SIF 39:1\)](#), **ss. 85(6)(a)**, 123, **Sch. 8 para. 16**
- C30** S. 36 amended by [Criminal Justice Act 1988 \(c. 33, SIF 39:1\)](#), **ss. 85(6)(b)**, 123, **Sch. 8 para. 16**
- C31** S. 36 restricted (3.2.1995) by 1994 c. 37, **ss. 33(6)(a)**, 69(2) (with s. 66(2))  
S. 36 restricted (1.4.1996) by 1995 c. 43, **ss. 44(1)**, 50(2), **Sch. 2 para. 1(5)(a)(b)**  
S. 36 restricted (11.12.1999) by S.I. 1999/2979, **reg. 17(2)(a)**
- C32** S. 36 applied (with modifications) (4.4.2006) by [The Cross-Border Insolvency Regulations 2006 \(S.I. 2006/1030\)](#), **reg. 2(1)**, **Sch. 1 Article 23 paras. 1-3** (subject to paras. 6, 9)

**Marginal Citations**

- M15** 1889 c. 39.  
**M16** 1889 c. 39.

[<sup>F117</sup> **36A Recovery of excessive pension contributions.** **S**

- (1) Where a debtor's estate has been sequestrated and he—  
(a) has rights under an approved pension arrangement, or  
(b) has excluded rights under an unapproved pension arrangement,  
the permanent trustee may apply to the court for an order under this section.
- (2) If the court is satisfied—  
(a) that the rights under the arrangement are to any extent, and whether directly or indirectly, the fruits of relevant contributions, and  
(b) that the making of any of the relevant contributions (“the excessive contributions”) has unfairly prejudiced the debtor's creditors,  
the court may make such order as it thinks fit for restoring the position to what it would have been had the excessive contributions not been made.
- (3) Subsection (4) applies where the court is satisfied that the value of the rights under the arrangement is, as a result of rights of the debtor under the arrangement or any other pension arrangement having at any time become subject to a debit under section 29(1) (a) of the Welfare Reform and Pensions Act 1999 (debits giving effect to pension-sharing), less than it would otherwise have been.
- (4) Where this subsection applies—

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- (a) any relevant contributions which were represented by the rights which became subject to the debit shall, for the purposes of subsection (2), be taken to be contributions of which the rights under the arrangement are the fruits, and
  - (b) where the relevant contributions represented by the rights under the arrangement (including those so represented by virtue of paragraph (a)) are not all excessive contributions, relevant contributions which are represented by the rights under the arrangement otherwise than by virtue of paragraph (a) shall be treated as excessive contributions before any which are so represented by virtue of that paragraph.
- (5) In subsections (2) to (4) “relevant contributions” means contributions to the arrangement or any other pension arrangement—
- (a) which the debtor has at any time made on his own behalf, or
  - (b) which have at any time been made on his behalf.
- (6) The court shall, in determining whether it is satisfied under subsection (2)(b), consider in particular—
- (a) whether any of the contributions were made for the purpose of putting assets beyond the reach of the debtor’s creditors or any of them, and
  - (b) whether the total amount of any contributions—
    - (i) made by or on behalf of the debtor to pension arrangements, and
    - (ii) represented (whether directly or indirectly) by rights under approved pension arrangements or excluded rights under unapproved pensions arrangements,
 is an amount which is excessive in view of the debtor’s circumstances when those contributions were made.
- (7) For the purposes of this section and sections 36B and 36C (“the recovery provisions”), rights of a debtor under an unapproved pension arrangement are excluded rights if they are rights which are excluded from his estate by virtue of regulations under section 12 of the Welfare Reform and Pensions Act 1999.
- (8) In the recovery provisions—
- “approved pension arrangement” has the same meaning as in section 11 of the Welfare Reform and Pensions Act 1999;
  - “unapproved pension arrangement” has the same meaning as in section 12 of that Act.]

#### Textual Amendments

**F117** Ss. 36A-36C substituted (11.11.1999 for certain purposes and 6.4.2002 in so far as not already in force) by 1999 c. 30, ss. 16, 89(5)(a); S.I. 2002/153, **art. 2(f)**

#### Modifications etc. (not altering text)

**C33** S. 36A applied (with modifications) (4.4.2006) by The Cross-Border Insolvency Regulations 2006 (S.I. 2006/1030), reg. 2(1), **Sch. 1 Article 23 paras. 1-3** (subject to paras. 6, 9)

### <sup>F118</sup> 36B Orders under section 36A. **S**

- (1) Without prejudice to the generality of section 36A(2) an order under section 36A may include provision—

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- (a) requiring the person responsible for the arrangement to pay an amount to the permanent trustee,
  - (b) adjusting the liabilities of the arrangement in respect of the debtor,
  - (c) adjusting any liabilities of the arrangement in respect of any other person that derive, directly or indirectly, from rights of the debtor under the arrangement,
  - (d) for the recovery by the person responsible for the arrangement (whether by deduction from any amount which that person is ordered to pay or otherwise) of costs incurred by that person in complying in the debtor's case with any requirement under section 36C(1) or in giving effect to the order.
- (2) In subsection (1), references to adjusting the liabilities of the arrangement in respect of a person include (in particular) reducing the amount of any benefit or future benefit to which that person is entitled under the arrangement.
- (3) In subsection (1)(c), the reference to liabilities of the arrangement does not include liabilities in respect of a person which result from giving effect to an order or provision falling within section 28(1) of the Welfare Reform and Pensions Act 1999 (pension sharing orders and agreements).
- (4) The maximum amount which the person responsible for an arrangement may be required to pay by an order under section 36A is the lesser of—
- (a) the amount of the excessive contributions, and
  - (b) the value of the debtor's rights under the arrangement (if the arrangement is an approved pension arrangement) or of his excluded rights under the arrangement (if the arrangement is an unapproved pension arrangement).
- (5) An order under section 36A which requires the person responsible for an arrangement to pay an amount ("the restoration amount") to the permanent trustee must provide for the liabilities of the arrangement to be correspondingly reduced.
- (6) For the purposes of subsection (5), liabilities are correspondingly reduced if the difference between—
- (a) the amount of the liabilities immediately before the reduction, and
  - (b) the amount of the liabilities immediately after the reduction,
- is equal to the restoration amount.
- (7) An order under section 36A in respect of an arrangement—
- (a) shall be binding on the person responsible for the arrangement; and
  - (b) overrides provisions of the arrangement to the extent that they conflict with the provisions of the order.

#### Textual Amendments

**F118** Ss. 36A-36C substituted (11.11.1999 for certain purposes and 6.4.2002 in so far as not already in force) by 1999 c. 30, s. 16; S.I. 2002/153, art. 2(f)

#### Modifications etc. (not altering text)

**C34** S. 36B applied (with modifications) (4.4.2006) by The Cross-Border Insolvency Regulations 2006 (S.I. 2006/1030), reg. 2(1), Sch. 1 Article 23 paras. 1-3 (subject to paras. 6, 9)

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### <sup>F119</sup>36C Orders under section 36A: supplementary. **S**

- (1) The person responsible for—
  - (a) an approved pension arrangement under which a debtor has rights,
  - (b) an unapproved pension arrangement under which a debtor has excluded rights, or
  - (c) a pension arrangement under which a debtor has at any time had rights,
 shall, on the permanent trustee making a written request, provide the permanent trustee with such information about the arrangement and rights as the permanent trustee may reasonably require for, or in connection with, the making of applications under section 36A.
- (2) Nothing in—
  - (a) any provision of section 159 of the <sup>M17</sup>Pensions Schemes Act 1993 or section 91 of the <sup>M18</sup>Pensions Act 1995 (which prevent assignation and the making of orders that restrain a person from receiving anything which he is prevented from assigning),
  - (b) any provision of any enactment (whether passed or made before or after the passing of the Welfare Reform and Pensions Act 1999) corresponding to any of the provisions mentioned in paragraph (a), or
  - (c) any provision of the arrangement in question corresponding to any of those provisions,
 applies to a court exercising its powers under section 36A.
- (3) Where any sum is required by an order under section 36A to be paid to the permanent trustee, that sum shall be comprised in the debtor's estate.
- (4) Regulations may, for the purposes of the recovery provisions, make provision about the calculation and verification of—
  - (a) any such value as is mentioned in section 36B(4)(b);
  - (b) any such amounts as are mentioned in section 36B(6)(a) and (b).
- (5) The power conferred by subsection (4) includes power to provide for calculation or verification—
  - (a) in such manner as may, in the particular case, be approved by a prescribed person; or
  - (b) in accordance with guidance—
    - (i) from time to time prepared by a prescribed person, and
    - (ii) approved by the Secretary of State.
- (6) References in the recovery provisions to the person responsible for a pension arrangement are to—
  - (a) the trustees, managers or provider of the arrangement, or
  - (b) the person having functions in relation to the arrangement corresponding to those of a trustee, manager or provider.
- (7) In this section and sections 36A and 36B—
 

“the recovery provisions” means this section and sections 36A and 36B;

“regulations” means regulations made by the Secretary of State.
- (8) Regulations under the recovery provisions may contain such incidental, supplemental and transitional provisions as appear to the Secretary of State necessary or expedient.

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#### Textual Amendments

**F119** Ss. 36A-36C substituted (11.11.1999 for certain purposes and 6.4.2002 in so far as not already in force) by 1999 c. 30, ss. 16, 89; S.I. 2002/153, **art. 2(f)**

#### Modifications etc. (not altering text)

**C35** S. 36C applied (with modifications) (4.4.2006) by The Cross-Border Insolvency Regulations 2006 (S.I. 2006/1030), reg. 2(1), **Sch. 1 Article 23 paras. 1-3** (subject to paras. 6, 9)

#### Marginal Citations

**M17** 1993 c. 48.

**M18** 1995 c. 26.

### [<sup>F120</sup>36D Recovery of excessive contributions in pension-sharing cases. **S**

- (1) For the purposes of section 34 of this Act, a pension-sharing transaction shall be taken—
  - (a) to be a transaction, entered into by the transferor with the transferee, by which the appropriate amount is transferred by the transferor to the transferee; and
  - (b) to be capable of being an alienation challengeable under that section only so far as it is a transfer of so much of the appropriate amount as is recoverable.
- (2) For the purposes of section 35 of this Act, a pension-sharing transaction shall be taken—
  - (a) to be a pension sharing order made by the court under section 8(2) of the Family Law (Scotland) Act 1985; and
  - (b) to be an order capable of being recalled under that section only so far as it is a payment or transfer of so much of the appropriate amount as is recoverable.
- (3) For the purposes of section 36 of this Act, a pension-sharing transaction shall be taken—
  - (a) to be something (namely a transfer of the appropriate amount to the transferee) done by the transferor; and
  - (b) to be capable of being an unfair preference given to the transferee only so far as it is a transfer of so much of the appropriate amount as is recoverable.
- (4) Where—
  - (a) an alienation is challenged under section 34;
  - (b) an application is made under section 35 for the recall of an order made in divorce proceedings; or
  - (c) a transaction is challenged under section 36,if any question arises as to whether, or the extent to which, the appropriate amount in the case of a pension-sharing transaction is recoverable, the question shall be determined in accordance with subsections (5) to (9).
- (5) The court shall first determine the extent (if any) to which the transferor's rights under the shared arrangement at the time of the transaction appear to have been (whether directly or indirectly) the fruits of contributions ("personal contributions")—
  - (a) which the transferor has at any time made on his own behalf, or
  - (b) which have at any time been made on the transferor's behalf,

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to the shared arrangement or any other pension arrangement.

- (6) Where it appears that those rights were to any extent the fruits of personal contributions, the court shall then determine the extent (if any) to which those rights appear to have been the fruits of personal contributions whose making has unfairly prejudiced the transferor’s creditors (“the unfair contributions”).
- (7) If it appears to the court that the extent to which those rights were the fruits of the unfair contributions is such that the transfer of the appropriate amount could have been made out of rights under the shared arrangement which were not the fruits of the unfair contributions, then the appropriate amount is not recoverable.
- (8) If it appears to the court that the transfer could not have been wholly so made, then the appropriate amount is recoverable to the extent to which it appears to the court that the transfer could not have been so made.
- (9) In making the determination mentioned in subsection (6) the court shall consider in particular—
- (a) whether any of the personal contributions were made for the purpose of putting assets beyond the reach of the transferor’s creditors or any of them; and
  - (b) whether the total amount of any personal contributions represented, at the time the pension sharing arrangement was made, by rights under pension arrangements is an amount which is excessive in view of the transferor’s circumstances when those contributions were made.
- (10) In this section and sections 36E and 36F—
- “appropriate amount”, in relation to a pension-sharing transaction, means the appropriate amount in relation to that transaction for the purposes of section 29(1) of the Welfare Reform and Pensions Act 1999 (creation of pension credits and debits);
- “pension-sharing transaction” means an order or provision falling within section 28(1) of the Welfare Reform and Pensions Act 1999 (orders and agreements which activate pension-sharing);
- “shared arrangement”, in relation to a pension-sharing transaction, means the pension arrangement to which the transaction relates;
- “transferee”, in relation to a pension-sharing transaction, means the person for whose benefit the transaction is made;
- “transferor”, in relation to a pension-sharing transaction, means the person to whose rights the transaction relates.]

#### Textual Amendments

**F120** S. 36D inserted (26.3.2002 for certain purposes and otherwise 6.4.2002) by 1999 c. 30, ss. 84(1), 89(1), **Sch. 12 Pt. II para. 69**; S.I 2002/818 {art. 3(b)}

#### [<sup>F121</sup>**36E Recovery orders.** **S**

- (1) In this section and section 36F of this Act, “recovery order” means—
- (a) a decree granted under section 34(4) of this Act;
  - (b) an order made under section 35(2) of this Act;
  - (c) a decree granted under section 36(5) of this Act,



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in any proceedings to which section 36D of this Act applies.

- (2) Without prejudice to the generality of section 34(4), 35(2) or 36(5) a recovery order may include provision—
- (a) requiring the person responsible for a pension arrangement in which the transferee has acquired rights derived directly or indirectly from the pension-sharing transaction to pay an amount to the permanent trustee,
  - (b) adjusting the liabilities of the pension arrangement in respect of the transferee,
  - (c) adjusting any liabilities of the pension arrangement in respect of any other person that derive, directly or indirectly, from rights of the transferee under the arrangement,
  - (d) for the recovery by the person responsible for the pension arrangement (whether by deduction from any amount which that person is ordered to pay or otherwise) of costs incurred by that person in complying in the debtor's case with any requirement under section 36F(1) or in giving effect to the order.
- (3) In subsection (2), references to adjusting the liabilities of a pension arrangement in respect of a person include (in particular) reducing the amount of any benefit or future benefit to which that person is entitled under the arrangement.
- (4) The maximum amount which the person responsible for an arrangement may be required to pay by a recovery order is the smallest of—
- (a) so much of the appropriate amount as, in accordance with section 36D of this Act, is recoverable,
  - (b) so much (if any) of the amount of the unfair contributions (within the meaning given by section 36D(6)) as is not recoverable by way of an order under section 36A of this Act containing provision such as is mentioned in section 36B(1)(a), and
  - (c) the value of the debtor's rights under the arrangement acquired by the transferee as a consequence of the transfer of the appropriate amount.
- (5) A recovery order which requires the person responsible for an arrangement to pay an amount ("the restoration amount") to the permanent trustee must provide for the liabilities of the arrangement to be correspondingly reduced.
- (6) For the purposes of subsection (5), liabilities are correspondingly reduced if the difference between—
- (a) the amount of the liabilities immediately before the reduction, and
  - (b) the amount of the liabilities immediately after the reduction,
- is equal to the restoration amount.
- (7) A recovery order in respect of an arrangement—
- (a) shall be binding on the person responsible for the arrangement, and
  - (b) overrides provisions of the arrangement to the extent that they conflict with the provisions of the order.]

#### Textual Amendments

**F121** S. 36E inserted (26.3.2002 for certain purposes and otherwise 6.4.2002) by 1999 c. 30, ss. 84(1), 89(1), **Sch. 12 Pt. II para. 69**; S.I. 2002/818, {art. 3(b)}

*Status: Point in time view as at 06/04/2007. This version of this Act contains provisions that are not valid for this point in time.*

*Changes to legislation: Bankruptcy (Scotland) Act 1985 (repealed) is up to date with all changes known to be in force on or before 13 June 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details)*

[<sup>F122</sup>**36F Recovery orders: supplementary. S**]

- (1) The person responsible for a pension arrangement under which the transferee has, at any time, acquired rights by virtue of the transfer of the appropriate amount shall, on the permanent trustee making a written request, provide the trustee with such information about the arrangement and the rights under it of the transferor and transferee as the permanent trustee may reasonably require for, or in connection with, the making of an application for a recovery order.
- (2) Nothing in—
  - (a) any provision of section 159 of the <sup>M19</sup>Pension Schemes Act 1993 or section 91 of the <sup>M20</sup>Pensions Act 1995 (which prevent assignation and the making of orders which restrain a person from receiving anything which he is prevented from assigning),
  - (b) any provision of any enactment (whether passed or made before or after the passing of the Welfare Reform and Pensions Act 1999) corresponding to any of the provisions mentioned in paragraph (a), or
  - (c) any provision of the arrangement in question corresponding to any of those provisions,
 applies to a court exercising its power to make a recovery order.
- (3) Regulations may, for the purposes of the recovery provisions, make provision about the calculation and verification of—
  - (a) any such value as is mentioned in section 36E(4)(c);
  - (b) any such amounts as are mentioned in section 36E(6)(a) and (b).
- (4) The power conferred by subsection (3) includes power to provide for calculation or verification—
  - (a) in such manner as may, in the particular case, be approved by a prescribed person; or
  - (b) in accordance with guidance—
    - (i) from time to time prepared by a prescribed person, and
    - (ii) approved by the Secretary of State.
- (5) References in the recovery provisions to the person responsible for a pension arrangement are to—
  - (a) the trustees, managers or provider of the arrangement, or
  - (b) the person having functions in relation to the arrangement corresponding to those of a trustee, manager or provider.
- (6) In this section—
 

“prescribed” means prescribed by regulations;

“the recovery provisions” means this section and sections 34, 35, 36 and 36E of this Act;

“regulations” means regulations made by the Secretary of State.
- (7) Regulations under the recovery provisions may—
  - (a) make different provision for different cases;
  - (b) contain such incidental, supplemental and transitional provisions as appear to the Secretary of State necessary or expedient.
- (8) Regulations under the recovery provisions shall be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.]

**Status:** Point in time view as at 06/04/2007. This version of this Act contains provisions that are not valid for this point in time.  
**Changes to legislation:** Bankruptcy (Scotland) Act 1985 (repealed) is up to date with all changes known to be in force on or before 13 June 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details)

#### Textual Amendments

**F122** S. 36F inserted (26.3.2002 for certain purposes and otherwise 6.4.2002) by 1999 c. 30, ss. 84(1), 89(1), **Sch. 12 Pt. II para. 69**; S.I 2002/818 {art. 3(b)}

#### Marginal Citations

**M19** 1993 c. 48.  
**M20** 1995 c. 26.

### *Effect of sequestration on diligence*

#### **37 Effect of sequestration on diligence. S**

- (1) The order of the court awarding sequestration shall as from the date of sequestration have the effect, in relation to diligence done (whether before or after the date of sequestration) in respect of any part of the debtor's estate, of—
  - (a) a decree of adjudication of the heritable estate of the debtor for payment of his debts which has been duly recorded in the register of inhibitions and adjudications on that date; and
  - (b) an arrestment in execution and decree of furthcoming, an arrestment in execution and warrant of sale, and a completed poinding,in favour of the creditors according to their respective entitlements.
- (2) No inhibition on the estate of the debtor which takes effect within the period of 60 days before the date of sequestration shall be effectual to create a preference for the inhibitor and any relevant right of challenge shall, at the date of sequestration, vest in the permanent trustee as shall any right of the inhibitor to receive payment for the discharge of the inhibition:

Provided that this subsection shall neither entitle the trustee to receive any payment made to the inhibitor before the date of sequestration nor affect the validity of anything done before that date in consideration of such payment.
- (3) In subsection (2) above, “any relevant right of challenge” means any right to challenge a deed voluntarily granted by the debtor if it is a right which vested in the inhibitor by virtue of the inhibition.
- (4) No arrestment or [<sup>F123</sup>attachment] of the estate of the debtor (including any estate vesting in the permanent trustee under section 32(6) of this Act) executed—
  - (a) within the period of 60 days before the date of sequestration and whether or not subsisting at that date; or
  - (b) on or after the date of sequestration,shall be effectual to create a preference for the arrester or [<sup>F124</sup>attacher] ; and the estate so arrested or [<sup>F125</sup>attached] , or the proceeds of sale thereof, shall be handed over to the permanent trustee.
- (5) An arrester or [<sup>F124</sup>attacher] whose arrestment or [<sup>F123</sup>attachment] is executed within the said period of 60 days shall be entitled to payment, out of the arrested or [<sup>F125</sup>attached] estate or out of the proceeds of the sale thereof, of the expenses incurred—
  - (a) in obtaining the extract of the decree or other document on which the arrestment or [<sup>F123</sup>attachment] proceeded;

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- (b) in executing the arrestment or [<sup>F123</sup>attachment] ; and
- (c) in taking any further action in respect of the diligence.

[<sup>F126</sup>(5A) Nothing in subsection (4) or (5) above shall apply to an earnings arrestment, a current maintenance arrestment [<sup>F127</sup>, a conjoined arrestment order or a deduction from earnings order under the Child Support Act 1991].]

- (6) No pointing of the ground in respect of the estate of the debtor (including any estate vesting in the permanent trustee under section 32(6) of this Act) executed within the period of 60 days before the date of sequestration or on or after that date shall be effectual in a question with the permanent trustee, except for the interest on the debt of a secured creditor, being interest for the current half-yearly term and arrears of interest for one year immediately before the commencement of that term.
- (7) The foregoing provisions of this section shall apply to the estate of a deceased debtor which—
  - (a) has been sequestrated; or
  - (b) was absolutely insolvent at the date of death and in respect of which a judicial factor has been appointed under section 11A of the <sup>M21</sup>Judicial Factors (Scotland) Act 1889,

within 12 months after his death, but as if for any reference to the date of sequestration and the debtor there were substituted respectively a reference to the date of the deceased's death and to the deceased debtor.

- (8) It shall be incompetent on or after the date of sequestration for any creditor to raise or insist in an adjudication against the estate of a debtor (including any estate vesting in the permanent trustee under section 32(6) of this Act) or to be confirmed as executor-creditor on the estate.
- (9) Where—
  - (a) a deceased debtor's estate is sequestrated; or
  - (b) a judicial factor is appointed under section 11A of the <sup>M22</sup>Judicial Factors (Scotland) Act 1889 to administer his estate (in a case where the estate is absolutely insolvent),

within 12 months after the debtor's death, no confirmation as executor-creditor on that estate at any time after the debtor's death shall be effectual in a question with the permanent trustee or the judicial factor; but the executor-creditor shall be entitled out of that estate, or out of the proceeds of sale thereof, to the expenses incurred by him in obtaining the confirmation.

#### Textual Amendments

- F123** Words in s. 37(4)(5) substituted (30.12.2002) by Debt Arrangement and Attachment (Scotland) Act 2002 (asp. 17), s. 61, **Sch. 3 Pt. 1 para. 15(4)(a)**
- F124** Words in s. 37(4)(5) substituted (30.12.2002) by Debt Arrangement and Attachment (Scotland) Act 2002 (asp. 17), s. 61, **Sch. 3 Pt. 1 para. 15(4)(b)**
- F125** Words in s. 37(4)(5) substituted (30.12.2002) by Debt Arrangement and Attachment (Scotland) Act 2002 (asp. 17), s. 61, **Sch. 3 Pt. 1 para. 15(4)(c)**
- F126** S. 37(5A) inserted by Debtors (Scotland) Act 1987 (c. 18, SIF 45:2), s. 108(1)(2), Sch. 6 para. 27, Sch. 7 paras. 5, **9(1)**
- F127** Words in s. 37(5A) substituted (4.4.1993) by Child Support Act 1991 (c. 48, SIF 20), s. 58(13), **Sch. 5 para. 6(3)** (with s. 9(2)); S.I. 1992/2644, **art.2**.

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**Modifications etc. (not altering text)**

**C36** S. 37(1)–(5)(6) applied with modifications by [Insolvency Act 1986 \(c. 45, SIF 66\)](#), **ss. 185(1)(a)**, 443

**Marginal Citations**

**M21** 1889 c. 39.

**M22** 1889 c. 39.

*Administration of estate by permanent trustee*

**38 Taking possession of estate by permanent trustee. S**

- (1) The permanent trustee shall—
  - (a) as soon as may be after his confirmation in office, for the purpose of recovering the debtor’s estate under section 3(1)(a) of this Act, and subject to section 40 of this Act, take possession of the debtor’s whole estate so far as vesting in the permanent trustee under sections 31 and 32 of this Act and any document in the debtor’s possession or control relating to his assets or his business or financial affairs;
  - (b) make up and maintain an inventory and valuation of the estate which he shall record in the sederunt book; and
  - (c) forthwith thereafter send a copy of any such inventory and valuation to the Accountant in Bankruptcy.
- (2) The permanent trustee shall be entitled to have access to all documents relating to the assets or the business or financial affairs of the debtor sent by or on behalf of the debtor to a third party and in that third party’s hands and to make copies of any such documents.
- (3) If any person obstructs a permanent trustee who is exercising, or attempting to exercise, a power conferred by subsection (2) above, the sheriff, on the application of the permanent trustee, may order that person to cease so to obstruct the permanent trustee.
- (4) The permanent trustee may require delivery to him of any title deed or other document of the debtor, notwithstanding that a right of lien is claimed over the title deed or document; but this subsection is without prejudice to any preference of the holder of the lien.

**Modifications etc. (not altering text)**

**C37** Ss. 38, 39(4)(7) applied with modifications by [S.I. 1986/1915](#), **Rule 4.22.(1)**

**39 Management and realisation of estate. S**

- (1) As soon as may be after his confirmation in office, the permanent trustee shall consult with the commissioners or, if there are no commissioners, with the Accountant in Bankruptcy concerning the exercise of his functions under section 3(1)(a) of this Act; and, subject to subsection (6) below, the permanent trustee shall comply with any general or specific directions given to him, as the case may be—
  - (a) by the creditors;

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- (b) on the application under this subsection of the commissioners, by the court; or
  - (c) if there are no commissioners, by the Accountant in Bankruptcy,

as to the exercise by him of such functions.
- (2) The permanent trustee may, but if there are commissioners only with the consent of the commissioners, the creditors or the court, do any of the following things if he considers that its doing would be beneficial for the administration of the estate—
  - (a) carry on any business of the debtor;
  - (b) bring, defend or continue any legal proceedings relating to the estate of the debtor;
  - (c) create a security over any part of the estate;
  - (d) where any right, option or other power forms part of the debtor's estate, make payments or incur liabilities with a view to obtaining, for the benefit of the creditors, any property which is the subject of the right, option or power.
- (3) Any sale of the debtor's estate by the permanent trustee may be by either public sale or private bargain.
- (4) The following rules shall apply to the sale of any part of the debtor's heritable estate over which a heritable security is held by a creditor or creditors if the rights of the secured creditor or creditors are preferable to those of the permanent trustee—
  - (a) the permanent trustee may sell that part only with the concurrence of every such creditor unless he obtains a sufficiently high price to discharge every such security;
  - (b) subject to paragraph (c) below, the following acts shall be precluded—
    - (i) the taking of steps by a creditor to enforce his security over that part after the permanent trustee has intimated to the creditor that he intends to sell it;
    - (ii) the commencement by the permanent trustee of the procedure for the sale of that part after a creditor has intimated to the permanent trustee that he intends to commence the procedure for its sale;
  - (c) where the permanent trustee or a creditor has given intimation under paragraph (b) above, but has unduly delayed in proceeding with the sale, then, if authorised by the court in the case of intimation under—
    - (i) sub-paragraph (i) of that paragraph, any creditor to whom intimation has been given may enforce his security; or
    - (ii) sub-paragraph (ii) of that paragraph, the permanent trustee may sell that part.
- (5) The function of the permanent trustee under section 3(1)(a) of this Act to realise the debtor's estate shall include the function of selling, with or without recourse against the estate, debts owing to the estate.
- (6) The permanent trustee may sell any perishable goods without complying with any directions given to him under subsection (1)(a) or (c) above if the permanent trustee considers that compliance with such directions would adversely affect the sale.
- (7) The validity of the title of any purchaser shall not be challengeable on the ground that there has been a failure to comply with a requirement of this section.
- (8) It shall be incompetent for the permanent trustee or an associate of his or for any commissioner, to purchase any of the debtor's estate in pursuance of this section.

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**Modifications etc. (not altering text)**

**C38** S. 39(3)(4)(7)(8) applied with modifications by [Insolvency Act 1986 \(c. 45, SIF 66\)](#), **ss. 185(1)(b)**, 443

**C39** Ss. 38, 39(4)(7) applied with modifications by [S.I. 1986/1915](#), **Rule 4.22.(1)**

VALID FROM 01/04/2008

**[<sup>F128</sup>39A Debtor's home ceasing to form part of sequestrated estate **S****

- (1) This section applies where a debtor's sequestrated estate includes any right or interest in the debtor's family home.
- (2) At the end of the period of 3 years beginning with the date of sequestration the right or interest mentioned in subsection (1) above shall—
  - (a) cease to form part of the debtor's sequestrated estate; and
  - (b) be reinvested in the debtor (without disposition, conveyance, assignation or other transfer).
- (3) Subsection (2) above shall not apply if, during the period mentioned in that subsection—
  - (a) the trustee disposes of or otherwise realises the right or interest mentioned in subsection (1) above;
  - (b) the trustee concludes missives for sale of the right or interest;
  - (c) the trustee sends a memorandum to the keeper of the register of inhibitions under section 14(4) of this Act;
  - (d) the trustee registers in the Land Register of Scotland or, as the case may be, records in the Register of Sasines a notice of title in relation to the right or interest mentioned in subsection (1) above;
  - (e) the trustee commences proceedings—
    - (i) to obtain the authority of the sheriff under section 40(1)(b) of this Act to sell or dispose of the right or interest;
    - (ii) in an action for division and sale of the family home; or
    - (iii) in an action for the purpose of obtaining vacant possession of the family home;
  - (f) the trustee and the debtor enter into an agreement such as is mentioned in subsection (5) below;
  - <sup>F129</sup>(g) **[** the trustee has commenced an action under section 34 of this Act in respect of any right or interest mentioned in sub-section (1) above or the trustee has not known about the facts giving rise to a right of action under section 34 of this Act, provided the trustee commences such an action reasonably soon after the trustee becomes aware of such right.**]**
- (4) The Scottish Ministers may, by regulations, modify paragraphs (a) to (f) of subsection (3) above so as to—
  - (a) add or remove a matter; or
  - (b) vary any such matter,referred to in that subsection.

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- (5) The agreement referred to in subsection (3)(f) above is an agreement that the debtor shall incur a specified liability to his estate (with or without interest from the date of the agreement) in consideration of which the right or interest mentioned in subsection (1) above shall—
- (a) cease to form part of the debtor's sequestrated estate; and
  - (b) be reinvested in the debtor (without disposition, conveyance, assignation or other transfer).
- (6) If the debtor does not inform the trustee or the Accountant in Bankruptcy of his right or interest in the family home before the end of the period of 3 months beginning with the date of sequestration, the period of 3 years mentioned in subsection (2) above—
- (a) shall not begin with the date of sequestration; but
  - (b) shall begin with the date on which the trustee or the Accountant in Bankruptcy becomes aware of the debtor's right or interest.
- (7) The sheriff may, on the application of the trustee, substitute for the period of 3 years mentioned in subsection (2) above a longer period—
- (a) in prescribed circumstances; and
  - (b) in such other circumstances as the sheriff thinks appropriate.
- (8) The Scottish Ministers may, by regulations—
- (a) make provision for this section to have effect with the substitution, in such circumstances as the regulations may prescribe, of a shorter period for the period of 3 years mentioned in subsection (2) above;
  - (b) prescribe circumstances in which this section does not apply;
  - (c) prescribe circumstances in which a sheriff may disapply this section;
  - (d) make provision requiring the trustee to give notice that this section applies or does not apply;
  - (e) make provision about compensation;
  - (f) make such provision as they consider necessary or expedient in consequence of regulations made under paragraphs (a) to (e) above.
- (9) In this section, “family home” has the same meaning as in section 40 of this Act.]

#### Textual Amendments

**F128** S. 39A inserted (1.4.2008) by *Bankruptcy and Diligence etc. (Scotland) Act 2007* (asp 3), **ss. 19(2), 227(3)** (with s. 223); *S.S.I. 2008/115*, **art. 3(1)(a)** (with arts. 4-6, 10 (as amended (with effect from 31.1.2011) by *S.S.I. 2011/31*, art. 5))

**F129** S. 39A(3)(g) inserted (1.4.2008) by *The Bankruptcy (Scotland) Act 1985 (Low Income, Low Asset Debtors etc.) Regulations 2008* (S.S.I. 2008/81), **reg. 4**

## 40 Power of permanent trustee in relation to the debtor's family home. **S**

- (1) Before the permanent trustee sells or disposes of any right or interest in the debtor's family home he shall—
- (a) obtain the relevant consent; or
  - (b) where he is unable to do so, obtain the authority of the court in accordance with subsection (2) below.



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(2) Where the permanent trustee requires to obtain the authority of the court in terms of subsection (1)(b) above, the court, after having regard to all the circumstances of the case, including—

- (a) the needs and financial resources of the debtor's spouse or former spouse;
- [<sup>F130</sup>(aa) the needs and financial resources of the debtor's civil partner or former civil partner;]
- (b) the needs and financial resources of any child of the family;
- (c) the interests of the creditors;
- (d) the length of the period during which (whether before or after the relevant date) the family home was used as a residence by any of the persons referred to in [<sup>F131</sup>paragraphs (a) to (b)] above,

may refuse to grant the application or may postpone the granting of the application for such period (not exceeding twelve months) as it may consider reasonable in the circumstances or may grant the application subject to such conditions as it may prescribe.

(3) Subsection (2) above shall apply—

- (a) to an action for division and sale of the debtor's family home; or
- (b) to an action for the purpose of obtaining vacant possession of the debtor's family home,

brought by the permanent trustee as it applies to an application under subsection (1)(b) above and, for the purposes of this subsection, any reference in the said subsection (2) to that granting of the application shall be construed as a reference to the granting of decree in the action.

(4) In this section—

- (a) “family home” means any property in which, at the relevant date, the debtor had (whether alone or in common with any other person) a right or interest, being property which was occupied at that date as a residence by the debtor and his spouse [<sup>F132</sup>or civil partner] or by the debtor's spouse [<sup>F133</sup>or civil partner] or former spouse [<sup>F133</sup>or civil partner] (in any case with or without a child of the family) or by the debtor with a child of the family;
- (b) “child of the family” includes any child or grandchild of either the debtor or his spouse [<sup>F134</sup>or civil partner] or former spouse [<sup>F134</sup>or civil partner], and any person who has been brought up or accepted by either the debtor or his spouse [<sup>F135</sup>or civil partner] or former spouse [<sup>F135</sup>or civil partner] as if he or she were a child of the debtor, spouse [<sup>F135</sup>or civil partner] or former spouse [<sup>F135</sup>or civil partner] whatever the age of such a child, grandchild or person may be;
- (c) “relevant consent” means in relation to the sale or disposal of any right or interest in a family home—
  - (i) in a case where the family home is occupied by the debtor's spouse [<sup>F136</sup>or civil partner] or former spouse [<sup>F136</sup>or civil partner], the consent of the spouse [<sup>F136</sup>or civil partner], or, as the case may be, the former spouse [<sup>F136</sup>or civil partner], whether or not the family home is also occupied by the debtor;
  - (ii) where sub-paragraph (i) above does not apply, in a case where the family home is occupied by the debtor with a child of the family, the consent of the debtor; and
- (d) “relevant date” means the day immediately preceding the date of sequestration.

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### Textual Amendments

- F130** S. 40(2)(aa) inserted (5.12.2005) by [Civil Partnership Act 2004 \(c. 33\)](#), ss. 261(2), 263, [Sch. 28 para. 36\(1\)\(2\)](#); [S.S.I. 2005/604](#) {art. 2(c)}
- F131** Words in s. 40(2)(d) substituted (5.12.2005) by [Civil Partnership Act 2004 \(c. 33\)](#), ss. 261(2), 263, [Sch. 28 para. 36\(1\)\(3\)](#); [S.S.I. 2005/604](#) {art. 2(c)}
- F132** Words in s. 40(4)(a) inserted (5.12.2005) by [Civil Partnership Act 2004 \(c. 33\)](#), ss. 261(2), 263, [Sch. 28 para. 36\(1\)\(4\)\(a\)](#); [S.S.I. 2005/604](#), art. 2(c)
- F133** Words in s. 40(4)(a) inserted (5.12.2005) by [Civil Partnership Act 2004 \(c. 33\)](#), ss. 261(2), 263, [Sch. 28 para. 36\(1\)\(4\)\(a\)](#); [S.S.I. 2005/604](#), art. 2(c)
- F134** Words in s. 40(4)(b) inserted (5.12.2005) by [Civil Partnership Act 2004 \(c. 33\)](#), ss. 261(2), 263, [Sch. 28 para. 36\(1\)\(4\)\(b\)](#); [S.S.I. 2005/604](#), art. 2(c)
- F135** Words in s. 40(4)(b) inserted (5.12.2005) by [Civil Partnership Act 2004 \(c. 33\)](#), ss. 261(2), 263, [Sch. 28 para. 36\(1\)\(4\)\(b\)](#); [S.S.I. 2005/604](#), art. 2(c)
- F136** Words in s. 40(4)(c)(i) inserted (5.12.2005) by [Civil Partnership Act 2004 \(c. 33\)](#), ss. 261(2), 263, [Sch. 28 para. 36\(1\)\(4\)\(c\)](#); [S.S.I. 2005/604](#) {art. 2(c)}

## 41 Protection of rights of spouse against arrangements intended to defeat them. S

- (1) If a debtor's sequestrated estate includes a matrimonial home of which the debtor, immediately before the date of issue of the act and warrant of the permanent trustee (or, if more than one such act and warrant is issued in the sequestration, of the first such issue) was an entitled spouse and the other spouse is a non-entitled spouse—
- (a) the permanent trustee shall, where he—
    - (i) is aware that the entitled spouse is married to the non-entitled spouse; and
    - (ii) knows where the non-entitled spouse is residing,
 inform the non-entitled spouse, within the period of 14 days beginning with that date, of the fact that sequestration of the entitled spouse's estate has been awarded, of the right of petition which exists under section 16 of this Act and of the effect of paragraph (b) below; and
  - (b) the Court of Session, on the petition under section 16 of this Act of the non-entitled spouse presented either within the period of 40 days beginning with that date or within the period of 10 weeks beginning with the date of sequestration may—
    - (i) under section 17 of this Act recall the sequestration; or
    - (ii) make such order as it thinks appropriate to protect the occupancy rights of the non-entitled spouse;
 if it is satisfied that the purpose of the petition for sequestration was wholly or mainly to defeat the occupancy rights of the non-entitled spouse.
- (2) In subsection (1) above—
- “entitled spouse” and “non-entitled spouse” have the same meanings as in section 6 of the <sup>M23</sup>Matrimonial Homes (Family Protection) (Scotland) Act 1981;
- “matrimonial home” has the meaning assigned by section 22 of that Act as amended by the <sup>M24</sup>Law Reform (Miscellaneous Provisions) (Scotland) Act 1985; and
- “occupancy rights” has the meaning assigned by section 1(4) of the said Act of 1981.

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#### Marginal Citations

M23 1981 c. 59.

M24 1985 c. 73.

### [<sup>F137</sup>41A Protection of rights of civil partner against arrangements intended to defeat them **S**

(1) If a debtor's sequestrated estate includes a family home of which the debtor, immediately before the date of issue of the act and warrant of the permanent trustee (or, if more than one such act and warrant is issued in the sequestration, of the first such issue) was an entitled partner and the other partner in the civil partnership is a non-entitled partner—

(a) the permanent trustee shall, where he—

(i) is aware that the entitled partner is in civil partnership with the non-entitled partner; and

(ii) knows where the non-entitled partner is residing,

inform the non-entitled partner, within the period of 14 days beginning with that date, of the fact that sequestration of the entitled partner's estate has been awarded, of the right of petition which exists under section 16 of this Act and of the effect of paragraph (b) below; and

(b) the Court of Session, on the petition under section 16 of this Act of the non-entitled partner presented either within the period of 40 days beginning with that date or within the period of 10 weeks beginning with the date of sequestration may—

(i) under section 17 of this Act recall the sequestration; or

(ii) make such order as it thinks appropriate to protect the occupancy rights of the non-entitled partner,

if it is satisfied that the purpose of the petition for sequestration was wholly or mainly to defeat the occupancy rights of the non-entitled partner.

(2) In subsection (1) above—

“entitled partner” and “non-entitled partner” have the same meanings as in section 101 of the Civil Partnership Act 2004;

“family home” has the meaning assigned by section 135 of the 2004 Act; and

“occupancy rights” means the rights conferred by subsection (1) of that section 101.]

#### Textual Amendments

F137 S. 41A inserted (5.12.2005) by [Civil Partnership Act 2004 \(c. 33\)](#), ss. 261(2), 263, [Sch. 28 para. 37](#); [S.S.I. 2005/604](#) {art. 2(c)}

### 42 Contractual powers of permanent trustee. **S**

(1) Subject to subsections (2) and (3) below, the permanent trustee may adopt any contract entered into by the debtor before the date of sequestration where he considers that its adoption would be beneficial to the administration of the debtor's estate, except

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where the adoption is precluded by the express or implied terms of the contract, or may refuse to adopt any such contract.

- (2) The permanent trustee shall, within 28 days from the receipt by him of a request in writing from any party to a contract entered into by the debtor or within such longer period of that receipt as the court on application by the permanent trustee may allow, adopt or refuse to adopt the contract.
- (3) If the permanent trustee does not reply in writing to the request under subsection (2) above within the said period of 28 days or longer period, as the case may be, he shall be deemed to have refused to adopt the contract.
- (4) The permanent trustee may enter into any contract where he considers that this would be beneficial for the administration of the debtor's estate.

**Modifications etc. (not altering text)**

**C40** S. 42 excluded (25.4.1991) by [Companies Act 1989 \(c. 40, SIF 27\)](#), **ss. 154, 155, 164(2)**; [S.I. 1991/878](#), **art. 2**, Sch.

**43 Money received by permanent trustee. S**

- (1) Subject to subsection (2) below, all money received by the permanent trustee in the exercise of his functions shall be deposited by him in the name of the debtor's estate in an appropriate bank or institution.
- (2) The permanent trustee may at any time retain in his hands a sum not exceeding £200 or such other sum as may be prescribed.

VALID FROM 01/04/2008

**[<sup>F138</sup> 43A Debtor's requirement to give account of state of affairs S**

- (1) This section applies to a debtor who—
  - (a) has not been discharged under this Act; or
  - (b) is subject to—
    - (i) an order made by the sheriff under subsection (2) of section 32 of this Act; or
    - (ii) an agreement entered into under subsection (4B) of that section.
- (2) The trustee shall, at the end of—
  - (a) the period of 6 months beginning with the date of sequestration; and
  - (b) each subsequent period of 6 months,
 require the debtor to give an account in writing, in such form as may be prescribed, of his current state of affairs.]

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#### Textual Amendments

**F138** S. 43A inserted (1.4.2008) by [Bankruptcy and Diligence etc. \(Scotland\) Act 2007 \(asp 3\)](#), [ss. 30, 227\(3\)](#) (with [s. 223](#)); [S.S.I. 2008/115](#), [art. 3\(1\)\(a\)](#) (with [arts. 4-6, 10](#) (as amended (with effect from [31.1.2011](#)) by [S.S.I. 2011/31](#), [art. 5](#)))

### Examination of debtor

#### 44 Private examination. **S**

- (1) The permanent trustee may request—
  - (a) the debtor to appear before him and to give information relating to his assets, his dealings with them or his conduct in relation to his business or financial affairs; or
  - (b) the debtor’s spouse [<sup>F139</sup>or civil partner] or any other person who the permanent trustee believes can give such information (in this Act such spouse [<sup>F140</sup>, civil partner] or other person being referred to as a “relevant person”), to give that information,and, if he considers it necessary, the permanent trustee may apply to the sheriff for an order to be made under subsection (2) below.
- (2) Subject to section 46(2) of this Act, on application to him under subsection (1) above the sheriff may make an order requiring the debtor or a relevant person to attend for private examination before him on a date (being not earlier than 8 days nor later than 16 days after the date of the order) and at a time specified in the order.
- (3) A person who fails without reasonable excuse to comply with an order made under subsection (2) above shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale or to imprisonment for a term not exceeding 3 months or to both.
- (4) Where the debtor is an entity whose estate may be sequestrated by virtue of section 6(1) of this Act, the references in this section and in sections 45 to 47 of this Act to the debtor shall be construed, unless the context otherwise requires, as references to a person representing the entity.

#### Textual Amendments

**F139** Words in s. 44(1)(b) inserted (5.12.2005) by [Civil Partnership Act 2004 \(c. 33\)](#), [ss. 261\(2\), 263](#), [Sch. 28 para. 38\(a\)](#); [S.S.I. 2005/604](#) {art. 2(c)}

**F140** Words in s. 44(1)(b) inserted (5.12.2005) by [Civil Partnership Act 2004 \(c. 33\)](#), [ss. 261\(2\), 263](#), [Sch. 28 para. 38\(b\)](#); [S.S.I. 2005/604](#) {art. 2(c)}

#### 45 Public examination. **S**

- (1) Not less than 8 weeks before the end of the first accounting period, the permanent trustee—
  - (a) may; or
  - (b) if requested to do so by the Accountant in Bankruptcy or the commissioners (if any) or one quarter in value of the creditors, shall,

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apply to the sheriff for an order for the public examination before the sheriff of the debtor or of a relevant person relating to the debtor's assets, his dealings with them or his conduct in relation to his business or financial affairs:

Provided that, on cause shown, such application may be made by the permanent trustee at any time.

- (2) Subject to section 46(2) of this Act, the sheriff, on an application under subsection (1) above, shall make an order requiring the debtor or relevant person to attend for examination before him in open court on a date (being not earlier than 8 days nor later than 16 days after the date of the order) and at a time specified in the order.
- (3) On the sheriff making an order under subsection (2) above, the permanent trustee shall—
  - (a) publish in the Edinburgh Gazette a notice in such form and containing such particulars as may be prescribed; and
  - (b) send a copy of the said notice—
    - (i) to every creditor known to the permanent trustee; and
    - (ii) where the order is in respect of a relevant person, to the debtor, and inform the creditor and, where applicable, the debtor that he may participate in the examination.
- (4) A person who fails without reasonable excuse to comply with an order made under subsection (2) above shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale or to imprisonment for a term not exceeding 3 months or to both.

#### 46 Provisions ancillary to sections 44 and 45. **U.K.**

- (1) If the debtor or relevant person is residing—
  - (a) in Scotland, the sheriff may, on the application of the permanent trustee, grant a warrant which may be executed by a messenger-at-arms or sheriff officer anywhere in Scotland; or <sup>F141</sup>to apprehend]
  - (b) in any other part of the United Kingdom, the Court of Session or the sheriff may, on the application of the permanent trustee, <sup>F142</sup>grant a warrant for the arrest of]

<sup>F143</sup> . . . the debtor or relevant person and <sup>F144</sup>to]have him taken to the place of the examination:

Provided that a warrant under <sup>F145</sup>this subsection shall not be granted] unless the court is satisfied that it is necessary to do so to secure the attendance of the debtor or relevant person at the examination.

- (2) If the debtor or a relevant person is for any good reason prevented from attending for examination, the sheriff may, without prejudice to subsection (3) below, grant a commission to take his examination (the commissioner being in this section and section 47 below referred to as an “examining commissioner”).
- (3) The sheriff or the examining commissioner may at any time adjourn the examination to such day as the sheriff or the examining commissioner may fix.
- (4) The sheriff or the examining commissioner may order the debtor or a relevant person to produce for inspection any document in his custody or control relating to the debtor's assets, his dealings with them or his conduct in relation to his business or financial

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affairs, and to deliver the document or a copy thereof to the permanent trustee for further examination by him.

#### Textual Amendments

- F141** Words in s. 46(1)(a) added (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 20(2)(a)** (with s. 12(6)); S.I. 1993/438, **art.3**
- F142** Words in s. 46(1)(b) substituted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 20(2)(b)** (with s. 12(6)); S.I. 1993/438, **art.3**
- F143** Words in s. 46(1) repealed (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 20(2)(c)(i)**, **Sch.2** (with s. 12(6)); S.I. 1993/438, **art.3**
- F144** Word "to" in s. 46(1) inserted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 20(2)(c)(ii)** (with s. 12(6)); S.I. 1993/438, **art.3**
- F145** Words in the proviso to s. 46(1) substituted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 20(3)** (with s. 12(6)); S.I. 1993/438, **art.3**

#### 47 Conduct of examination. **S**

- (1) The examination, whether before the sheriff or an examining commissioner, shall be taken on oath.
- (2) At the examination—
  - (a) the permanent trustee or a solicitor or counsel acting on his behalf and, in the case of public examination, any creditor may question the debtor or a relevant person; and
  - (b) the debtor may question a relevant person,  
as to any matter relating to the debtor's assets, his dealings with them or his conduct in relation to his business or financial affairs.
- (3) The debtor or a relevant person shall be required to answer any question relating to the debtor's assets, his dealings with them or his conduct in relation to his business or financial affairs and shall not be excused from answering any such question on the ground that the answer may incriminate or tend to incriminate him or on the ground of confidentiality:

Provided that—

- (a) a statement made by the debtor or a relevant person in answer to such a question shall not be admissible in evidence in any subsequent criminal proceedings against the person making the statement, except where the proceedings are in respect of a charge of perjury relating to the statement;
  - (b) a person subject to examination shall not be required to disclose any information which he has received from a person who is not called for examination if the information is confidential between them.
- (4) <sup>F146</sup>The rules relating to the recording of evidence in ordinary causes specified in the First Schedule to the Sheriff Courts (Scotland) Act 1907] shall apply in relation to the recording of evidence at the examination before the sheriff or the examining commissioner.
  - (5) The debtor's deposition at the examination shall be subscribed by himself and by the sheriff (or, as the case may be, the examining commissioner) and shall be inserted in the sederunt book.

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- (6) The permanent trustee shall insert a copy of the record of the examination in the sederunt book and send a copy of the record to the Accountant in Bankruptcy.
- (7) A relevant person shall be entitled to fees or allowances in respect of his attendance at the examination as if he were a witness in an ordinary civil cause in the sheriff court:
- Provided that, if the sheriff thinks that it is appropriate in all the circumstances, he may disallow or restrict the entitlement to such fees or allowances.

#### Textual Amendments

**F146** Words substituted by [S.I. 1986/517](#), [art. 5](#)

### *Submission and adjudication of claims*

#### **48 Submission of claims to permanent trustee. S**

- (1) Subject to subsection (2) below and subsections (8) and (9) of section 52 of this Act, a creditor in order to obtain an adjudication as to his entitlement—
- (a) to vote at a meeting of creditors other than the statutory meeting; or
  - (b) (so far as funds are available), to a dividend out of the debtor's estate in respect of any accounting period,
- shall submit a claim in accordance with this section to the permanent trustee respectively—
- (i) at or before the meeting; or
  - (ii) not later than 8 weeks before the end of the accounting period.
- (2) A claim submitted by a creditor—
- (a) under section 22 of this Act and accepted in whole or in part by the interim trustee for the purpose of voting at the statutory meeting; or
  - (b) under this section [<sup>F147</sup>which has not been rejected in whole] ,
- shall be deemed to have been re-submitted for the purpose of obtaining an adjudication as to his entitlement both to vote at any subsequent meeting and (so far as funds are available) to a dividend in respect of an accounting period, or, as the case may be, any subsequent accounting period.
- (3) Subsections (2) and (3) of section 22 of this Act shall apply for the purposes of this section but as if in the proviso to subsection (2) for the words “interim trustee” there were substituted the words “permanent trustee with the consent of the commissioners, if any”, and for any other reference to the interim trustee there were substituted a reference to the permanent trustee.
- (4) A creditor who has submitted a claim under this section (or under section 22 of this Act, a statement of claim which has been deemed re-submitted as mentioned in subsection (2) above) may at any time submit a further claim under this section specifying a different amount for his claim:

Provided that a secured creditor shall not be entitled to produce a further claim specifying a different value for the security at any time after the permanent trustee requires the creditor to discharge, or convey or assign, the security under paragraph 5(2) of Schedule 1 to this Act.



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- (5) The permanent trustee, for the purpose of satisfying himself as to the validity or amount of a claim submitted by a creditor under this section, may require—
- (a) the creditor to produce further evidence; or
  - (b) any other person who he believes can produce relevant evidence, to produce such evidence,
- and, if the creditor or other person refuses or delays to do so, the permanent trustee may apply to the sheriff for an order requiring the creditor or other person to attend for his private examination before the sheriff.
- (6) Sections 44(2) and (3) and 47(1) of this Act shall apply, subject to any necessary modifications, to the examination of the creditor or other person as they apply to the examination of a relevant person; and references in this subsection and subsection (5) above to a creditor in a case where the creditor is an entity mentioned in section 6(1) of this Act shall be construed, unless the context otherwise requires, as references to a person representing the entity.
- (7) Subsections (5) to (10) of section 22 of this Act shall apply for the purposes of this section but as if—
- (a) in subsection (5) the words “interim trustee or” were omitted;
  - (b) in subsection (7) for the words “interim” and “keep a record of it” there were substituted respectively the words “permanent” and “make an insertion relating thereto in the sederunt book”.
- (8) At any private examination under subsection (5) above, a solicitor or counsel may act on behalf of the permanent trustee or he may appear himself.

#### Textual Amendments

**F147** Words in s. 48(2)(b) substituted (31.3.2007) by [Bankruptcy and Diligence etc. \(Scotland\) Act 2007](#) (asp 3), ss. 36, 227(3), **Sch. 1 para. 42(a)** (with savings in s. 223); S.S.I. 2007/82, **art. 4(d)**

#### Modifications etc. (not altering text)

- C41** S. 48 restricted (S.) (31.3.1996) by 1995 c. 20, s. 110(1), **Sch. 4 para. 1(2)**; S.I. 1996/517, **art. 3(2)** (which 1995 c. 20 was repealed (1.4.1996) by 1995 c. 40, ss. 6, 7(2), Sch. 3 para. 16(3), Sch. 5 (with [Sch. 3 paras. 1, 3](#)))  
S. 48 restricted (S.) (17.12.2001) by 2001 asp 13, s. 20, **Sch. 6 para. 8(2)** (with s. 29); S.S.I. 2001/456, **art. 2**
- C42** S. 48(5)(6)(8) applied (with modifications) by S.I. 1986/1915, [Rules 4.16\(1\)\(b\)](#), 7.9(4) and by Rule 2.41(2) (as substituted (15.9.2003) by [The Insolvency \(Scotland\) Amendment Rules 2003](#) (S.I. 2003/2111), [Rule 3](#), **Sch. 1 Pt. 1**)

## 49 Adjudication of claims. **S**

- (1) At the commencement of every meeting of creditors (other than the statutory meeting), the permanent trustee shall, for the purposes of section 50 of this Act so far as it relates to voting at that meeting, accept or reject the claim of each creditor.
- (2) Where funds are available for payment of a dividend out of the debtor’s estate in respect of an accounting period, the permanent trustee for the purpose of determining who is entitled to such a dividend shall, not later than 4 weeks before the end of the period, accept or reject every claim submitted or deemed to have been re-submitted to

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him under this Act; and shall at the same time make a decision on any matter requiring to be specified under paragraph (a) or (b) of subsection (5) below.

- (3) If the amount of a claim is stated in foreign currency the permanent trustee in adjudicating on the claim under subsection (1) or (2) above shall convert the amount into sterling, in such manner as may be prescribed, at the rate of exchange prevailing at the close of business on the date of sequestration.
- (4) Where the permanent trustee rejects a claim, he shall forthwith notify the creditor giving reasons for the rejection.
- (5) Where the permanent trustee accepts or rejects a claim, he shall record in the sederunt book his decision on the claim specifying—
  - (a) the amount of the claim accepted by him,
  - (b) the category of debt, and the value of any security, as decided by him, and
  - (c) if he is rejecting the claim, his reasons therefor.
- (6) The debtor or any creditor may, if dissatisfied with the acceptance or rejection of any claim (or, in relation to such acceptance or rejection, with a decision in respect of any matter requiring to be specified under subsection (5)(a) or (b) above), appeal therefrom to the sheriff—
  - (a) if the acceptance or rejection is under subsection (1) above, within 2 weeks of that acceptance or rejection;
  - (b) if the acceptance or rejection is under subsection (2) above, not later than 2 weeks before the end of the accounting period,
 and the permanent trustee shall record the sheriff's decision in the sederunt book.
- (7) Any reference in this section to the acceptance or rejection of a claim shall be construed as a reference to the acceptance or rejection of the claim in whole or in part.

**Modifications etc. (not altering text)**

**C43** S. 49 applied (with modifications) by [S.I. 1986/1915](#), [Rules 4.16\(1\)\(c\)](#) (as amended by [S.I. 2003/3226](#), [reg. 15](#)), [7.9\(4\)](#) and by [Rule 2.41\(2\)](#) (as substituted (15.9.2003) by [S.I. 2003/2111](#), [Rule 3](#), [Sch. 1 Pt. 1](#))

*Entitlement to vote and draw dividend*

**50 Entitlement to vote and draw dividend. S**

<sup>F148</sup>(1) A creditor who has had his claim accepted in whole or in part by the permanent trustee or on appeal under subsection (6) of section 49 of this Act shall be entitled—

- (a) subject to sections 29(1)(a) and 30(1) and (4)(b) of this Act, in a case where the acceptance is under (or on appeal arising from) subsection (1) of the said section 49, to vote on any matter at the meeting of creditors for the purpose of voting at which the claim is accepted; and
- (b) in a case where the acceptance is under (or on appeal arising from) subsection (2) of the said section 49, to payment out of the debtor's estate of a dividend in respect of the accounting period for the purposes of which the claim is accepted; but such entitlement to payment shall arise only in so far as that estate has funds available to make that payment, having regard to section 51 of this Act.

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- [<sup>F149</sup>(2) No vote shall be cast by virtue of a debt more than once on any resolution put to a meeting of creditors.
- (3) Where a creditor—
- (a) is entitled to vote under this section;
  - (b) has lodged his claim in one or more sets of other proceedings; and
  - (c) votes (either in person or by proxy) on a resolution put to the meeting,
- only the creditor’s vote shall be counted.
- (4) Where—
- (a) a creditor has lodged his claim in more than one set of other proceedings; and
  - (b) more than one member State liquidator seeks to vote by virtue of that claim,
- the entitlement to vote by virtue of that claim is exercisable by the member State liquidator in main proceedings, whether or not the creditor has lodged his claim in the main proceedings.
- (5) For the purposes of subsections (3) and (4) above, “other proceedings” means main proceedings, secondary proceedings or territorial proceedings in a member State other than the United Kingdom.]

#### Textual Amendments

**F148** S. 50 renumbered (8.9.2003) as s. 50(1) by [The Insolvency \(Scotland\) Regulations 2003 \(S.I. 2003/2109\)](#), [reg. 13\(a\)](#)

**F149** S. 50(2)-(5) inserted (8.9.2003) by [The Insolvency \(Scotland\) Regulations 2003 \(S.I. 2003/2109\)](#), [reg. 13\(b\)](#)

#### Modifications etc. (not altering text)

**C44** S. 50 applied with modifications by [S.I. 1986/1915](#), [Rules 4.16\(1\)\(d\)](#), [7.9\(4\)](#) and by [Rule 2.41\(2\)](#) (as substituted (15.9.2003) by [S.I. 2003/2111](#), [Rule 3](#), [Sch. 1 Pt. 1](#))

### *Distribution of debtor’s estate*

## 51 Order of priority in distribution. **S**

- (1) The funds of the debtor’s estate shall be distributed by the permanent trustee to meet the following debts in the order in which they are mentioned—
- (a) the outlays and remuneration of the interim trustee in the administration of the debtor’s estate;
  - (b) the outlays and remuneration of the permanent trustee in the administration of the debtor’s estate;
  - (c) where the debtor is a deceased debtor, deathbed and funeral expenses reasonably incurred and expenses reasonably incurred in administering the deceased’s estate;
  - (d) the expenses reasonably incurred by a creditor who is a petitioner, or concurs in the petition, for sequestration;
  - (e) preferred debts (excluding any interest which has accrued thereon to the date of sequestration);

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- (f) ordinary debts, that is to say a debt which is neither a secured debt nor a debt mentioned in any other paragraph of this subsection;
  - (g) interest at the rate specified in subsection (7) below on—
    - (i) the preferred debts;
    - (ii) the ordinary debts,
 between the date of sequestration and the date of payment of the debt;
  - (h) any postponed debt.
- (2) In this Act “preferred debt” means a debt listed in Part I of Schedule 3 to this Act; and Part II of that Schedule shall have effect for the interpretation of the said Part I.
- (3) In this Act “postponed debt” means—
- (a) a loan made to the debtor, in consideration of a share of the profits in his business, which is postponed under section 3 of the <sup>M25</sup>Partnership Act 1890 to the claims of other creditors;
  - (b) a loan made to the debtor by the debtor’s spouse [<sup>F150</sup>or civil partner] ;
  - (c) a creditor’s right to anything vesting in the permanent trustee by virtue of a successful challenge under section 34 of this Act or to the proceeds of sale of such a thing.
- (4) Any debt falling within any of paragraphs (c) to (h) of subsection (1) above shall have the same priority as any other debt falling within the same paragraph and, where the funds of the estate are inadequate to enable the debts mentioned in the paragraph to be paid in full, they shall abate in equal proportions.
- (5) Any surplus remaining, after all the debts mentioned in this section have been paid in full, shall be made over to the debtor or to his successors or assignees; and in this subsection “surplus” includes any kind of estate but does not include any unclaimed dividend.
- [<sup>F151</sup>(5A) Subsection (5) above is subject to Article 35 of the EC Regulation (surplus in secondary proceedings to be transferred to main proceedings).]
- (6) Nothing in this section shall affect—
- (a) the right of a secured creditor which is preferable to the rights of the permanent trustee; or
  - (b) any preference of the holder of a lien over a title deed or other document which has been delivered to the permanent trustee in accordance with a requirement under section 38(4) of this Act.
- (7) The rate of interest referred to in paragraph (g) of subsection (1) above shall be whichever is the greater of—
- (a) the prescribed rate at the date of sequestration; and
  - (b) the rate applicable to that debt apart from the sequestration.

#### Textual Amendments

**F150** Words in s. 51(3)(b) inserted (5.12.2005) by [Civil Partnership Act 2004 \(c. 33\)](#), ss. 261(2), 263, [Sch. 28 para. 39](#); [S.S.I. 2005/604](#) {art. 2(c)}

**F151** S. 51(5A) inserted (8.9.2003) by [The Insolvency \(Scotland\) Regulations 2003 \(S.I. 2003/2109\)](#), [reg.](#)

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**Modifications etc. (not altering text)**

**C45** S. 51 applied (11.12.1999) by S.I. 1999/2979, **reg. 14(5)(b)**

**C46** S. 51(1)(d)-(h) excluded (10.8.2005) by **The Insurers (Reorganisation and Winding up) Regulations 2004 (S.I. 2004/353)**, **reg. 20** (as amended by **The Insurers (Reorganisation and Winding up) (Lloyd's) Regulations 2005 (S.I. 2005/1998)**, **reg. 40(1)-(5)**)

**Marginal Citations**

**M25** 1890 c. 39.

**52 Estate to be distributed in respect of accounting periods. S**

[<sup>F152</sup>(1) The permanent trustee shall make up accounts of his intromissions with the debtor's estate in respect of each accounting period.

(2) In this Act "accounting period" shall be construed as follows—

- (a) the first accounting period shall be the period of 6 months beginning with the date of sequestration; and
- (b) any subsequent accounting period shall be the period of 6 months beginning with the end of the last accounting period; except that—
  - (i) in a case where the Accountant in Bankruptcy is not the permanent trustee, the permanent trustee and the commissioners or, if there are no commissioners, the Accountant in Bankruptcy agree; or
  - (ii) in a case where the Accountant in Bankruptcy is the permanent trustee, he determines,

that the accounting period shall be such other period beginning with the end of the last accounting period as may be agreed or, as the case may be determined, it shall be that other period.

(2A) An agreement or determination under subsection (2)(b)(i) or (ii) above—

- (a) may be made in respect of one or more than one accounting period;
- (b) may be made before the beginning of the accounting period in relation to which it has effect and, in any event, shall not have effect unless made before the day on which such accounting period would, but for the agreement or determination, have ended;
- (c) may provide for different accounting periods to be of different durations,

and shall be recorded in the sederunt book by the permanent trustee.]

(3) Subject to the following provisions of this section, the permanent trustee shall, if the funds of the debtor's estate are sufficient and after making allowance for future contingencies, pay under section 53(7) of this Act a dividend out of the estate to the creditors in respect of each accounting period.

(4) The permanent trustee may pay—

- (a) the debts mentioned in subsection (1)(a) to (d) of section 51 of this Act, other than his own remuneration, at any time;
- (b) the preferred debts at any time but only with the consent of the commissioners or, if there are no commissioners, of the Accountant in Bankruptcy.

(5) If the permanent trustee—

- (a) is not ready to pay a dividend in respect of an accounting period; or

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(b) considers it would be inappropriate to pay such a dividend because the expense of doing so would be disproportionate to the amount of the dividend, he may, with the consent of the commissioners, or if there are no commissioners of the Accountant in Bankruptcy, postpone such payment to a date not later than the time for payment of a dividend in respect of the next accounting period.

<sup>F153</sup>(6) .....

(7) Where an appeal is taken under section 49(6)(b) of this Act against the acceptance or rejection of a creditor's claim, the permanent trustee shall, at the time of payment of dividends and until the appeal is determined, set aside an amount which would be sufficient, if the determination in the appeal were to provide for the claim being accepted in full, to pay a dividend in respect of that claim.

(8) Where a creditor—

- (a) has failed to produce evidence in support of his claim earlier than 8 weeks before the end of an accounting period on being required by the permanent trustee to do so under section 48(5) of this Act; and
- (b) has given a reason for such failure which is acceptable to the permanent trustee,

the permanent trustee shall set aside, for such time as is reasonable to enable him to produce that evidence or any other evidence that will enable the permanent trustee to be satisfied under the said section 48(5), an amount which would be sufficient, if the claim were accepted in full, to pay a dividend in respect of that claim.

(9) Where a creditor submits a claim to the permanent trustee later than 8 weeks before the end of an accounting period but more than 8 weeks before the end of a subsequent accounting period in respect of which, after making allowance for contingencies, funds are available for the payment of a dividend, the permanent trustee shall, if he accepts the claim in whole or in part, pay to the creditor—

- (a) the same dividend or dividends as has or have already been paid to creditors of the same class in respect of any accounting period or periods; and
- (b) whatever dividend may be payable to him in respect of the said subsequent accounting period:

Provided that paragraph (a) above shall be without prejudice to any dividend which has already been paid.

[<sup>F154</sup>(10) In the declaration of and payment of a dividend, no payments shall be made more than once by virtue of the same debt.

(11) Any dividend paid in respect of a claim should be paid to the creditor.]

#### Textual Amendments

**F152** S. 52(1)(2)(2A) substituted for s. 52(1)(2) (1.4.1993, subject to savings in arts. 4,5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para.21** (with s. 12(6)); S.I. 1993/438, **art.3**

**F153** S. 52(6) repealed (1.4.1993, subject to savings in arts. 4,5 of S.I. 1993/438) by 1993 c. 6, s. 11(4), **Sch.2** (with s. 12(6)); S.I. 1993/438, **art.3**

**F154** S. 52(10)(11) inserted (8.9.2003) by **The Insolvency (Scotland) Regulations 2003** (S.I. 2003/2109), **reg. 15**

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**Modifications etc. (not altering text)**

C47 S. 52 applied with modifications by S.I. 1986/1915, **Rule 4.68** and by Rule 2.41(2) (as substituted (15.9.2003) by S.I. 2003/2111, **rule 3**, {Sch. 1Pt. 1})

**53 Procedure after end of accounting period. S**

- (1) Within 2 weeks after the end of an accounting period, the permanent trustee shall in respect of that period submit to the commissioners or, if there are no commissioners, to the Accountant in Bankruptcy—
- (a) his accounts of his intromissions with the debtor's estate for audit and, where funds are available after making allowance for contingencies, a scheme of division of the divisible funds; and
  - (b) a claim for the outlays reasonably incurred by him and for his remuneration; and, where the said documents are submitted to the commissioners, he shall send a copy of them to the Accountant in Bankruptcy.

[<sup>F155</sup>(2) Subject to subsection (2A) below, all accounts in respect of legal services incurred by the permanent trustee shall, before payment thereof by him, be submitted for taxation to the auditor of the court before which the sequestration is pending.

(2A) Where—

- (a) any such account has been agreed between the permanent trustee and the person entitled to payment in respect of that account (in this subsection referred to as “the payee”);
- (b) the permanent trustee is not an associate of the payee; and
- (c) the commissioners have not determined that the account should be submitted for taxation,

the permanent trustee may pay such account without submitting it for taxation.]

(3) Within 6 weeks after the end of an accounting period—

- (a) the commissioners or, as the case may be, the Accountant in Bankruptcy <sup>F156</sup> . . .  
—
  - (i) [<sup>F157</sup>may]audit the accounts; and
  - (ii) [<sup>F157</sup>shall]issue a determination fixing the amount of the outlays and the remuneration payable to the permanent trustee; and
- (b) the permanent trustee shall make the audited accounts, scheme of division and the said determination available for inspection by the debtor and the creditors.

(4) The basis for fixing the amount of the remuneration payable to the permanent trustee may be a commission calculated by reference to the value of the debtor's estate which has been realised by the permanent trustee, but there shall in any event be taken into account—

- (a) the work which, having regard to that value, was reasonably undertaken by him; and
- (b) the extent of his responsibilities in administering the debtor's estate.

(5) If fixing the amount of such remuneration in respect of [<sup>F158</sup>any] accounting period, the commissioners or, as the case may be, the Accountant in Bankruptcy may take into account any adjustment which the commissioners or the Accountant in Bankruptcy may wish to make in the amount of the remuneration fixed in respect of any earlier accounting period.

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- (6) Not later than 8 weeks after the end of an accounting period, the permanent trustee, the debtor or any creditor may appeal against a determination issued under subsection (3) (a)(ii) above—
- (a) where it is a determination of the commissioners, to the Accountant in Bankruptcy; and
  - (b) where it is a determination of the Accountant in Bankruptcy, to the sheriff;
- and the determination of the Accountant in Bankruptcy under paragraph (a) above shall be appealable to the sheriff <sup>F159</sup>; and the decision of the sheriff on such an appeal shall be final.]
- (7) On the expiry of the period within which an appeal may be taken under subsection (6) above or, if an appeal is so taken, on the final determination of the last such appeal, the permanent trustee shall pay to the creditors their dividends in accordance with the scheme of division.
- (8) Any dividend—
- (a) allocated to a creditor which is not cashed or uplifted; or
  - (b) dependent on a claim in respect of which an amount has been set aside under subsection (7) or (8) of section 52 of this Act,
- shall be deposited by the permanent trustee in an appropriate bank or institution.
- (9) If a creditor's claim is revalued, the permanent trustee may—
- (a) in paying any dividend to that creditor, make such adjustment to it as he considers necessary to take account of that revaluation; or
  - (b) require the creditor to repay to him the whole or part of a dividend already paid to him.
- (10) The permanent trustee shall insert in the sederunt book the audited accounts, the scheme of division and the final determination in relation to the permanent trustee's outlays and remuneration.

#### Textual Amendments

- F155** S. 53(2)(2A) substituted for s. 53(2) (1.4.1993, subject to savings in arts. 4,5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 22(2)** (with s. 12(6)); S.I. 1993/438, **art.3**
- F156** Word "shall" in s. 53(3)(a) repealed (1.4.1993, subject to savings in arts. 4,5 of S.I. 1993/438) by 1993 c. 6, s. 11(4), **Sch.2** (with s. 12(6)); S.I. 1993/438, **art.3**
- F157** Words in s. 53(a)(i)(ii) inserted (1.4.1993, subject to savings in arts. 4,5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 22(3)** (with s. 12(6)); S.I. 1993/438, **art.3**
- F158** Words in s. 53(5) substituted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 22(4)** (with s. 12(6)); S.I. 1993/438, **art.3**
- F159** Words at the end of s. 53(6) added (18.2.1993) by 1993 c. 6, s. 11(3), **Sch. 1 para. 22(5)**

#### Modifications etc. (not altering text)

- C48** S. 53 applied with modifications by S.I. 1986/1915, Rule 4.32.(1), 68 and by Rule 2.41(2)-(4) (as substituted (15.9.2003) by S.I. 2003/2111, Rule 3, **Sch. 1 Pt. 1**)
- S. 53 modified (18.2.1993) by 1993 c. 6, s. 9(1)(2)



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**[<sup>F160</sup>53A Modification of procedure under section 53 where Accountant in Bankruptcy is trustee S**

- (1) In any case where the Accountant in Bankruptcy is the trustee, section 53 of this Act shall have effect subject to the following modifications.
- (2) For subsections (1) to (7) of that section, there shall be substituted—
  - “(1) At the end of each accounting period, the Accountant in Bankruptcy shall prepare accounts of his intromissions with the debtor's estate and he shall make a determination of his fees and outlays calculated in accordance with regulations made under section 69A of this Act.
  - (2) Such accounts and determination shall be available for inspection by the debtor and the creditors not later than 6 weeks after the end of the accounting period to which they relate.
  - (3) In making a determination as mentioned in subsection (1) above, the Accountant in Bankruptcy may take into account any adjustment which he may wish to make in the amount of his remuneration fixed in respect of any earlier accounting period.
  - (4) Not later than 8 weeks after the end of an accounting period, the debtor (subject to subsection (5) below) or any creditor may appeal to the sheriff against the determination of the Accountant in Bankruptcy; and the decision of the sheriff on such an appeal shall be final.
  - (5) A debtor may appeal under subsection (4) above if, and only if, he satisfies the sheriff that he has, or is likely to have, a pecuniary interest in the outcome of the appeal.
  - (6) Before—
    - (a) a debtor; or
    - (b) any creditor,appeals under subsection (4) above, he must give notice to the Accountant in Bankruptcy of his intention to appeal.
  - (7) On the expiry of the period within which an appeal may be made under subsection (4) above, the Accountant in Bankruptcy shall pay to the creditors their dividends in accordance with the scheme of division.”.
- (3) In subsection (10) for the words “the audited” there shall be substituted the word “his ”.]

**Textual Amendments**

**F160** S. 53A inserted (1.4.2008) by [Bankruptcy and Diligence etc. \(Scotland\) Act 2007 \(asp 3\)](#), ss. 36, 227(3), [Sch. 1 para. 46](#) (with s. 223); S.S.I. 2008/115, [art. 3\(1\)\(i\)](#) (with arts. 4-6, 10 (as amended (with effect from 31.1.2011) by S.S.I. 2011/31, art. 5))

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### *Discharge of debtor*

#### **54 Automatic discharge after 3 years. S**

- (1) Subject to the following provisions of this section, the debtor shall be discharged on the expiry of 3 years from the date of sequestration.
- (2) Every debtor who has been discharged under or by virtue of this section or section 75(4) of this Act may apply to the Accountant in Bankruptcy for a certificate that he has been so discharged; and the Accountant in Bankruptcy, if satisfied of such discharge, shall grant a certificate of discharge in the prescribed form.
- (3) The permanent trustee or any creditor may, not later than 2 years and 9 months after the date of sequestration, apply to the sheriff for a deferment of the debtor's discharge by virtue of subsection (1) above.
- (4) On an application being made to him under subsection (3) above, the sheriff shall order—
  - (a) the applicant to serve the application on the debtor and (if he is not himself the applicant and is not discharged) the permanent trustee; and
  - (b) the debtor to lodge in court a declaration—
    - (i) that he has made a full and fair surrender of his estate and a full disclosure of all claims which he is entitled to make against other persons; and
    - (ii) that he has delivered to the interim or permanent trustee every document under his control relating to his estate or his business or financial affairs;

and, if the debtor fails to lodge such a declaration in court within 14 days of being required to do so, the sheriff shall defer his discharge without a hearing for a period not exceeding 2 years.
- (5) If the debtor lodges the declaration in court within the said period of 14 days, the sheriff shall—
  - (a) fix a date for a hearing not earlier than 28 days after the date of the lodging of the declaration; and
  - (b) order the applicant to notify the debtor and the permanent trustee or (if he has been discharged) the Accountant in Bankruptcy of the date of the hearing;

and the permanent trustee or (if he has been discharged) the Accountant in Bankruptcy shall, not later than 7 days before the date fixed under paragraph (a) above, lodge in court a report upon the debtor's assets and liabilities, his financial and business affairs and his conduct in relation thereto and upon the sequestration and his conduct in the course of it.
- (6) After considering at the hearing any representations made by the applicant, the debtor or any creditor, the sheriff shall make an order either deferring the discharge for such period not exceeding 2 years as he thinks appropriate or dismissing the application:
 

Provided that the applicant or the debtor may appeal against an order under this subsection within 14 days after it is made.
- (7) Where the discharge is deferred under subsection (4) or (6) above, the clerk of the court shall send—

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- (a) a certified copy of the order of the sheriff deferring discharge to the keeper of the register of inhibitions and adjudications for recording in that register; and
  - (b) a copy of such order to—
    - (i) the Accountant in Bankruptcy; and
    - (ii) the permanent trustee (if not discharged) for insertion in the sederunt book.
- (8) A debtor whose discharge has been deferred under subsection (4) or (6) above may, at any time thereafter and provided that he lodges in court a declaration as to the matters mentioned in sub-paragraphs (i) and (ii) of paragraph (b) of the said subsection (4), petition the sheriff for his discharge; and subsections (5) to (7) above shall, with any necessary modifications, apply in relation to the proceedings which shall follow the lodging of a declaration under this subsection as they apply in relation to the proceedings which follow the timeous lodging of a declaration under the said paragraph (b).
- (9) The permanent trustee or any creditor may, not later than 3 months before the end of a period of deferment, apply to the sheriff for a further deferment of the discharge; and subsections (4) to (8) above and this subsection shall apply in relation to that further deferment.

**Modifications etc. (not altering text)**

C49 S. 54 amended by [Education \(Student Loans\) Act 1990 \(c. 6, SIF 41:1, 2\), s. 1\(5\), Sch. 2 para. 6\(c\)\(ii\)](#)

**55 Effect of discharge under section 54. U.K.**

- (1) Subject to <sup>F161</sup>subsections (2) and (3) below, on the debtor's discharge under section 54 of this Act, the debtor shall be discharged within the United Kingdom of all debts and obligations contracted by him, or for which he was liable, at the date of sequestration.
- (2) The debtor shall not be discharged by virtue of subsection (1) above from—
- (a) any liability to pay a fine or other penalty due to the Crown;
  - <sup>F162</sup>(aa) any liability to pay a fine imposed in a district court;
  - (ab) any liability under a compensation order within the meaning of section 249 of the Criminal Procedure (Scotland) Act 1995;]
  - (b) any liability to forfeiture of a sum of money deposited in court under section 1(3) of the <sup>M26</sup>Bail etc. (Scotland) Act 1980;
  - (c) any liability incurred by reason of fraud or breach of trust;
  - (d) any obligation to pay aliment or any sum of an alimentary nature under any enactment or rule of law or any periodical allowance payable on divorce by virtue of a court order or under an obligation, not being
    - <sup>F163</sup>(i) aliment or a periodical allowance which could be included in the amount of a creditor's claim under paragraph 2 of Schedule 1 to this Act; <sup>F164</sup>or
    - (ii) child support maintenance within the meaning of the Child Support Act 1991 which was unpaid in respect of any period before the date of sequestration of—
      - (aa) any person by whom it was due to be paid; or

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- (bb) any employer by whom it was, or was due to be, deducted under section 31(5) of that Act.]
- (e) the obligation imposed on him by section 64 of this Act.
- [<sup>F165</sup>(3) The discharge of the debtor under the said section 54 shall not affect any right of a secured creditor—
- (a) for a debt in respect of which the debtor has been discharged to enforce his security for payment of the debt and any interest due and payable on the debt until the debt is paid in full; or
- (b) for an obligation in respect of which the debtor has been discharged to enforce his security in respect of the obligation.]
- [<sup>F166</sup>(4) In subsection (2)(a) above the reference to a fine or other penalty due to the Crown includes a reference to a confiscation order made under Part 2, 3 or 4 of the Proceeds of Crime Act 2002.]

#### Textual Amendments

- F161** Words in s. 55(1) substituted (retrospectively) by 1993 c. 6, s. 11(3), **Sch. 1 para. 23(2)(4)**
- F162** S. 55(2)(aa)(ab) inserted (S.) (1.4.1996) by 1995 c. 40, ss. 5, 7(2), **Sch. 4 para. 58(4)**
- F163** Word "(i)" inserted (4.4.1993) by Child Support Act 1991 (c. 48, SIF 20), s. 58(13), **Sch. 5 para. 6(4)(a)** (with s. 9(2)); S.I. 1992/2644, **art. 2.**
- F164** Word "or" and s. 55(2)(d)(ii) inserted (4.4.1993) by Child Support Act 1991 (c. 48, SIF 20), s. 58(13), **Sch. 5 para. 6(4)(b)** (with s. 9(2)); S.I. 1992/2644, **art. 2.**
- F165** S. 55(3) inserted (retrospectively) by 1993 c. 6, s. 11(3), **Sch. 1 para. 23(3)(4)**
- F166** S. 55(4) inserted (24.3.2003) by Proceeds of Crime Act 2002 (c. 29), ss. 456, 458(1)(3), **Sch. 11 para. 15(5)**; S.I. 2003/333, **art. 2(1)**, Sch. (subject to transitional provisions in arts. 3-14) (as amended by S.I. 2003/531); S.I. 2003/210, **art. 2(1)(b)**, Sch. (subject to transitional provisions in arts. 3-7)

#### Modifications etc. (not altering text)

- C50** S. 55(2) amended (E.W.S.) by Drug Trafficking Offences Act 1986 (c. 32, SIF 39:1), s. 39(6)
- C51** S. 55(2) amended by Criminal Justice (Scotland) Act 1987 (c. 41, SIF 39:1), ss. 45(5)(c), 47(4)(a)
- C52** S. 55(2) amended by Criminal Justice Act 1988 (c. 33, SIF 39:1), ss. 123, 170, Sch. 8 para. 16, **Sch. 15 para. 109**
- C53** S. 55(2) extended (3.2.1995) by 1994 c. 37, ss. 65(4), 69(2)  
S. 55(2) extended (S.) (1.4.1996) by 1995 c. 43, ss. 47(3), 50(2)
- C54** S. 55(2) excluded (S.) (31.3.1996) by 1995 c. 20, ss. 113(7); S.I. 1996/517, **art. 3(2)**

#### Marginal Citations

- M26** 1980 c. 4.

## 56 Discharge on Composition. **S**

Schedule 4 to this Act shall have effect in relation to an offer of composition by or on behalf of the debtor to the permanent trustee in respect of his debts and his discharge and the discharge of the permanent trustee where the offer is approved.

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## <sup>F167</sup> Bankruptcy restrictions orders and undertakings

### Textual Amendments

**F167** Ss. 56A-56K and preceding cross-heading inserted (1.4.2008) by [Bankruptcy and Diligence etc. \(Scotland\) Act 2007 \(asp 3\)](#), **ss. 2(1), 227(3)** (with s. 223); [S.S.I. 2008/115](#), **art. 3(1)(a)** (with arts. 4-6, 10 (as amended (with effect from 31.1.2011) by [S.S.I. 2011/31](#), art. 5))

### **56A** Bankruptcy restrictions order **S**

- (1) Where sequestration of a living debtor's estate is awarded, an order (known as a “bankruptcy restrictions order”) in respect of the debtor may be made by the sheriff.
- (2) An order may be made only on the application of the Accountant in Bankruptcy.

### **56B** Grounds for making order **S**

- (1) The sheriff shall grant an application for a bankruptcy restrictions order if he thinks it appropriate having regard to the conduct of the debtor (whether before or after the date of sequestration).
- (2) The sheriff shall, in particular, take into account any of the following kinds of behaviour on the part of the debtor—
  - (a) failing to keep records which account for a loss of property by the debtor, or by a business carried on by him, where the loss occurred in the period beginning 2 years before the date of presentation of the petition for sequestration or, as the case may be, the date the debtor application was made and ending with the date of the application for a bankruptcy restrictions order;
  - (b) failing to produce records of that kind on demand by—
    - (i) the Accountant in Bankruptcy;
    - (ii) the interim trustee; or
    - (iii) the trustee;
  - (c) making a gratuitous alienation or any other alienation for no consideration or for no adequate consideration which a creditor has, under any rule of law, right to challenge;
  - (d) creating an unfair preference or any other preference which a creditor has, under any rule of law, right to challenge;
  - (e) making an excessive pension contribution;
  - (f) failing to supply goods or services which were wholly or partly paid for which gave rise to a claim submitted by a creditor under section 22 or 48 of this Act;
  - (g) trading at a time before the date of sequestration when the debtor knew or ought to have known that he was to be unable to meet his debts;
  - (h) incurring, before the date of sequestration, a debt which the debtor had no reasonable expectation of being able to pay;
  - (j) failing to account satisfactorily to—

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- (i) the sheriff;
  - (ii) the Accountant in Bankruptcy;
  - (iii) the interim trustee; or
  - (iv) the trustee,
- for a loss of property or for an insufficiency of property to meet his debts;
- (k) carrying on any gambling, speculation or extravagance which may have materially contributed to or increased the extent of his debts or which took place between the date of presentation of the petition for sequestration or, as the case may be, the date the debtor application was made and the date on which sequestration is awarded;
  - (l) neglect of business affairs of a kind which may have materially contributed to or increased the extent of his debts;
  - (m) fraud or breach of trust;
  - (n) failing to co-operate with—
    - (i) the Accountant in Bankruptcy;
    - (ii) the interim trustee; or
    - (iii) the trustee.
- (3) The sheriff shall also, in particular, consider whether the debtor—
- (a) has previously been sequestrated; and
  - (b) remained undischarged from that sequestration at any time during the period of 5 years ending with the date of the sequestration to which the application relates.
- (4) For the purposes of subsection (2) above—
- “excessive pension contribution” shall be construed in accordance with section 36A of this Act; and
- “gratuitous alienation” means an alienation challengeable under section 34(1) of this Act.

#### **56C Application of section 67(9) S**

- (1) Where the sheriff thinks it appropriate, the sheriff may specify in the bankruptcy restrictions order that subsection (9) of section 67 of this Act shall apply to the debtor during the period he is subject to the order as if he were a debtor within the meaning of subsection (10)(a) of that section.
- (2) For the purposes of subsection (1) above, section 67(10) of this Act shall have effect as if, for paragraph (c) of that subsection, there were substituted—
  - “(c) the relevant information about the status of the debtor is the information that—
    - (i) he is subject to a bankruptcy restrictions order; or
    - (ii) where his estate has been sequestrated and he has not been discharged, that fact.”.

#### **56D Timing of application for order S**

- (1) An application for a bankruptcy restrictions order must be made, subject to subsection (2) below, within the period beginning with the date of sequestration and ending with the date on which the debtor's discharge becomes effective.

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- (2) An application may be made after the end of the period referred to in subsection (1) above only with the permission of the sheriff.

#### **56E Duration of order and application for annulment** **S**

- (1) A bankruptcy restrictions order—
- (a) shall come into force when it is made; and
  - (b) shall cease to have effect at the end of the date specified in the order.
- (2) The date specified in a bankruptcy restrictions order under subsection (1)(b) above must not be—
- (a) before the end of the period of 2 years beginning with the date on which the order is made; or
  - (b) after the end of the period of 15 years beginning with that date.
- (3) On an application by the debtor the sheriff may—
- (a) annul a bankruptcy restrictions order; or
  - (b) vary such an order, including providing for such an order to cease to have effect at the end of a date earlier than the date specified in the order under subsection (1)(b) above.

#### **56F Interim bankruptcy restrictions order** **S**

- (1) This section applies at any time between—
- (a) the making of an application for a bankruptcy restrictions order; and
  - (b) the determination of the application.
- (2) The sheriff may make an interim bankruptcy restrictions order if he thinks that—
- (a) there are prima facie grounds to suggest that the application for the bankruptcy restrictions order will be successful; and
  - (b) it is in the public interest to make an interim order.
- (3) An interim order may be made only on the application of the Accountant in Bankruptcy.
- (4) An interim order—
- (a) shall have the same effect as a bankruptcy restrictions order; and
  - (b) shall come into force when it is made.
- (5) An interim order shall cease to have effect—
- (a) on the determination of the application for the bankruptcy restrictions order;
  - (b) on the acceptance of a bankruptcy restrictions undertaking made by the debtor; or
  - (c) if the sheriff discharges the interim order on the application of the Accountant in Bankruptcy or of the debtor.
- (6) Where a bankruptcy restrictions order is made in respect of a debtor who is subject to an interim order, section 56E(2) of this Act shall have effect in relation to the bankruptcy restrictions order as if the reference to the date on which the order is made were a reference to the date on which the interim order was made.

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### **56G Bankruptcy restrictions undertaking** **S**

- (1) A living debtor who is not subject to a bankruptcy restrictions order may offer an undertaking (known as a “bankruptcy restrictions undertaking”) to the Accountant in Bankruptcy.
- (2) In determining whether to accept a bankruptcy restrictions undertaking, the Accountant in Bankruptcy shall have regard to the matters specified in section 56B(2) and (3) of this Act.
- (3) A bankruptcy restrictions undertaking—
  - (a) shall take effect on being accepted by the Accountant in Bankruptcy; and
  - (b) shall cease to have effect at the end of the date specified in the undertaking.
- (4) The date specified under subsection (3)(b) above must not be—
  - (a) before the end of the period of 2 years beginning with the date on which the undertaking is accepted; or
  - (b) after the end of the period of 15 years beginning with that date.
- (5) On an application by the debtor the sheriff may—
  - (a) annul a bankruptcy restrictions undertaking; or
  - (b) vary such an undertaking, including providing for a bankruptcy restrictions undertaking to cease to have effect at the end of a date earlier than the date specified in the undertaking under subsection (3)(b) above.

### **56H Bankruptcy restrictions undertakings: application of section 67(9)** **S**

- (1) A debtor may, with the agreement of the Accountant in Bankruptcy, specify in a bankruptcy restrictions undertaking that subsection (9) of section 67 of this Act shall apply to the debtor during the period the undertaking has effect as if he were a debtor within the meaning of subsection (10)(a) of that section.
- (2) For the purposes of subsection (1) above, section 67(10) of this Act shall have effect as if, for paragraph (c) of that subsection, there were substituted—
  - “(c) the relevant information about the status of the debtor is the information that—
    - (i) he is subject to a bankruptcy restrictions undertaking; or
    - (ii) where his estate has been sequestrated and he has not been discharged, that fact.”.

### **56J Effect of recall of sequestration** **S**

- (1) Where an award of sequestration of a debtor's estate is recalled under section 17(1) of this Act—
  - (a) the sheriff may annul any bankruptcy restrictions order, interim bankruptcy restrictions order or bankruptcy restrictions undertaking which is in force in respect of the debtor;
  - (b) no new bankruptcy restrictions order or interim order may be made in respect of the debtor; and
  - (c) no new bankruptcy restrictions undertaking by the debtor may be accepted.
- (2) Where the sheriff refuses to annul a bankruptcy restrictions order, interim bankruptcy restrictions order or bankruptcy restrictions undertaking under subsection (1)(a)



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above the debtor may, no later than 28 days after the date on which the award of sequestration is recalled, appeal to the sheriff principal against such a refusal.

(3) The decision of the sheriff principal on an appeal under subsection (2) above is final.

#### **56K Effect of discharge on approval of offer of composition** **S**

(1) This section applies where a certificate of discharge is granted under paragraph 11(1) of Schedule 4 to this Act discharging a debtor.

(2) Subject to sections 56E(3)(a), 56F(5)(c) and 56G(5)(a) of this Act, the debtor shall remain subject to any bankruptcy restrictions order, interim bankruptcy restrictions order or bankruptcy restrictions undertaking which is in force in respect of him.

(3) The sheriff may make a bankruptcy restrictions order in relation to the debtor on an application made before the discharge.

(4) The Accountant in Bankruptcy may accept a bankruptcy restrictions undertaking offered before the discharge.

(5) No application for a bankruptcy restrictions order or interim order may be made in respect of the debtor.]

#### *Discharge of permanent trustee*

#### **57 Discharge of permanent trustee.** **S**

(1) After the permanent trustee has made a final division of the debtor's estate and has inserted his final audited accounts in the sederunt book, he—

- (a) shall deposit any unclaimed dividends and any unapplied balances in an appropriate bank or institution;
- (b) shall thereafter send to the Accountant in Bankruptcy the sederunt book, a copy of the audited accounts and a receipt for the deposit of the unclaimed dividends and unapplied balances; and
- (c) may at the same time as sending the said documents apply to the Accountant in Bankruptcy for a certificate of discharge.

(2) The permanent trustee shall send notice of an application under subsection (1)(c) above to the debtor and to all the creditors known to the permanent trustee and shall inform the debtor and such creditors—

- (a) that they may make written representations relating to the application to the Accountant in Bankruptcy within a period of 14 days after such notification;
- (b) that the sederunt book is available for inspection at the office of the Accountant in Bankruptcy and contains the audited accounts of, and scheme of division in, the sequestration; and
- (c) of the effect mentioned in subsection (5) below.

(3) On the expiry of the period mentioned in subsection (2)(a) above, the Accountant in Bankruptcy, after examining the documents sent to him and considering any representations duly made to him, shall—

- (a) grant or refuse to grant the certificate of discharge; and

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- (b) notify (in addition to the permanent trustee) the debtor and all creditors who have made such representations accordingly.
- (4) The permanent trustee, the debtor or any creditor who has made representations under subsection (2)(a) above, may within 14 days after the issuing of the determination under subsection (3) above, appeal therefrom to the sheriff and if the sheriff determines that a certificate of discharge which has been refused should be granted he shall order the Accountant in Bankruptcy to grant it; and the sheriff clerk shall send a copy of the decree of the sheriff to the Accountant in Bankruptcy.
- [<sup>F168</sup>(4A) The decision of the sheriff on an appeal under subsection (4) above shall be final.]
- (5) The grant of a certificate of discharge under this section by the Accountant in Bankruptcy shall have the effect of discharging the permanent trustee from all liability (other than any liability arising from fraud) to the creditors or to the debtor in respect of any act or omission of the permanent trustee in exercising the functions conferred on him by this Act including, where he was also the interim trustee, the functions conferred on him as interim trustee.
- (6) Where a certificate of discharge is granted under this section, the Accountant in Bankruptcy shall make an appropriate entry in the register of insolvencies and in the sederunt book.
- (7) Where the permanent trustee has died, resigned office or been removed from office, the provisions of this section shall, subject to any necessary modifications, apply in relation to that permanent trustee or, if he has died, to his executor as they apply to a permanent trustee who has made a final division of the debtor's estate in accordance with the foregoing provisions of this Act.
- [<sup>F168</sup>(8) This section does not apply in any case where the Accountant in Bankruptcy is the permanent trustee.]

#### Textual Amendments

**F168** S. 57(4A) inserted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3),

**Sch. 1 para. 24(2)** (with s. 12(6)); S.I. 1993/438, **art.3**

S. 57(8) inserted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch.**

**1 para. 24(3)** (with s. 12(6)); S.I. 1993/438, **art.3**

## 58 Unclaimed dividends. **S**

- (1) Any person, producing evidence of his right, may apply to the Accountant in Bankruptcy to receive a dividend deposited under section 57(1)(a) [<sup>F169</sup>or 58A(3)] of this Act, if the application is made not later than 7 years after the date of such deposit.
- (2) If the Accountant in Bankruptcy is satisfied of the applicant's right to the dividend, he shall authorise the appropriate bank or institution to pay to the applicant the amount of that dividend and of any interest which has accrued thereon.
- (3) The Accountant in Bankruptcy shall, at the expiry of 7 years from the date of deposit of any unclaimed dividend or unapplied balance under section 57(1)(a) [<sup>F169</sup>or 58A(3)] of this Act, hand over the deposit receipt or other voucher relating to such dividend or balance to the Secretary of State, who shall thereupon be entitled to payment of the

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amount due, principal and interest, from the bank or institution in which the deposit was made.

#### Textual Amendments

**F169** Words in s. 58(1)(3) inserted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para.25** (with s. 12(6)); S.I. 1993/438, **art.3**

#### Modifications etc. (not altering text)

**C55** S. 58 applied with modifications by S.I. 1986/1915, **Rule 4.68** and by Rule 2.41(2) (as substituted (15.9.2003) by S.I. 2003/2111, **Rule 3**, {Sch. 1Pt. 1})

**C56** S. 58 applied with modifications by Insolvency Act 1986 (c. 45, SIF 66), **ss. 193(3), 443**

**C57** S. 58 extended with modifications by Companies Act 1985 (c. 6, SIF 27), **s. 430(14)** (as substituted by Financial Services Act 1986 (c. 60, SIF 69), s. 172, **Sch. 12**)

**C58** S. 58 applied (6.4.2007) by Companies Act 2006 (c. 46), **ss. 982(8), 1300**; S.I. 2007/1093, **art. 2(1)(b)** (with saving in **art. 11(1)**)

**C59** S. 58 applied (with modifications) (20.5.2006) by The Takeovers Directive (Interim Implementation) Regulations 2006 (S.I. 2006/1183), **reg. 30, Sch. 2 para. 3(15)**

**C60** S. 58 applied (with modifications) (14.11.2011) by The Investment Bank Special Administration (Scotland) Rules 2011 (S. I. 2011/2262), **rules 127(2), 132**

### [58A] <sup>F170</sup> Discharge of Accountant in Bankruptcy **S**

- (1) This section applies where the Accountant in Bankruptcy has acted as the permanent trustee in any sequestration.
- (2) After the Accountant in Bankruptcy has made a final division of the debtor's estate, he shall insert in the sederunt book—
  - (a) his final accounts of his intromissions (if any) with the debtor's estate;
  - (b) the scheme of division (if any); and
  - (c) a determination of his fees and outlays calculated in accordance with regulations made under section 69A of this Act.
- (3) The Accountant in Bankruptcy shall deposit any unclaimed dividends and any unapplied balances in an appropriate bank or institution.
- (4) The Accountant in Bankruptcy shall send to the debtor and to all creditors known to him—
  - (a) a copy of the determination mentioned in subsection (2)(c) above; and
  - (b) a notice in writing stating—
    - (i) that the Accountant in Bankruptcy has commenced the procedure under this Act leading to discharge in respect of his acting as permanent trustee;
    - (ii) that the sederunt book relating to the sequestration is available for inspection at such address as the Accountant in Bankruptcy may determine;
    - (iii) that an appeal may be made to the sheriff under subsection (5) below; and
    - (iv) the effect of subsection (7) below.
- (5) The debtor and any creditor may appeal to the sheriff against—

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- (a) the determination of the Accountant in Bankruptcy mentioned in subsection (2)(c) above;
  - (b) the discharge of the Accountant in Bankruptcy in respect of his actings as permanent trustee; or
  - (c) both such determination and discharge.
- (6) An appeal under subsection (5) above shall be made not more than 14 days after the issue of the notice mentioned in subsection (4)(b) above; and the decision of the sheriff on such an appeal shall be final.
- (7) Where—
- (a) the requirements of this section have been complied with; and
  - (b) no appeal to the sheriff is made under subsection (5) above or such an appeal is made but is refused as regards the discharge of the Accountant in Bankruptcy, the Accountant in Bankruptcy shall be discharged from all liability (other than any liability arising from fraud) to the creditors or to the debtor in respect of any act or omission of the Accountant in Bankruptcy in exercising the functions of permanent trustee in the sequestration.
- (8) Where the Accountant in Bankruptcy is discharged from all liability as mentioned in subsection (7) above, he shall make an entry in the sederunt book recording such discharge.
- (9) Where the Accountant in Bankruptcy—
- (a) has acted as both interim trustee and permanent trustee in a sequestration;
  - (b) has not been discharged under section 26A(7) of this Act,
- references in this section to his acting as or exercising the functions of permanent trustee shall be construed as including references to his acting as or exercising the functions of interim trustee; and subsection (7) above shall have effect accordingly.]

#### Textual Amendments

**F170** S. 58A inserted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para.26** (with s. 12(6)); S.I. 1993/438, **art.3**

### *Voluntary trust deeds for creditors*

#### **59** Voluntary trust deeds for creditors. **S**

Schedule 5 to this Act shall have effect in relation to trust deeds executed after the commencement of this section.

#### [<sup>F171</sup>**59A** Petition for conversion into sequestration **S**

- (1) Where a member State liquidator proposes to petition the court for the conversion under Article 37 of the EC Regulation (conversion of earlier proceedings) of a protected trust deed into sequestration, an affidavit complying with section 59B of this Act must be prepared and sworn, and lodged in court in support of the petition.
- (2) The petition and the affidavit required under subsection (1) above shall be served upon—

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- (a) the debtor;
- (b) the trustee;
- (c) such other person as may be prescribed.]

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**Textual Amendments**

**F171** Ss. 59A-59C inserted (8.9.2003) by [The Insolvency \(Scotland\) Regulations 2003 \(S.I. 2003/2109\)](#), [reg. 16](#)

[<sup>F171</sup>**59B Contents of affidavit** **S**

- (1) The affidavit shall—
  - (a) state that main proceedings have been opened in relation to the debtor in a member State other than the United Kingdom;
  - (b) state that the member State liquidator believes that the conversion of the trust deed into a sequestration would prove to be in the interests of the creditors in the main proceedings;
  - (c) contain such other information the member State liquidator considers will be of assistance to the court—
    - (i) in deciding whether to make an order under section 59C; and
    - (ii) if the court were to do so, in considering the need for any consequential provision that would be necessary or desirable; and
  - (d) contain any other matters as may be prescribed.
- (2) An affidavit under this section shall be sworn by, or on behalf of, the member State liquidator.]

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**Textual Amendments**

**F171** Ss. 59A-59C inserted (8.9.2003) by [The Insolvency \(Scotland\) Regulations 2003 \(S.I. 2003/2109\)](#), [reg. 16](#)

[<sup>F171</sup>**59C Power of court** **S**

- (1) On hearing the petition for conversion of a trust deed into a sequestration the court may make such order as it thinks fit.
- (2) If the court makes an order for conversion into sequestration the order may contain all such consequential provisions as the court deems necessary or desirable.
- (3) Where the court makes an order for conversion into sequestration under sub-section (1) above, any expenses properly incurred as expenses of the administration of the trust deed in question shall be a first charge on the debtor's estate.]

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**Textual Amendments**

**F171** Ss. 59A-59C inserted (8.9.2003) by [The Insolvency \(Scotland\) Regulations 2003 \(S.I. 2003/2109\)](#), [reg. 16](#)

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### Miscellaneous and supplementary

## 60 Liabilities and rights of co-obligants. **S**

- (1) Where a creditor has an obligant (in this section referred to as the “co-obligant”) bound to him along with the debtor for the whole or part of the debt, the co-obligant shall not be freed or discharged from his liability for the debt by reason of the discharge of the debtor or by virtue of the creditor’s voting or drawing a dividend or assenting to, or not opposing—
  - (a) the discharge of the debtor; or
  - (b) any composition.
- (2) Where—
  - (a) a creditor has had a claim accepted in whole or in part; and
  - (b) a co-obligant holds a security over any part of the debtor’s estate,
 the co-obligant shall account to the permanent trustee so as to put the estate in the same position as if the co-obligant had paid the debt to the creditor and thereafter had had his claim accepted in whole or in part in the sequestration after deduction of the value of the security.
- (3) Without prejudice to any right under any rule of law of a co-obligant who has paid the debt, the co-obligant may require and obtain at his own expense from the creditor an assignation of the debt on payment of the amount thereof, and thereafter may in respect of that debt submit a claim, and vote and draw a dividend, if otherwise legally entitled to do so.
- (4) In this section a “co-obligant” includes a cautioner.

#### Modifications etc. (not altering text)

**C61** S. 60 applied with modifications by [S.I. 1986/1915](#), [Rules 4.16\(1\)\(e\)](#), [7.9\(4\)](#) and by [Rule 2.41\(2\)](#) (as substituted (15.9.2003) by [S.I. 2003/2111](#), [Rule 3](#), [Sch. 1 Pt. 1](#))

## [<sup>F172</sup>60A Member State liquidator deemed creditor **U.K.**

For the purposes of this Act, and without prejudice to the generality of the right to participate referred to in paragraph 3 of Article 32 of the EC Regulation (exercise of creditors’ rights) a member State liquidator appointed in relation to the debtor is deemed to be a creditor in the sum due to creditors in proceedings in relation to which he holds office.]

#### Textual Amendments

**F172** Ss. 60A, 60B inserted (8.9.2003) by [The Insolvency \(Scotland\) Regulations 2003](#) ([S.I. 2003/2109](#)), [reg. 17](#)

## [<sup>F172</sup>60B Trustee’s duties concerning notices and copies of documents **U.K.**

- (1) This section applies where a member State liquidator has been appointed in relation to the debtor.

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- (2) Where an interim or a permanent trustee is obliged to give notice to, or provide a copy of a document (including an order of court) to, the court or the Accountant in Bankruptcy, the trustee shall give notice or provide copies, as appropriate, to the member State liquidator.
- (3) Subsection (2) above is without prejudice to the generality of the obligations imposed by Article 31 of the EC Regulation (duty to co-operate and communicate information).]

#### Textual Amendments

**F172** Ss. 60A, 60B inserted (8.9.2003) by [The Insolvency \(Scotland\) Regulations 2003 \(S.I. 2003/2109\)](#), [reg. 17](#)

## 61 Extortionate credit transactions. **S**

- (1) This section applies where the debtor is or has been a party to a transaction for, or involving, the provision to him of credit and his estate is sequestered.
- (2) The court may, on the application of the permanent trustee, make an order with respect to the transaction if the transaction is or was extortionate and was not entered into more than three years before the date of sequestration.
- (3) For the purposes of this section a transaction is extortionate if, having regard to the risk accepted by the person providing the credit—
  - (a) the terms of it are or were such as to require grossly exorbitant payments to be made (whether unconditionally or in certain contingencies) in respect of the provision of the credit; or
  - (b) it otherwise grossly contravened ordinary principles of fair dealing; and it shall be presumed, unless the contrary is proved, that a transaction with respect to which an application is made under this section is, or as the case may be was, extortionate.
- (4) An order under this section with respect to any transaction may contain such one or more of the following as the court thinks fit—
  - (a) provision setting aside the whole or part of any obligation created by the transaction;
  - (b) provision otherwise varying the terms of the transaction or varying the terms on which any security for the purposes of the transaction is held;
  - (c) provision requiring any person who is a party to the transaction to pay to the permanent trustee any sums paid to that person, by virtue of the transaction, by the debtor;
  - (d) provision requiring any person to surrender to the permanent trustee any property held by him as security for the purposes of the transaction;
  - (e) provision directing accounts to be taken between any persons.
- (5) Any sums or property required to be paid or surrendered to the permanent trustee in accordance with an order under this section shall vest in the permanent trustee.
- (6) <sup>F173</sup> . . . The powers conferred by this section shall be exercisable in relation to any transaction concurrently with any powers exercisable under this Act in relation to that transaction as a gratuitous alienation or unfair preference.

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(7) In this section “credit” has the same meaning as in the said Act of 1974.

#### Textual Amendments

**F173** Words in s. 61(6) repealed (6.4.2007) by [Consumer Credit Act 2006 \(c. 14\)](#), ss. 70, 71, [Sch. 4](#) (with [Sch. 3 para. 15\(5\)](#)); [S.I. 2007/123](#), art. 3(2), [Sch. 2](#) (as amended by [S.I. 2007/387](#), [art. 2\(3\)\(e\)\(iii\)](#))

#### Modifications etc. (not altering text)

**C62** S. 61 applied (with modifications) (4.4.2006) by [The Cross-Border Insolvency Regulations 2006 \(S.I. 2006/1030\)](#), reg. 2(1), [Sch. 1 Article 23 paras. 1-3](#) (subject to [paras. 6, 9](#))

### 62 Sederunt book and other documents. **S**

- (1) Subject to subsection (2) below, whoever by virtue of this Act for the time being holds the sederunt book shall make it available for inspection at all reasonable hours by any interested person.
- (2) As regards any case in which the person on whom a duty is imposed by subsection (1) above is the Accountant in Bankruptcy, the Court of Session may by act of sederunt—
  - (a) limit the period for which the duty is so imposed; and
  - (b) prescribe conditions in accordance with which the duty shall be carried out.
- (3) Any entry in the sederunt book shall be sufficient evidence of the facts stated therein, except where it is founded on by the permanent trustee in his own interest.
- (4) Notwithstanding any provision of this Act, the permanent trustee shall not be bound to insert in the sederunt book any document of a confidential nature.
- (5) The permanent trustee shall not be bound to exhibit to any person other than a commissioner or the Accountant in Bankruptcy any document in his possession of a confidential nature.
- (6) An extract from the register of insolvencies bearing to be signed by the Accountant in Bankruptcy shall be sufficient evidence of the facts stated therein.

### 63 Power to cure defects in procedure. **S**

- (1) The sheriff may, on the application of any person having an interest—
  - (a) if there has been a failure to comply with any requirement of this Act or any regulations made under it, make an order waiving any such failure and, so far as practicable, restoring any person prejudiced by the failure to the position he would have been in but for the failure;
  - (b) if for any reason anything required or authorised to be done in, or in connection with, the sequestration process cannot be done, make such order as may be necessary to enable that thing to be done.
- (2) The sheriff, in an order under subsection (1) above, may impose such conditions, including conditions as to expenses, as he thinks fit and may—
  - (a) authorise or dispense with the performance of any act in the sequestration process;



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- (b) appoint as permanent trustee on the debtor's estate a person who would be eligible to be elected under section 24 of this Act, whether or not in place of an existing trustee;
  - (c) extend or waive any time limit specified in or under this Act.
- (3) An application under subsection (1) above—
- (a) may at any time be remitted by the sheriff to the Court of Session, of his own accord or on an application by any person having an interest;
  - (b) shall be so remitted, if the Court of Session so directs on an application by any such person,
- if the sheriff or the Court of Session, as the case may be, considers that the remit is desirable because of the importance or complexity of the matters raised by the application.
- (4) The permanent trustee shall record in the sederunt book the decision of the sheriff or the Court of Session under this section.

**Modifications etc. (not altering text)**

C63 S. 63 applied with modifications by S.I. 1986/1915, Rule 7.32.

**64 Debtor to co-operate with permanent trustee. S**

- (1) The debtor shall take every practicable step, and in particular shall execute any document, which may be necessary to enable the permanent trustee to perform the functions conferred on him by this Act.
- (2) If the sheriff, on the application of the permanent trustee, is satisfied that the debtor has failed—
  - (a) to execute any document in compliance with subsection (1) above, he may authorise the sheriff clerk to do so; and the execution of a document by the sheriff clerk under this paragraph shall have the like force and effect in all respects as if the document had been executed by the debtor;
  - (b) to comply in any other respect with subsection (1) above, he may order the debtor to do so.
- (3) If the debtor fails to comply with an order of the sheriff under subsection (2) above, he shall be guilty of an offence.
- (4) In this section “debtor” includes a debtor discharged under this Act.
- (5) A person convicted of an offence under subsection (3) above shall be liable—
  - (a) on summary conviction, to a fine not exceeding the statutory maximum or—
    - (i) to imprisonment for a term not exceeding 3 months; or
    - (ii) if he has previously been convicted of an offence inferring dishonest appropriation of property or an attempt at such appropriation, to imprisonment for a term not exceeding 6 months,or (in the case of either sub-paragraph) to both such fine and such imprisonment; or
  - (b) on conviction on indictment to a fine or to imprisonment for a term not exceeding 2 years or to both.

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## 65 Arbitration and compromise. **S**

- (1) The permanent trustee may (but if there are commissioners only with the consent of the commissioners, the creditors or the court)—
  - (a) refer to arbitration any claim or question of whatever nature which may arise in the course of the sequestration; or
  - (b) make a compromise with regard to any claim of whatever nature made against or on behalf of the sequestrated estate;and the decree arbitral or compromise shall be binding on the creditors and the debtor.
- (2) Where any claim or question is referred to arbitration under this section, the Accountant in Bankruptcy may vary any time limit in respect of which any procedure under this Act has to be carried out.
- (3) The permanent trustee shall insert a copy of the decree arbitral, or record the compromise, in the sederunt book.

## 66 Meetings of creditors and commissioners. **S**

Part I of Schedule 6 to this Act shall have effect in relation to meetings of creditors other than the statutory meeting; Part II of that Schedule shall have effect in relation to all meetings of creditors under this Act; and Part III of that Schedule shall have effect in relation to meetings of commissioners.

## 67 General offences by debtor etc. **S**

- (1) A debtor who during the relevant period makes a false statement in relation to his assets or his business or financial affairs to any creditor or to any person concerned in the administration of his estate shall be guilty of an offence, unless he shows that he neither knew nor had reason to believe that his statement was false.
- (2) A debtor, or other person acting in his interest whether with or without his authority, who during the relevant period destroys, damages, conceals or removes from Scotland any part of the debtor's estate or any document relating to his assets or his business or financial affairs shall be guilty of an offence, unless the debtor or other person shows that he did not do so with intent to prejudice the creditors.
- (3) A debtor who is absent from Scotland and who after the date of sequestration of his estate fails, when required by the court, to come to Scotland for any purpose connected with the administration of his estate, shall be guilty of an offence.
- (4) A debtor, or other person acting in his interest whether with or without his authority, who during the relevant period falsifies any document relating to the debtor's assets or his business or financial affairs, shall be guilty of an offence, unless the debtor or other person shows that he had no intention to mislead the permanent trustee, a commissioner or any creditor.
- (5) If a debtor whose estate is sequestrated—
  - (a) knows that a person has falsified any document relating to the debtor's assets or his business or financial affairs; and
  - (b) fails, within one month of the date of acquiring such knowledge, to report his knowledge to the interim or permanent trustee,he shall be guilty of an offence.

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- (6) A person who is absolutely insolvent and who during the relevant period transfers anything to another person for an inadequate consideration or grants any unfair preference to any of his creditors shall be guilty of an offence, unless the transferor or grantor shows that he did not do so with intent to prejudice the creditors.
- (7) A debtor who is engaged in trade or business shall be guilty of an offence if at any time in the period of one year ending with the date of sequestration of his estate, he pledges or disposes of, otherwise than in the ordinary course of his trade or business, any property which he has obtained on credit and has not paid for unless he shows that he did not intend to prejudice his creditors.
- (8) A debtor who is engaged in trade or business shall be guilty of an offence if at any time in the period of 2 years ending with the date of sequestration, he has failed to keep or preserve such records as are necessary to give a fair view of the state of his assets or his business and financial affairs and to explain his transactions, unless he shows that such failure was neither reckless nor dishonest:

Provided that a debtor shall not be guilty of an offence under this subsection if, at the date of sequestration, his unsecured liabilities did not exceed the prescribed amount; but, for the purposes of this proviso, if at any time the amount of a debt (or part of a debt) over which a security is held exceeds the value of the security, that debt (or part) shall be deemed at that time to be unsecured to the extent of the excess.

- (9) If a debtor, either alone or jointly with another person, obtains credit to the extent of £100 (or such other sum as may be prescribed) or more without giving the person from whom he obtained it the relevant information about his status he shall be guilty of an offence.
- (10) For the purposes of subsection (9) above—
- (a) “debtor” means—
    - (i) a debtor whose estate has been sequestrated; or
    - (ii) a person who has been adjudged bankrupt in England and Wales or Northern Ireland,  
and who, in either case, has not been discharged;
  - (b) the reference to the debtor obtaining credit includes a reference to a case where goods are hired to him under a hire-purchase agreement or agreed to be sold to him under a conditional sale agreement; and
  - (c) the relevant information about the status of the debtor is the information that his estate has been sequestrated and that he has not received his discharge or, as the case may be, that he is an undischarged bankrupt in England and Wales or Northern Ireland.
- (11) In this section—
- (a) “the relevant period” means the period commencing one year immediately before the date of sequestration of the debtor’s estate and ending with his discharge;
  - (b) references to intent to prejudice creditors shall include references to intent to prejudice an individual creditor.
- (12) A person convicted of any offence under this section shall be liable—
- (a) on summary conviction, to a fine not exceeding the statutory maximum or—
    - (i) to imprisonment for a term not exceeding 3 months; or

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- (ii) if he has previously been convicted of an offence inferring dishonest appropriation of property or an attempt at such appropriation, to imprisonment for a term not exceeding 6 months,
- or (in the case of either sub-paragraph) to both such fine and such imprisonment; or
- (b) on conviction on indictment to a fine or—
  - (i) in the case of an offence under subsection (1), (2), (4) or (7) above to imprisonment for a term not exceeding 5 years,
  - (ii) in any other case to imprisonment for a term not exceeding 2 years.
 or (in the case of either sub-paragraph) to both such fine and such imprisonment.

## 68 Summary proceedings. **S**

- (1) <sup>F174</sup>Subject to subsection (1A) below, summary proceedings for an offence under this Act may be commenced at any time within the period of <sup>F175</sup>12 months after the date on which evidence sufficient in the opinion of the Lord Advocate to justify the proceedings comes to his knowledge.
- <sup>F174</sup>(1A) No such proceedings shall be commenced by virtue of this section more than three years after the commission of the offence.]
- (2) Subsection (3) of <sup>F176</sup>section 136 of the Criminal Procedure (Scotland) Act 1995] (date of commencement of summary proceedings) shall have effect for the purposes of subsection (1) above as it has effect for the purposes of that section.
- (3) For the purposes of subsection (1) above, a certificate of the Lord Advocate as to the date on which the evidence in question came to his knowledge is conclusive evidence of the date on which it did so.

### Textual Amendments

- F174** Words at the beginning of s. 68(1) inserted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 27(2)(a)** (with s. 12(6)); S.I. 1993/438, **art. 3**
- S. 68(1A) inserted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 27(3)** (with s. 12(6)); S.I. 1993/438, **art. 3**
- F175** Words in s. 68(1) substituted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 27(2)(b)** (with s. 12(6)); S.I. 1993/438, **art. 3**
- F176** Words in s. 68(2) substituted (1.4.1996) by 1995 c. 40, ss. 5, 7(2), **Sch. 4 para. 58(5)**

## 69 Outlays of interim and permanent trustee. **S**

The Secretary of State may, by regulations, provide for the premium (or a proportionate part thereof) of any bond of caution or other security required, for the time being, to be given by an insolvency practitioner to be taken into account as part of the outlays of the insolvency practitioner in his actings as an interim trustee or permanent trustee.

## [69A <sup>F177</sup>Fees for the Accountant in Bankruptcy. **S**

The Secretary of State may prescribe—

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- (a) the fees and outlays to be payable to the Accountant in Bankruptcy in respect of the exercise of any of his functions under this Act; [<sup>F178</sup>or the Insolvency Act 1986]]
- (b) the time and manner in which such fees and outlays are to be paid; and
- (c) the circumstances, if any, in which the Accountant in Bankruptcy may allow exemption from payment or the remission or modification of payment of any fees or outlays payable or paid to him.

#### Textual Amendments

**F177** S. 69A inserted (18.2.1993) by 1993 c. 6, s. 8

**F178** Words in s. 69A(a) inserted (1.7.1999) by S.I. 1999/1820, art. 4, Sch. 2 Pt. I para. 82(3) (with art. 5)

## 70 Supplies by utilities. **S**

- (1) This section applies where on any day (“the relevant day”)—
- (a) sequestration is awarded in a case where the petition was presented by the debtor,
  - (b) a warrant is granted under section 12(2) of this Act in a case where the petition was presented by a creditor or a trustee acting under a trust deed; or
  - (c) the debtor grants a trust deed,
- and in this section “the office holder” means the interim trustee, the permanent trustee or the trustee acting under a trust deed, as the case may be.
- (2) If a request falling within subsection (3) below is made for the giving after the relevant day of any of the supplies mentioned in subsection (4) below, the supplier—
- (a) may make it a condition of the giving of the supply that the office holder personally guarantees the payment of any charges in respect of the supply; and
  - (b) shall not make it a condition of the giving of the supply, or do anything which has the effect of making it a condition of the giving of the supply, that any outstanding charges in respect of a supply given to the debtor before the relevant day are paid.
- (3) A request falls within this subsection if it is made—
- (a) by or with the concurrence of the office holder; and
  - (b) for the purposes of any business which is or has been carried on by or on behalf of the debtor.
- (4) The supplies referred to in subsection (2) above are—
- (a) a supply of gas by [<sup>F179</sup>a [<sup>F180</sup>gas supplier] within the meaning of Part I of the Gas Act 1986];
  - (b) a supply of electricity by [<sup>F181</sup>a [<sup>F182</sup>electricity supplier] within the meaning of Part I of the Electricity Act 1989];
  - (c) a supply of water by [<sup>F183</sup>Scottish Water];
  - [<sup>F184</sup>(d) a supply of communications services by a provider of a public electronic communications service.]
- [<sup>F185</sup>(5) In subsection (4), “communications services” do not include electronic communications services to the extent that they are used to broadcast or otherwise transmit programme services (within the meaning of the Communications Act 2003).]

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### Textual Amendments

- F179** Words substituted by [Gas Act 1986](#) (c. 44, SIF 44:2), ss. 3, 67(1)(3), Sch. 7 para. 32, **Sch. 8 para. 33**
- F180** Words in s. 70(4)(a) substituted (1.3.1996) by 1995 c. 45, s. 16(1), **Sch. 4 para. 13**; S.I. 1996/218, **art. 2**
- F181** Words substituted by [Electricity Act 1989](#) (c. 29, SIF 44:1), s. 112(1)(3), Sch. 16 para. 32, Sch. 17 paras. 33, **35(1)**
- F182** Words in s. 70(4)(b) substituted (1.10.2001) by 2000 c. 27, s. 108, **Sch. 6 Pt. III para. 46**; S.I. 2001/3266, **art. 2, Sch.** (subject to transitional provisions in arts. 3-20)
- F183** Words in s. 70(4)(c) substituted (1.4.2002) by [Water Industry \(Scotland\) Act 2002](#) (asp. 3), s. 71, Sch. 7 para. 16; S.I. 2002/118, **art. 2(3)**
- F184** S. 70(4)(d) substituted (25.7.2003 for specified purposes and 29.12.2003 for further specified purposes) by [Communications Act 2003](#) (c. 21), ss. 406, 411(2)(3), **Sch. 17 para. 78(2)**; S.I. 2003/1900, arts. 2(1), 3(1), **Sch. 1**, (with transitional provisions in arts. 3-6 (as amended by S.I. 2003/3142, **art. 1(3)**)); S.I. 2003/3142, **art. 3(2)**, (with art. 11)
- F185** S. 70(5) substituted (25.7.2003 for specified purposes and 29.12.2003 for further specified purposes) by [Communications Act 2003](#) (c. 21), ss. 406, 411(2)(3), **Sch. 17 para. 78(2)**; S.I. 2003/1900, arts. 2(1), 3(1), **Sch. 1**, (with transitional provisions in arts. 3-6 (as amended by S.I. 2003/3142, **art. 1(3)**)); S.I. 2003/3142, **art. 3(2)**, (with art. 11)

## 71 **Edinburgh Gazette.** **S**

The keeper of the Edinburgh Gazette shall, on each day of its publication, send a free copy of it to—

- (a) the Accountant in Bankruptcy; and
- (b) the petition department of the Court of Session.

### [<sup>F186</sup>71A Further duty of Accountant in Bankruptcy **S**

The Accountant in Bankruptcy shall, on receiving any notice under section 109(1) of the Insolvency Act 1986 in relation to a community interest company, forward a copy of that notice to the Regulator of Community Interest Companies.]

### Textual Amendments

- F186** S. 71A inserted (S.) (1.7.2005) by [Companies \(Audit, Investigations and Community Enterprise\) Act 2004](#) (c. 27), **ss. 59(2)**, 65, 66; S.I. 2004/3322 {art. 2(3)}, Sch. 3

VALID FROM 01/04/2008

### [<sup>F187</sup>71B Disqualification provisions: power to make orders **S**

- (1) The Scottish Ministers may make an order under this section in relation to a disqualification provision.
- (2) A “disqualification provision” is a provision made by or under any enactment which disqualifies (whether permanently or temporarily and whether absolutely or conditionally) a relevant debtor or a class of relevant debtors from—
  - (a) being elected or appointed to an office or position;

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- (b) holding an office or position; or
  - (c) becoming or remaining a member of a body or group.
- (3) In subsection (2) above, the reference to a provision which disqualifies a person conditionally includes a reference to a provision which enables him to be dismissed.
- (4) An order under subsection (1) above may repeal or revoke the disqualification provision.
- (5) An order under subsection (1) above may amend, or modify the effect of, the disqualification provision—
- (a) so as to reduce the class of relevant debtors to whom the disqualification provision applies;
  - (b) so as to extend the disqualification provision to some or all individuals who are subject to a bankruptcy restrictions order;
  - (c) so that the disqualification provision applies only to some or all individuals who are subject to a bankruptcy restrictions order;
  - (d) so as to make the application of the disqualification provision wholly or partly subject to the discretion of a specified person, body or group.
- (6) An order by virtue of subsection (5)(d) above may provide for a discretion to be subject to—
- (a) the approval of a specified person or body;
  - (b) appeal to a specified person, body, court or tribunal.
- (7) The Scottish Ministers may be specified for the purposes of subsection (5)(d) or (6) (a) or (b) above.
- (8) In this section—
- “bankruptcy restrictions order” includes—
    - (a) a bankruptcy restrictions undertaking;
    - (b) a bankruptcy restrictions order made under paragraph 1 of Schedule 4A to the Insolvency Act 1986 (c. 45); and
    - (c) a bankruptcy restrictions undertaking entered into under paragraph 7 of that Schedule;
  - “relevant debtor” means a debtor—
    - (a) whose estate has been sequestrated;
    - (b) who has granted (or on whose behalf there has been granted) a trust deed;
    - (c) who has been adjudged bankrupt by a court in England and Wales or in Northern Ireland; or
    - (d) who, in England and Wales or in Northern Ireland, has made an agreement with his creditors for a composition in satisfaction of his debts or a scheme of arrangement of his affairs or for some other kind of settlement or arrangement.
- (9) An order under this section—
- (a) may make provision generally or for a specified purpose only;
  - (b) may make different provision for different purposes; and
  - (c) may make transitional, consequential or incidental provision.
- (10) An order under this section—

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- (a) shall be made by statutory instrument; and
- (b) shall not be made unless a draft has been laid before and approved by a resolution of the Scottish Parliament.]

#### Textual Amendments

**F187** S. 71B inserted (1.4.2008) by [Bankruptcy and Diligence etc. \(Scotland\) Act 2007 \(asp 3\)](#), **ss. 5**, 227(3) (with s. 223); [S.S.I. 2008/115](#), **art. 3(1)(a)** (with arts. 4-6, 10 (as amended (with effect from 31.1.2011) by [S.S.I. 2011/31](#), art. 5))

## 72 Regulations. **S**

Any power to make regulations under this Act shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament; and the regulations may make different provision for different cases or classes of case.

#### Modifications etc. (not altering text)

**C64** S. 72 modified (18.2.1993) by [1993 c. 6](#), **s. 9(1)(2)(5)**

## [<sup>F188</sup>72ZA] Modification of regulation making powers **U.K.**

Any power in any provision of this Act to make regulations may, insofar as that provision relates to a matter to which the EC Regulation applies, be exercised for the purpose of making provision in consequence of the EC Regulation.]

#### Textual Amendments

**F188** S. 72ZA inserted (8.9.2003) by [The Insolvency \(Scotland\) Regulations 2003 \(S.I. 2003/2109\)](#), **reg. 18**

## [<sup>F188</sup>72A <sup>F189</sup>Variation of references to time, money etc. **S**

For any reference in this Act to—

- (a) a period of time;
- (b) an amount of money; or
- (c) a fraction,

there shall be substituted a reference to such other period or, as the case may be, amount or fraction as may be prescribed.]

#### Textual Amendments

**F188** S. 72ZA inserted (8.9.2003) by [The Insolvency \(Scotland\) Regulations 2003 \(S.I. 2003/2109\)](#), **reg. 18**

**F189** S. 72A inserted (1.4.1993, subject to savings in arts. 4, 5 of [S.I. 1993/438](#)) by [1993 c. 6](#), s. 11(3), **Sch. 1 para.28** (with s. 12(6)); [S.I. 1993/438](#), **art.3**



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### 73 Interpretation. **U.K.**

(1) In this Act, unless the context otherwise requires—

“Accountant in Bankruptcy” shall be construed in accordance with section 1 of this Act;

“accounting period” shall be construed in accordance with section [F19052(2)] of this Act;

“apparent insolvency” and “apparently insolvent” shall be construed in accordance with section 7 of this Act;

[F191“appropriate bank or institution” means—

- (a) the Bank of England,
- (b) a person who has permission under Part 4 of the Financial Services and Markets Act 2000 to accept deposits,
- (c) an EEA firm of the kind mentioned in paragraph 5(b) of Schedule 3 to that Act which has permission under paragraph 15 of that Schedule (as a result of qualifying for authorisation under paragraph 12 of that Schedule) to accept deposits, or
- (d) a person who is exempt from the general prohibition in respect of accepting deposits as a result of an exemption order made under section 38(1) of that Act,

and the expressions in this definition must be read with section 22 of the Financial Services and Markets Act 2000, any relevant order under that section and Schedule 2 to that Act;]

“act and warrant” means an act and warrant issued under section 25(2) of, or paragraph 2(2) of Schedule 2 to, this Act;

“associate” shall be construed in accordance with section 74 of this Act;

“business” means the carrying on of any activity, whether for profit or not;

[F192“centre of main interests” has the same meaning as in the EC Regulation;]

“commissioner”, except in the expression “examining commissioner”, shall be construed in accordance with section 30(1) of this Act;

“court” means Court of Session or sheriff;

[F193“creditor” includes a member State liquidator deemed to be a creditor under section 60A of this Act;]

“date of sequestration” has the meaning assigned by section 12(4) of this Act;

“debtor” includes, without prejudice to the expression’s generality, an entity whose estate may be sequestrated by virtue of section 6 of this Act, a deceased debtor or his executor or a person entitled to be appointed as executor to a deceased debtor;

[F194“the EC Regulation” means Council Regulation (EC) No. 1346/2000 of 29th May 2000 on insolvency proceedings<sup>M27</sup>;

[F195“establishment” has the meaning given by Article 2(h) of the EC Regulation;]

“examination” means a public examination under section 45 of this Act or a private examination under section 44 of this Act;

“examining commissioner” shall be construed in accordance with section 46(2) of this Act;

“interim trustee” shall be construed in accordance with section 2 of this Act;

“” F196 . . .

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[<sup>F197</sup>“main proceedings” means proceedings opened in accordance with Article 3(1) of the EC Regulation and falling within the definition of insolvency proceedings in Article 2(a) of the EC Regulation and—

- (a) in relation to England and Wales and Scotland, set out in Annex A to the EC Regulation under the heading “United Kingdom”; and
- (b) in relation to another member State, set out in Annex A to the EC Regulation under the heading relating to that member State;]

[<sup>F198</sup>“member State liquidator” means a person falling within the definition of liquidator in Article 2(b) of the EC Regulation appointed in proceedings to which it applies in a member State other than the United Kingdom;]

“ordinary debt” shall be construed in accordance with section 51(1)(f) of this Act;

“permanent trustee” shall be construed in accordance with section 3 of this Act;

“postponed debt” has the meaning assigned by section 51(3) of this Act;

“preferred debt” has the meaning assigned by section 51(2) of this Act;

“prescribed” means prescribed by regulations made by the Secretary of State;

“protected trust deed” shall be construed in accordance with paragraph 8 of Schedule 5 to this Act;

“qualified creditor” and “qualified creditors” shall be construed in accordance with section 5(4) of this Act;

“qualified to act as an insolvency practitioner” means being, in accordance with section 2 of the <sup>M28</sup>Insolvency Act 1985 (qualifications of insolvency practitioners), so qualified:

Provided that, until the coming into force of that section the expression shall instead mean satisfying such requirements (which, without prejudice to the generality of this definition, may include requirements as to the finding of caution) as may be prescribed for the purposes of this Act;

“register of insolvencies” has the meaning assigned by section [<sup>F199</sup>1A(1)(b)] of this Act;

“relevant person” has the meaning assigned by section 44(1)(b) of this Act;

[<sup>F200</sup>“secondary proceedings” means proceedings opened in accordance with Articles 3(2) and 3(3) of the EC Regulation and falling within the definition of winding-up proceedings in Article 2(c) of the EC Regulation, and—

- (a) in relation to England and Wales and Scotland, set out in Annex B to the EC Regulation under the heading “United Kingdom”; and
- (b) in relation to another member State, set out in Annex B to the EC Regulation under the heading relating to that member State;]

“secured creditor” means a creditor who holds a security for his debt over any part of the debtor’s estate;

“security” means any security, heritable or moveable, or any right of lien, retention or preference;

“sederunt book” means the sederunt book maintained under section 3(1)(e) of this Act;

<sup>F201</sup>

[<sup>F202</sup>“statement of assets and liabilities” means a document (including a copy of a document) in such form as may be prescribed containing—

- (i) a list of the debtor’s assets and liabilities;

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- (ii) a list of his income and expenditure; and
  - (iii) such other information as may be prescribed;]
- “statutory meeting” has the meaning assigned by section [F203 section 20A] of this Act;
- F201 . . .
- [F204 “temporary administrator” means a temporary administrator referred to by Article 38 of the EC Regulation; and]
- [F205 “territorial proceedings” means proceedings opened in accordance with Articles 3(2) and 3(4) of the EC Regulation and falling within the definition of insolvency proceedings in Article 2(a) of the EC Regulation, and—
- (a) in relation to England and Wales and Scotland, set out in Annex A to the EC Regulation under the heading “United Kingdom”; and
  - (b) in relation to another member State, set out in Annex A to the EC Regulation under the heading relating to that member State.]
- [F206 “trust deed” has the meaning assigned by section 5(4A) of this Act;]
- “unfair preference” means a preference created as is mentioned in subsection (1) of section 36 of this Act by a transaction to which subsection (4) of that section applies.

- (2) Any reference in this Act to a debtor being absolutely insolvent shall be construed as a reference to his liabilities being greater than his assets, and any reference to a debtor’s estate being absolutely insolvent shall be construed accordingly.
- (3) Any reference in this Act to value of the creditors is, in relation to any matter, a reference to the value of their claims as accepted for the purposes of that matter.
- (4) Any reference in this Act to “the creditors” in the context of their giving consent or doing any other thing shall, unless the context otherwise requires, be construed as a reference to the majority in value of such creditors as vote in that context at a meeting of creditors.
- (5) Any reference in this Act to any of the following acts by a creditor barring the effect of any enactment or rule of law relating to the limitation of actions in any part of the United Kingdom, namely—
  - (a) the presentation of a petition for sequestration;
  - (b) the concurrence in such a petition; and
  - (c) the submission of a claim,

shall be construed as a reference to that act having the same effect, for the purposes of any such enactment or rule of law, as an effective acknowledgment of the creditor’s claim; and any reference in this Act to any such enactment shall not include a reference to an enactment which implements or gives effect to any international agreement or obligation.

- [F207 (6) Any reference in this Act, howsoever expressed, to the time when a petition for sequestration is presented shall be construed as a reference to the time when the petition is received by the clerk of the court.]

#### Textual Amendments

**F190** Words in definition of accounting period in s. 73(1) substituted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 29(2)** (with s. 12(6)); S.I. 1993/438, **art. 3**

**F191** S. 73(1): definition of appropriate bank or institution

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substituted (1.12.2001) by S.I. 2001/3649, **art. 225**

- F192** Definition of "centre of main interests" in s. 73(1) inserted (8.9.2003) by The Insolvency (Scotland) Regulations 2003 (S.I. 2003/2109), **reg. 19**
- F193** Definition of "creditor" in s. 73(1) inserted (8.9.2003) by The Insolvency (Scotland) Regulations 2003 (S.I. 2003/2109), **reg. 19**
- F194** Definition of "the EC Regulation" in s. 73(1) inserted (8.9.2003) by The Insolvency (Scotland) Regulations 2003 (S.I. 2003/2109), **reg. 19**
- F195** Definition of "establishment" in s. 73(1) inserted (8.9.2003) by The Insolvency (Scotland) Regulations 2003 (S.I. 2003/2109), **reg. 19**
- F196** Definition of list of interim trustees in s. 73(1) repealed (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(4), **Sch. 2** (with s. 12(6)); S.I. 1993/438, **art. 3**
- F197** Definition of "main proceedings" in s. 73(1) inserted (8.9.2003) by The Insolvency (Scotland) Regulations 2003 (S.I. 2003/2109), **reg. 19**
- F198** Definition of "member state liquidator" in s. 73(1) inserted (8.9.2003) by The Insolvency (Scotland) Regulations 2003 (S.I. 2003/2109), **reg. 19**
- F199** Words in definition of "register of insolvencies" in s. 73(1) substituted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 29(3)** (with s. 12(6)); S.I. 1993/438, **art. 3**
- F200** Definition of "secondary proceedings" in s. 73(1) inserted (8.9.2003) by The Insolvency (Scotland) Regulations 2003 (S.I. 2003/2109), **reg. 19**
- F201** Definitions of standard scale and statutory maximum in s. 73(1) repealed (5.11.1993) by 1993 c. 50, s. 1(1), **Sch. 1 Pt. XIV** Group 2
- F202** Definition of statement of assets and liabilities in s. 73(1) inserted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 29(5)** (with s. 12(6)); S.I. 1993/438, **art. 3**
- F203** Words in definition of statutory meeting in s. 73(1) substituted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 29(4)** (with s. 12(6)); S.I. 1993/438, **art. 3**
- F204** Definition of "temporary administrator" in s. 73(1) inserted (8.9.2003) by The Insolvency (Scotland) Regulations 2003 (S.I. 2003/2109), **reg. 19**
- F205** Definition of "territorial proceedings" in s. 73(1) inserted (8.9.2003) by The Insolvency (Scotland) Regulations 2003 (S.I. 2003/2109), **reg. 19**
- F206** Definition of "trust deed" in s. 73(1) substituted (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 29(6)** (with s. 12(6)); S.I. 1993/438, **art. 3**
- F207** S. 73(6) added (1.4.1993, subject to savings in arts. 4, 5 of S.I. 1993/438) by 1993 c. 6, s. 11(3), **Sch. 1 para. 29(7)** (with s. 12(6)); S.I. 1993/438, **art. 3**

#### Modifications etc. (not altering text)

- C65** S. 73(1) modified (25.4.1991) by Companies Act 1989 (c. 40, SIF 27), s. 182(4), **Sch. 22 para. 6(3)**; S.I. 1991/878, **art. 2**, Sch.
- C66** S. 73(1) amended (1.1.1993) by S.I. 1992/3218, reg. 82(1), **Sch. 10 Pt. 1 para. 18**.

#### Marginal Citations

- M27** Council Regulation (EC) 1346/2000, O.J. No. L 160, 30.06.00, p.1.
- M28** 1985 c. 65.

## 74 Meaning of "associate". **S**

- (1) Subject to subsection (7) below, for the purposes of this Act any question whether a person is an associate of another person shall be determined in accordance with the following provisions of this section (any reference, whether in those provisions or in regulations under the said subsection (7), to a person being an associate of another person being taken to be a reference to their being associates of each other).

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- (2) A person is an associate of an individual if that person is the individual's [<sup>F208</sup>husband, wife or civil partner] , or is a relative, or the [<sup>F208</sup>husband, wife or civil partner] of a relative, of the individual or of the individual's [<sup>F208</sup>husband, wife or civil partner] .
  - (3) A person is an associate of any person with whom he is in partnership, [<sup>F209</sup>and of any person who is an associate of any person with whom he is in partnership;] and a firm is an associate of any person who is a member of the firm.
  - (4) For the purposes of this section a person is a relative of an individual if he is that individual's brother, sister, uncle, aunt, nephew, niece, lineal ancestor or lineal descendant treating—
    - (a) any relationship of the half blood as a relationship of the whole blood and the stepchild or adopted child of any person as his child; and
    - (b) an illegitimate child as the legitimate child of his mother and reputed father, and references in this section to a [<sup>F210</sup>husband, wife or civil partner] include a former [<sup>F210</sup>husband, wife or civil partner] and a reputed [<sup>F210</sup>husband, wife or civil partner] .
  - (5) A person is an associate of any person whom he employs or by whom he is employed; and for the purposes of this subsection any director or other officer of a company shall be treated as employed by that company.
- [<sup>F211</sup>(5A) A company is an associate of another company—
- (a) if the same person has control of both, or a person has control of one and persons who are his associates, or he and persons who are his associates, have control of the other; or
  - (b) if a group of two or more persons has control of each company, and the groups either consist of the same persons or could be regarded as consisting of the same persons by treating (in one or more cases) a member of either group as replaced by a person of whom he is an associate.
- (5B) A company is an associate of another person if that person has control of it or if that person and persons who are his associates together have control of it.
- (5C) For the purposes of this section a person shall be taken to have control of a company if—
- (a) the directors of the company or of another company which has control of it (or any of them) are accustomed to act in accordance with his directions or instructions; or
  - (b) he is entitled to exercise, or control the exercise of, one third or more of the voting power at any general meeting of the company or of another company which has control of it;
- and where two or more persons together satisfy either of the above conditions, they shall be taken to have control of the company.]
- (6) [<sup>F212</sup>In subsections (5), (5A), (5B), (5C) above,]“company” includes any body corporate (whether incorporated in Great Britain or elsewhere).
  - (7) The Secretary of State may by regulations—
    - (a) amend the foregoing provisions of this section so as to provide further categories of persons who, for the purposes of this Act, are to be associates of other persons; and
    - (b) provide that any or all of subsections (2) to (6) above (or any subsection added by virtue of paragraph (a) above) shall cease to apply, whether in whole or

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in part, or shall apply subject to such modifications as he may specify in the regulations;

and he may in the regulations make such incidental or transitional provision as he considers appropriate.

#### Textual Amendments

- F208** Words in s. 74(2) substituted (5.12.2005) by Civil Partnership Act 2004 (c. 33), ss. 261(2), 263, **Sch. 28 para. 40**; S.S.I. 2005/604, **art. 2(c)**
- F209** Words in s. 74(3) substituted (1.4.1986) by S.I. 1985/1925, regs. 1, 11(2) (which S.I. is revoked (1.4.2008) by S.I. 2008/82, **reg. 21**)
- F210** Words in s. 74(4) substituted (5.12.2005) by Civil Partnership Act 2004 (c. 33), ss. 261(2), 263, **Sch. 28 para. 40**; S.S.I. 2005/604, **art. 2(c)**
- F211** S. 74(5A)-(5C) inserted by S.I. 1985/1925, reg. 11(3); (which S.I. is revoked (1.4.2008) by S.I. 2008/82, **reg. 21**)
- F212** Words in s. 74(6) substituted by virtue of S.I. 1985/1925, reg. 11(4); (which S.I. is revoked (1.4.2008) by S.I. 2008/82, **reg. 21**)

#### Modifications etc. (not altering text)

- C67** S. 74 applied by Social Security Pensions Act 1975 (c. 60, SIF 113:1), **s. 57C(4)** (as inserted by Social Security Act 1990 (c. 27, SIF 113:1), s. 14, **Sch. 4 Pt. I para. 1**)
- C68** S. 74 applied (1.4.1996) by 1995 c. 43, ss. 34, 50(2), **Sch. 1 para. 2(1)(j)**  
S. 74 applied (with modifications) (6.4.1997) by S.I. 1996/3127, **art. 3(2)**  
S. 74 applied (6.4.1997) by 1995 c. 26, **s. 123(2)** (with s. 121(5)); S.I. 1997/664, **art. 2(3)**, **Sch. Pt. II**  
S.74 applied (1.10.2000) by S.I. 2000/1403, **art. 1(5)**
- C69** S. 74 applied by Social Security Pensions Act 1975 (c. 60, SIF 113:1), **s. 57A(4)** (as inserted by Social Security Act 1990 (c. 27, SIF 113:1), s. 14, **Sch. 4 Pt. I para. 3**)  
S. 74 applied (7.2.1994) by 1993 c. 48, ss. 112(4), 119(4) S.I. 1994/86, **art. 2** (with s. 6(8))  
S. 74 applied (6.4.2005) by Pensions Act 2004 (c. 35), {ss. 38(10(c)), 322 (with s. 313); S.I. 2005/275, **art. 2(7)**, **Sch. Pt. 7**  
S. 74 applied (6.4.2005) by Pensions Act 2004 (c. 35), **ss. 51(3)(c)**, 322 (with s. 313); S.I. 2005/275, **art. 2(7)**, **Sch. Pt. 7**  
S. 74 applied (6.4.2005) by Pensions Act 2004 (c. 35), **ss. 53(6)(c)**, 322 (with s. 313); S.I. 2005/275, **art. 2(7)**, **Sch. Pt. 7**  
S. 74 power to apply (with modifications) conferred (10.2.2005) by Pensions Act 2004 (c. 35), **ss. 57(2)(c)**, 322 (with s. 313); S.I. 2005/275, **art. 2(3)(a)**, **Sch. Pt. 3**
- C70** S. 74 modified (30.12.2005) by The Occupational Pension Schemes (Investment) Regulations 2005 (S.I. 2005/3378), **reg. 10(2)**

## 75 Amendments, repeals and transitional provisions. **S**

- (1) Subject to subsection (3) below—
- (a) the enactments mentioned in Part I of Schedule 7 to this Act shall have effect subject to the amendments respectively specified in that Schedule, being amendments consequential on the provisions of this Act;
  - (b) Part II of that Schedule, which re-enacts certain provisions of the <sup>M29</sup>Bankruptcy (Scotland) Act 1913 repealed by this Act, shall have effect.
- (2) The enactments set out in columns 1 and 2 of Schedule 8 to this Act are, subject to subsection (3) below, hereby repealed to the extent specified in the third column of that Schedule.

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(3) Subject to subsections (4) and (5) below, nothing in this Act shall affect any of the enactments repealed or amended by this Act in their operation in relation to a sequestration as regards which the award was made before the coming into force of this section.

(4) Where a debtor's estate has been sequestrated before the coming into force of this section but he has not been discharged, the debtor shall be discharged on the expiry of—

- (a) 2 years after such coming into force; or
- (b) 3 years after the date of sequestration,

whichever expires later:

Provided that, not later than 3 months before the date on which the debtor is due to be discharged under this subsection, the trustee in the sequestration or any creditor may apply to the sheriff for a deferment of that discharge; and subsections (4) to (8) of section 54 of this Act shall apply in relation to that application by the trustee as they apply in relation to an application under subsection (3) of that section by the permanent trustee.

(5) Section 63 of this Act shall apply in a case where before the coming into force of this section sequestration of a debtor's estate has been awarded under the Bankruptcy (Scotland) Act 1913 but the debtor has not yet been discharged, subject to the following modifications—

- (a) in subsections (1)(a) and (2)(c) for the words "this Act" there shall be substituted the words "the Bankruptcy (Scotland) Act 1913";
- (b) in subsections (2)(b) and (4) the word "permanent" shall be omitted; and
- (c) in subsection (2)(b) for the words "24 of this Act" there shall be substituted the words "64 of the Bankruptcy (Scotland) Act 1913".

(6) The apparent insolvency of a debtor may be constituted for the purposes of this Act notwithstanding that the circumstance founded upon to constitute the apparent insolvency occurred on a date before the coming into force of section 7 of this Act; and, for those purposes, the apparent insolvency shall be deemed to have been constituted on that date:

Provided that apparent insolvency shall be constituted by virtue of this subsection only on grounds which would have constituted notour bankruptcy under the <sup>M30</sup>Bankruptcy (Scotland) Act 1913.

(7) Where a debtor whose estate is sequestrated after the commencement of this subsection is liable, by virtue of a transaction entered into before that date, to pay royalties or a share of the profits to any person in respect of any copyright or interest in copyright comprised in the sequestrated estate, section 102 of the Bankruptcy (Scotland) Act 1913 (trustee's powers in relation to copyright) shall apply in relation to the permanent trustee as it applied before its repeal in relation to a trustee in bankruptcy under the said Act of 1913.

(8) Where sequestration of a debtor's estate is awarded under this Act a person shall not be guilty of an offence under any provision of this Act in respect of anything done before the date of commencement of that provision but, notwithstanding the repeal by this Act of the Bankruptcy (Scotland) Act 1913, he shall be guilty of an offence under that Act in respect of anything done before that date which would have been an offence under that Act if the award of sequestration had been made under that Act.

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- (9) Unless the context otherwise requires, any reference in any enactment or document to notour bankruptcy, or to a person being notour bankruptcy, shall be construed as a reference to apparent insolvency, or to a person being apparently insolvent, within the meaning of section 7 of this Act.
- (10) Unless the context otherwise requires, any reference in any enactment or document to a person’s estate being sequestrated under the Bankruptcy (Scotland) Act 1913 shall be construed as, or as including, a reference to its being sequestrated under this Act; and analogous references shall be construed accordingly.
- (11) Unless the context otherwise requires, any reference in any enactment or document to a trustee in sequestration or to a trustee in bankruptcy shall be construed as a reference to a permanent trustee, or in a case where no permanent trustee has been elected or appointed an interim trustee, within the meaning of this Act; and analogous expressions shall be construed accordingly.
- (12) Unless the context otherwise requires, any reference in any enactment or document—
- (a) to a “gratuitous alienation” shall be construed as including a reference to an alienation challengeable under section 34(1) of this Act or under section 615A(1) of the <sup>M31</sup>Companies Act 1985;
  - (b) to a “fraudulent preference” or to an “unfair preference” shall be construed as including a reference to—
    - (i) an unfair preference within the meaning of this Act;
    - (ii) a preference created as is mentioned in subsection (1) of section 36 of this Act (as applied by section 615B of the said Act of 1985), by a transaction to which subsection (4) of the said section 36 (as so applied) applies.

#### Marginal Citations

**M29** 1913 c. 20.

**M30** 1913 c. 20.

**M31** 1985 c. 6.

## 76 Receipts and expenses. **S**

- (1) Any—
- (a) payments received by the Secretary of State under section 58(3) of this Act; or
  - (b) amounts handed over to him in accordance with section 53 of this Act by virtue of the insertion provided for in paragraph 9 of Schedule 2 to this Act,
- shall be paid by him into the Consolidated Fund.
- (2) There shall be paid out of moneys provided by Parliament—
- (a) any amount of outlays and remuneration payable in accordance with section 53 of this Act by virtue of the insertion mentioned in subsection (1) (b) above;
  - (b) any administrative expenses incurred by the Secretary of State under this Act; and
  - (c) any increase attributable to this Act in the sums so payable under any other Act.



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**77 Crown application. S**

The application of this Act to the Crown is to the Crown as creditor only.

**78 Short title, commencement and extent. S**

- (1) This Act may be cited as the Bankruptcy (Scotland) Act 1985.
- (2) This Act, except this section, shall come into force on such day as the Secretary of State may by order made by statutory instrument appoint; and different days may be so appointed for different purposes and for different provisions.
- (3) An order under subsection (2) above may contain such transitional provisions and savings as appear to the Secretary of State necessary or expedient in connection with the provisions brought into force (whether wholly or partly) by the order.
- (4) Without prejudice to section 75(3) to (5) of this Act, this Act applies to sequestrations as regards which the petition—
  - (a) is presented on or after the date of coming into force of section 5 of this Act; or
  - (b) was presented before, but in respect of which no award of sequestration has been made by, that date.
- (5) This Act, except the provisions mentioned in subsection (6) below, extends to Scotland only.
- (6) The provisions referred to in subsection (5) above are sections 8(5), 22(8) (including that subsection as applied by section 48(7)), 46, 55 and 73(5), paragraph 16(b) of Schedule 4 and paragraph 3 of Schedule 5.

**Subordinate Legislation Made**

- P1** S. 78(2): power of appointment conferred by s. 78(2) fully exercised: [S.I. 1985/1924](#), 1986/78, 1913: whole Act in force on or before 29.12.1986

**Status:**

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**Changes to legislation:**

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