

Bankruptcy (Scotland) Bill 2011

[CONSULTATION DRAFT]

An Act of the Scottish Parliament to consolidate the Bankruptcy (Scotland) Act 1985, the Bankruptcy (Scotland) Act 1993, Part 1 of the Bankruptcy and Diligence etc. (Scotland) Act 2007, Part 2 of the Home Owner and Debtor Protection (Scotland) Act 2010 and related enactments.[LongTitle.doc]

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PART 1

APPLICATION OR PETITION FOR SEQUESTRATION

Applications and petitions

1 Sequestration of estate[j156.doc]

The estate of a debtor may be sequestrated in accordance with the provisions of this Act.

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2 Sequestration of estate of living debtor[j010.doc]

(1) The sequestration of the estate of a living debtor (“D”) is—

- (a) by debtor application made by D if subsection (3) applies to D, or
- (b) on the petition of—

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- (i) a qualified creditor, or qualified creditors, if D is apparently insolvent,
- (ii) a temporary administrator,
- (iii) a member State liquidator appointed in main proceedings, or
- (iv) a trustee (“T”) acting under a trust deed if a condition mentioned in subsection (2) is satisfied.

(2) The conditions are—

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- (a) that D has failed to comply—
 - (i) with an obligation imposed on D under the trust deed, being an obligation with which D reasonably could have complied, or
 - (ii) with an instruction reasonably given to, or requirement reasonably made of, D by T for the purposes of the trust deed, or

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(b) that T avers in T’s petition that it would be in the best interests of the creditors that an award of sequestration be made.

(3) This subsection applies to D where—

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- (a) the total amount of D’s debts (including interest) at the date the debtor application is made is not less than £3,000 or such sum as may be prescribed,
- (b) an award of sequestration has not been made against D in the period of 5 years ending on the day before the date the debtor application is made, and

(c) D—

- (i) is apparently insolvent,
- (ii) is unable to pay D's debts and each condition mentioned in section 7 is met,
- (iii) has, within the prescribed period and in accordance with section 8, been granted a certificate for sequestration of D's estate, or
- (iv) has granted a trust deed which, by reason of creditors objecting, or not agreeing, to it is not a protected trust deed in accordance with regulations under paragraph 6 of schedule 4.

(4) For the purposes of subsection (3)(c), D is not apparently insolvent by reason only of granting a trust deed or of giving notice to creditors as mentioned in section 15(1)(c).

(5) No petition may be presented under subsection (1)(b)(i) unless the qualified creditor has, or the qualified creditors have, provided the debtor, by such time prior to the presentation of the petition as may be prescribed, with a debt advice and information package.

(6) In subsection (5), “debt advice and information package” means the debt advice and information package referred to in section 10(5) of the Debt Arrangement and Attachment (Scotland) Act 2002 (asp 17).

(7) In subsection (3)(c)(iii), “the prescribed period” means such period, ending immediately before the date the debtor application is made, as may be prescribed under section 8(5)(c).

3 Sequestration of estate of deceased debtor[j132.doc]

The sequestration of the estate of a deceased debtor is 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,
- (c) a temporary administrator,
- (d) a member State liquidator appointed in main proceedings, or
- (e) a trustee acting under a trust deed.

4 Sequestration of other estates[j001.doc]

(1) 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,
- (d) an unincorporated body,
- (e) a limited partnership (including a dissolved limited partnership) within the meaning of the Limited Partnerships Act 1907 (c.24).

(2) But it is not competent to sequestrate the estate of any of the following entities—

- (a) a company registered under the Companies Act 2006 (c.46),

- (b) a limited liability partnership, or
- (c) any other entity if it is 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 is—
- 5 (a) by debtor application made by a majority of trustees, with the concurrence of a qualified creditor or qualified creditors, or
- (b) on the petition of—
- (i) a temporary administrator,
- (ii) a member State liquidator appointed in main proceedings, or
- 10 (iii) a qualified creditor or qualified creditors, if the trustees as such are apparently insolvent.
- (4) The sequestration of the estate of a partnership is—
- (a) by debtor application made by the partnership with the concurrence of a qualified creditor, or
- 15 (b) on the petition of—
- (i) a temporary administrator,
- (ii) a member State liquidator appointed in main proceedings,
- (iii) a trustee acting under a trust deed, or
- 20 (iv) a qualified creditor or qualified creditors, if the partnership is apparently insolvent.
- (5) A petition under subsection (4)(b) may be combined with a petition for the sequestration of the estate of any of the partners as an individual natural person where that person is apparently insolvent.
- (6) The sequestration of the estate of a body corporate or of an unincorporated body is—
- 25 (a) by debtor application made by a person authorised to act on behalf of the body, with the concurrence of a qualified creditor or qualified creditors, or
- (b) on the petition of—
- (i) a temporary administrator,
- (ii) a member State liquidator appointed in main proceedings, or
- 30 (iii) 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 is subject to such modifications as may be prescribed.
- (8) Subsection (3) of section 6 applies for the purposes of this section as it applies for the purposes of that section.
- 35 (9) Section 9(3) to (6) applies for the purposes of this section as it applies for the purposes of sections 2, 3 and 6.

5 Qualified creditor and qualified creditors[j134.doc]

(1) In this Act—

“qualified creditor” means a creditor who, at the date of the presentation of the petition, or as the case may be at the date the debtor application is made, is a creditor of the debtor in respect of relevant debts which amount (or of one such debt which amounts) to not less than £3,000 or such sum as may be prescribed, and

“qualified creditors” means creditors who, at the date in question, are creditors of the debtor in respect of relevant debts which amount in aggregate to not less than £3,000 or such sum as may be prescribed.

(2) In the definitions of “qualified creditor” and “qualified creditors” in subsection (1) “relevant debts” means liquid or illiquid debts (other than contingent or future debts or amounts payable under a confiscation order) whether secured or unsecured.

(3) In subsection (2), “confiscation order” means a confiscation order under Part 2, 3 or 4 of the Proceeds of Crime Act 2002 (c.29).

(4) Paragraphs 1(1) and (3), 2(1)(a) and (2) and 6 of schedule 1 apply in order to ascertain the amount of the debt or debts for the purposes of subsection (1) as those paragraphs 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 or, as the case may be, the date the debtor application is made.

6 Debtor applications: general[j133.doc]

(1) A debtor application—

- (a) is to be made to the Accountant in Bankruptcy, and
- (b) is to be in such form as may be prescribed.

(2) The Scottish Ministers may, by regulations, make provision—

- (a) in relation to the procedure to be followed in a debtor application (in so far as not provided for in this Act),
- (b) prescribing the form of any document that may be required for the purposes of making a debtor application, and
- (c) prescribing the fees and charges which may be levied by the Accountant in Bankruptcy in relation to a debtor application.

(3) The debtor (“D”) is to send a statement of assets and liabilities to the Accountant in Bankruptcy along with the application.

(4) If D, not being an entity mentioned in section 4(1)—

- (a) fails to send such a statement along with the application,
- (b) fails in such a statement to disclose a material fact, or
- (c) makes in such a statement a material misstatement,

then D is guilty of an offence and is 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 both to such fine and such imprisonment.

- (5) In any proceedings for an offence under subsection (4), it is a defence to show that the accused had a reasonable excuse for the failure in question or as the case may be for making the statement in question.

7 Debtor applications by low income and low asset debtors[j011.doc]

- 5 (1) The conditions referred to in section 2(3)(c)(ii) are—
- (a) that the debtor does not own any land,
 - (b) that the debtor's weekly income (if any), as at the date the debtor application is made, does not exceed £100 or such other amount as may be prescribed, and
 - 10 (c) that the total value of the debtor's assets (leaving out of account any liabilities) as at that date does not exceed £1,000 or such other amount as may be prescribed.
- (2) The Scottish Ministers may by regulations—
- (a) make provision as to how a debtor's weekly income is to be determined,
 - (b) provide that particular descriptions of income are to be excluded for the purposes of subsection (1)(b),
 - 15 (c) make provision as to how the value of a debtor's assets is to be determined,
 - (d) provide that particular descriptions of asset are to be excluded for the purposes of subsection (1)(c),
 - (e) make different provision for different categories of debtor,
 - 20 (f) add further conditions which must be met before a debtor application may be made by virtue of section 2(3)(c)(ii), and
 - (g) where such further conditions are added, remove or otherwise vary those further conditions.

8 Certificate for sequestration[j153.doc]

- 25 (1) A certificate for sequestration of the estate of a debtor ("D") is a certificate granted by an authorised person certifying that D is unable to pay debts as they become due.
- (2) A certificate may be granted only on D's application.
- (3) An authorised person must grant a certificate if, and only if, D can demonstrate that D is unable to pay debts as they become due.
- 30 (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—
 - 35 (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 2(3)(c)(iii).

9 Death or withdrawal[j135.doc]

- (1) Where, after a petition for sequestration is presented but before the sequestration is awarded, the debtor dies then, if the petitioner is a creditor, the proceedings are to continue in accordance with this Act so far as circumstances will permit.
- (2) Where, after a debtor application is made but before the sequestration is awarded, the debtor dies then the application falls.
- (3) Where, after a petition for sequestration is presented but before the sequestration is awarded, a creditor (“P”) who is the petitioner withdraws or dies, there may be sisted in the place of P any creditor who both was a qualified creditor at the date when the petition was presented and is a qualified creditor at the date of the sist.
- (4) Where, after a petition for sequestration is presented but before the sequestration is awarded, a creditor (“L”) who has lodged answers to the petition withdraws or dies, there may be sisted in the place of L any other creditor.
- (5) Where, after a debtor application is made but before the sequestration is awarded, a creditor (“C”) who concurs in the application withdraws or dies, any other creditor (“O”) may, if the conditions mentioned in subsection (6) are met, notify the Accountant in Bankruptcy that O concurs in the application in place of C.
- (6) The conditions are that O both was a qualified creditor at the date when the debtor application was made and is a qualified creditor at the date of the notification.

10 Petition for sequestration of estate: provision of information[j002.doc]

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

11 Debtor application: provision of information[j003.doc]

- (1) Where a debtor application is made, the debtor (“D”) is to state in the application—
- (a) whether or not D’s centre of main interests is situated—
 - (i) in the United Kingdom, or
 - (ii) in another member State, and
 - (b) whether or not D possesses an establishment—
 - (i) in the United Kingdom, or
 - (ii) in another member State.

- (2) If, to D's knowledge, there is a member State liquidator appointed in main proceedings in relation to D, D is, as soon as reasonably practicable, to send a copy of the debtor application to that member State liquidator.

12 Further provisions relating to presentation of petitions[j004.doc]

- (1) The petitioner is, on the day the petition for sequestration is presented under section 2, 3 or 4, to send a copy of the petition to the Accountant in Bankruptcy.

- (2) A petition for the sequestration of the estate of a debtor (other than a deceased debtor) may be presented—

(a) at any time by—

- (i) a trustee acting under a trust deed,
- (ii) a temporary administrator, or
- (iii) 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;

but this subsection is subject to subsection (3).

- (3) A petition for the sequestration of the estate of a limited partnership may be presented within such time as may be prescribed.

- (4) A petition for the sequestration of the estate of a deceased debtor may be presented—

(a) at any time by—

- (i) an executor of the estate,
- (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—

- (i) at any time, in a case where the apparent insolvency of the debtor founded on in the petition was constituted within 4 months before the date of death,
- (ii) not earlier than 6 months after the date of death, in any other case (whether or not apparent insolvency has been constituted).

- (5) If an executor ("E") does not petition for sequestration of a deceased debtor's estate, or for the appointment of a judicial factor to administer the estate, within a reasonable period after E knew or ought to have known that the estate was absolutely insolvent and likely to remain so, any intromission by E with the estate after the expiry of that period is deemed an intromission without a title.

- (6) The presentation of a petition for sequestration bars the effect of any enactment or rule of law relating to the limitation of actions.

- (7) Where, before sequestration is awarded, it becomes apparent that a petitioning creditor ("C") was ineligible to petition, C is to withdraw, or as the case may be withdraw from, the petition; but another creditor may be sisted in C's place.

13 Further provisions relating to debtor applications[j005.doc]

- (1) A debtor application may be made at any time; but this subsection is subject to subsection (2).
- (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) A debtor application's being—
- (a) made, or
 - (b) concurred in,
- bars 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 ("C") concurring in a debtor application was ineligible to concur the Accountant in Bankruptcy is to withdraw C from the application.
- (5) But another creditor ("CC") may concur in place of C; and if CC does concur in place of C, CC is to notify the Accountant in Bankruptcy of that fact.
- (6) Concurrence in a debtor application bars the effect of any enactment or rule of law relating to the limitation of actions.

*Jurisdiction***14 Petition or debtor application for sequestration of estate: jurisdiction[j006.doc]**

- (1) Where a petition is presented for the sequestration of the estate of a debtor (whether living or deceased), the sheriff has jurisdiction if, at the relevant time, the debtor—
- (a) had an established place of business in the sheriffdom, or
 - (b) was habitually resident in the sheriffdom.
- (2) The Accountant in Bankruptcy may determine a debtor application for the sequestration of the estate of a living debtor if, at the relevant time, the debtor—
- (a) had an established place of business in Scotland, or
 - (b) was habitually resident in Scotland.
- (3) Where a petition is presented for the sequestration of the estate of an entity which may be sequestrated by virtue of section 4, the sheriff has jurisdiction if the entity—
- (a) had at the relevant time an established place of business in the sheriffdom, or
 - (b) was constituted or formed under Scots law and at any time carried on business in the sheriffdom.
- (4) The Accountant in Bankruptcy may determine a debtor application for the sequestration of the estate of such an entity if the entity—
- (a) had at the relevant time an established place of business in Scotland, or
 - (b) was constituted or formed under Scots law and at any time carried on business in Scotland.

- (5) Notwithstanding that a person (“P”) (whether living or deceased) does not fall within subsection (1), the sheriff has jurisdiction in respect of the sequestration of P’s estate if—
- (a) a petition has been presented for the sequestration of the estate of a firm of which P is, or was at the relevant time before his decease, a partner, and
 - (b) the process of that sequestration is still current.
- (6) Any proceedings under this Act which—
- (a) may be brought before a sheriff, and
 - (b) relate either to a debtor application or to the sequestration of a debtor’s estate following any such application,
- are to be brought before the sheriff who, under subsection (1) or (3), would have jurisdiction in respect of a petition for sequestration of the debtor’s estate.
- (7) References in this section to “the relevant time” are to any time in the year immediately preceding (as the case may be)—
- (a) the date of presentation of the petition,
 - (b) the date the debtor application is made, or
 - (c) the date of death.
- (8) This section is subject to Article 3 of the EC Regulation.

Meaning of apparent insolvency

15 Meaning of apparent insolvency[j000.doc]

- (1) The apparent insolvency of a debtor (“D”) is constituted (or, where D is already apparently insolvent, again constituted) whenever—
- (a) D’s estate is sequestrated,
 - (b) D is adjudged bankrupt in England and Wales or in Northern Ireland,
 - (c) D, not being a person whose property is for the time being affected by a restraint order, detained under or by virtue of a relevant detention power or subject to a confiscation or charging order, gives written notice to D’s creditors that D has ceased to pay D’s debts in the ordinary course of business,
 - (d) D becomes subject to main proceedings in a member State other than the United Kingdom,
 - (e) any of the following occurs—
 - (i) D grants a trust deed,
 - (ii) following the service on D of a duly executed charge for payment of a debt, the days of charge expire without payment,
 - (iii) a debt constituted by a decree or document of debt (as defined in section 10 of the Debt Arrangement and Attachment (Scotland) Act 2002 (asp 17)) is being paid by D under a debt payment programme under that Act and the programme is revoked,
- unless the circumstances are shown to be such as are mentioned in subsection (2), or

- (f) a creditor of D, in respect of a liquid debt which amounts to (or liquid debts which in aggregate amount to) not less than £750 or such sum as may be prescribed, serves on D, by personal service by an officer of court, a demand in the prescribed form requiring D either to pay the debt (or debts) or to find security for its (or their) payment and the condition set out in subsection (3) is met.
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- (2) The circumstances are—
- (a) that at the time of the occurrence, D was able and willing to pay D's debts as they became due, or
- (b) that, but for D's property being affected by a restraint order or being subject to a confiscation order or charging order, D would at that time have been able to pay those debts as they became due.
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- (3) The condition is that within 3 weeks after the date of service D does not—
- (a) comply with the demand, or
- (b) intimate to the creditor, by recorded delivery, that D—
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- (i) denies that there is a debt, or
- (ii) denies that the sum claimed by the creditor as the debt is immediately payable.
- (4) D's apparent insolvency continues—
- (a) if constituted under paragraph (a) or (b) of subsection (1), until D's discharge,
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- (b) if constituted under paragraph (c), (e) or (f) of that subsection, until D becomes able to pay D's debts and pays them as they become due, or
- (c) if constituted under paragraph (d) that subsection, until the main proceedings end.
- (5) The apparent insolvency of a partnership is constituted (or as the case may be again constituted) either—
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- (a) in accordance with subsection (1), or
- (b) if any of the partners is apparently insolvent for a debt of the partnership.
- (6) The apparent insolvency of an unincorporated body is constituted (or as the case may be again constituted) either—
- (a) if a person representing the body is apparently insolvent for a debt of the body, or
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- (b) if a person holding property for the body in a fiduciary capacity is apparently insolvent for such a debt.
- (7) Notwithstanding subsection (2) of section 4, the apparent insolvency of an entity such as is mentioned in that subsection may be constituted (or as the case may be again constituted) under subsection (1); and any reference to D in subsections (1) to (4) is, except where the context otherwise requires, to be construed as including a reference to such an entity.
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- (8) In this section—
- “charging order” has the meaning assigned to it by section 78(2) of the Criminal Justice Act 1988 (c.33) or by section 27(2) of the Drug Trafficking Act 1994 (c.37),
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“confiscation order” and “restraint order” mean a confiscation order, or as the case may be a restraint order, made under Part 2, 3 or 4 of the Proceeds of Crime Act 2002 (c.29),

“liquid debt” does not include a sum payable under a confiscation order, and

“relevant detention power” means section 44A, 47J, 47K, 47M, 47P, 122A, 127J, 127K, 127M, 127P, 193A, 195J, 195K, 195M or 195P of that Act of 2002.

Concurrent proceedings

16 Duty to notify existence of concurrent proceedings for sequestration or analogous remedy[j007.doc]

(1) If, in the course of sequestration proceedings (referred to in this section and in section 17 as the “instant proceedings”) a person (“P”) who is—

- (a) a petitioner for sequestration,
- (b) the debtor, or
- (c) a creditor concurring in a debtor application,

is, or becomes, aware of any of the circumstances mentioned in subsection (2), P is as soon as possible to take the action mentioned in subsection (3).

(2) The circumstances are that, notwithstanding the instant proceedings—

- (a) a petition for sequestration of the debtor’s estate is before a sheriff,
- (b) such sequestration has been awarded,
- (c) a debtor application has been made in relation to the debtor’s estate,
- (d) sequestration has been awarded by virtue of any such application,
- (e) a petition for the appointment of a judicial factor on the debtor’s estate is before a court,
- (f) such a judicial factor has been appointed,
- (g) a petition is before a court for the winding up of the debtor under Part 4 or 5 of the Insolvency Act 1986 (c.45) or section 372 of the Financial Services and Markets Act 2000 (c.8),
- (h) an application for an analogous remedy in respect of the debtor’s estate is proceeding, or
- (i) such an analogous remedy is in force.

(3) The action is—

- (a) where the instant proceedings are by petition for sequestration, to notify the sheriff to whom that petition was presented of the circumstances in question,
- (b) where the instant proceedings are by debtor application, to notify the Accountant in Bankruptcy of those circumstances.

(4) A petitioner who fails to comply with subsection (1) may be made liable for the expenses of presenting the petition for sequestration.

- (5) A debtor who fails so to comply—
- (a) is guilty of an offence, and
 - (b) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.
- 5 (6) A creditor concurring in a debtor application who fails so to comply may be made liable for the expenses of making the debtor application.
- (7) In this section and in section 17, “analogous remedy” means—
- (a) in England and Wales—
 - 10 (i) a bankruptcy order under the Bankruptcy Act 1914 (c.59),
 - (ii) an individual voluntary arrangement or bankruptcy order under the Insolvency Act 1986 (c.45),
 - (iii) an administration order under section 112 of the County Courts Act 1984 (c.28), or
 - 15 (iv) a remedy having the like effect to any of those mentioned in subparagraphs (i) to (iii) or to sequestration, and
 - (b) in Northern Ireland or in any other country, a remedy having the like effect as a remedy mentioned in paragraph (a).

17 Powers in relation to concurrent proceedings for sequestration or analogous remedy[j008.doc]

- 20 (1) Where, in the course of instant proceedings which are by petition, any of the circumstances mentioned in paragraphs (a) to (g) of section 16(2) exists, the sheriff to whom the petition in the instant proceedings was presented may, on the sheriff’s own motion or at the instance of the debtor, of a creditor or of any other person having an interest—
- 25 (a) allow the petition to proceed,
 - (b) sist it, or
 - (c) dismiss it.
- 30 (2) Without prejudice to subsection (1), where, in the course of such instant proceedings, any of the circumstances mentioned in paragraph (a) (b), (e), (f) or (g) of section 16(2) exists, the Court of Session may, on the Court’s own motion or on the application of the debtor, of a creditor or of any other person having an interest—
- 35 (a) 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
 - (b) order the petitions to be heard together.
- 40 (3) Without prejudice to subsection (1), where, in the course of such instant proceedings, any of the circumstances mentioned in paragraph (c) or (d) of section 16(2) exists, the sheriff to whom the petition in the instant proceedings was presented may, on the sheriff’s own motion or at the instance of the debtor, of a creditor or of any 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 (g) of section 16(2) exists, the Accountant in Bankruptcy may dismiss the debtor application in the instant proceedings.
- (5) Subsection (6) applies where, in respect of the same estate—
- 5 (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.
- (6) The sheriff, on the sheriff's own motion or at the instance of the debtor, of a creditor or of any other person having an interest, may allow the petition for sequestration to
- 10 proceed or may sist or dismiss it.
- (7) Subsection (8) applies where, in respect of the same estate—
- (a) a debtor application has been made and is not yet determined, and
- (b) an application for an analogous remedy is proceeding or an analogous remedy is in force.
- 15 (8) The Accountant in Bankruptcy may proceed to determine the application or may dismiss it.

Creditor's oath

18 Creditor's oath[j009.doc]

- (1) Every creditor ("C"), being—
- 20 (a) a petitioner for sequestration,
- (b) a creditor who concurs in a debtor application, or
- (c) a qualified creditor who becomes sisted under subsection (3) of section 9 (or under that subsection as applied by section 4(8)),
- is to produce an oath, in the prescribed form, made by C or on C's behalf.
- 25 (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—
- 30 (i) a British diplomatic or consular officer, or
- (ii) any person authorised to administer an oath or affirmation under the law of the place where the oath is made.
- (3) The identity of C and the identity of the person before whom the oath is made, and their authority to make and to administer the oath respectively, are presumed to be correctly stated unless the contrary is established.
- 35 (4) Any seal or signature on the oath is presumed to be authentic unless the contrary is established.

- (5) If the oath contains an error or has omitted a fact—
- (a) the sheriff to whom the petition was presented, or
 - (b) in the case of a creditor concurring in a debtor application, the Accountant in Bankruptcy,
- 5 may at any time before sequestration is awarded allow another oath to be produced rectifying the original oath.
- (6) This section applies to the making of that other oath as it applies to the making of the original oath.
- (7) C must produce, along with the oath—
- 10 (a) an account or voucher (according to the nature of the debt) which constitutes *prima facie* evidence of the debt, and
 - (b) if a petitioning creditor, such evidence as is available to C to show the apparent insolvency of the debtor.

PART 2

AWARD OF SEQUESTRATION ETC.

Award of sequestration

19 When sequestration is awarded[j025.doc]

- (1) The Accountant in Bankruptcy, on a debtor application being made, is to award sequestration without delay if satisfied—
- 20 (a) that the application is made in accordance with—
 - (i) this Act, and
 - (ii) any provisions made under this Act,
 - (b) that subsection (3) of section 2 applies to the debtor, and
 - (c) that the provisions of subsection (3) of section 6 have been complied with.
- 25 (2) The sheriff, where a petition for sequestration of the estate of a debtor (“D”) is presented by a creditor, or by a trustee acting under a trust deed, is to grant warrant to cite D to appear before the sheriff on such date as is specified in the warrant (being a date no fewer than 6 nor more than 14 days after the date of citation) to show cause why sequestration should not be awarded.
- 30 (3) And where on that petition the sheriff is satisfied—
- (a) if D has not appeared, that proper citation has been made of D,
 - (b) that the petition has been presented in accordance with this Act,
 - (c) that the provisions of subsection (1) of section 12 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
 - 35 (e) that in the case of a petition by a trustee, the averments in the trustee’s petition as to any of the conditions in subsection (2) of section 2 are true,
- the sheriff is to award sequestration without delay.
- (4) But subsection (3) is subject to subsections (5) to (7).

- (5) Sequestration is not to be awarded in pursuance of subsection (3) if—
- (a) cause is shown why sequestration cannot competently be awarded,
 - (b) without delay, D 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 D became apparently insolvent, and
 - (ii) any other debt due by D to the petitioner and to any creditor concurring in the petition.
- (6) Where the sheriff is satisfied that D will, before the expiry of the period of 42 days beginning with the day D appears before the sheriff, pay or satisfy the debts mentioned in sub-paragraphs (i) and (ii) of subsection (5)(b), the sheriff may continue the petition for a period of no more than 42 days.
- (7) Where the sheriff is satisfied—
- (a) that a debt payment programme (within the meaning of Part 1 of the Debt Arrangement and Attachment (Scotland) Act 2002 (asp 17) relating to—
 - (i) the debt in respect of which the debtor became apparently insolvent, and
 - (ii) any other debt due by the debtor to the petitioner and to any creditor concurring in the petition,has been applied for and has not yet been approved or rejected, or
 - (b) that such a debt payment programme will be applied for,
- the sheriff may continue the petition for such period as the sheriff thinks fit.
- (8) In this Act, “the date of sequestration” means—
- (a) where a debtor application is made, the date on which sequestration is awarded,
 - (b) where the petition for sequestration is presented by a creditor, or by a trustee acting under a trust deed, and sequestration is awarded, the date on which the sheriff granted warrant under subsection (2) (or, where more than 1 warrant is so granted, the date on which the first warrant is so granted).

20 **Effect of sequestration on land attachment**[j136.doc]

- (1) No land attachment of the heritable property of a debtor (“D”) created within the period of six months before the date of sequestration (whether or not subsisting at that date) is effectual to create a preference for the creditor.
- (2) A creditor who creates a land attachment within the period of 6 months mentioned in subsection (1) is entitled to payment, out of the attached land or out of the proceeds of sale of it, of the expenses incurred—
- (a) in obtaining the extract of the decree, or other document, containing the warrant for land attachment, and
 - (b) in—
 - (i) serving the charge for payment,
 - (ii) registering the notice of land attachment,

- (iii) serving a copy of that notice, and
- (iv) registering certificate of service of that copy.

(3) A notice of land attachment registered—

- (a) on or after the date of sequestration against land forming part of D's heritable estate (including any estate vesting under section 59(4) in the trustee in the sequestration), or
- (b) before that date and in relation to which, by that date, no land attachment is created,

is of no effect.

(4) It is not competent for a creditor to insist in a land attachment—

- (a) created over D's heritable estate before the beginning of the period of 6 months mentioned in subsection (1), and
- (b) which subsists on the date of sequestration.

(5) But subsection (4) is subject to subsections (6) to (9).

(6) Where, in execution of a warrant for sale, a contract to sell the land has been concluded—

- (a) the trustee is to concur in and ratify the deed implementing that contract, and
- (b) the appointed person is to account for and pay to the trustee in the sequestration any balance of the proceeds of sale (being the balance which would, but for the sequestration, be due to the debtor) after disbursing those proceeds in accordance with section 116 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 (asp 3) (disbursement of proceeds of sale of attached land).

(7) Subsection (6) does not apply where the deed implementing the contract is not registered before the expiry of the period of 28 days beginning with the day on which—

- (a) the certified copy of the order of the sheriff granting warrant is recorded, under subsection (1)(a) of section 22, in the register of inhibitions, or
- (b) the certified copy of the determination of the Accountant in Bankruptcy awarding sequestration is recorded, under subsection (2) of that section, in that register.

(8) Where a decree of foreclosure has been granted but an extract of it has not been registered, the creditor may proceed to complete title to the land by registering that extract provided that the creditor does so before the expiry of the period mentioned in subsection (7).

(9) The Scottish Ministers may (as they think fit) prescribe—

- (a) such other period for the period mentioned in subsection (7), and
- (b) different periods for the purposes of that subsection and subsection (8).

(10) Expressions used in this section which also occur in Chapter 2 of Part 4 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 (asp 3) have the same meanings in this sections as they have in that Chapter.

21 Further provision as regards the effect of sequestration on diligence[j120.doc]

- 5 (1) The order of the sheriff, or as the case may be the determination of the debtor application by the Accountant in Bankruptcy, awarding sequestration has as from the date of sequestration, in relation to diligence done (whether before or after that date) in respect of any part of the estate of the debtor (“D”), the effect mentioned in subsection (2).
- (2) The effect is of—
- 10 (a) an arrestment in execution and decree of furthcoming,
- (b) an arrestment in execution and warrant of sale, and
- (c) an attachment,
- in favour of the creditors according to their respective entitlements.
- (3) Where an inhibition on the estate of D takes effect within the period of 60 days before the date of sequestration, any relevant right of challenge vests, at the date of sequestration, in the trustee in the sequestration as does any right of the inhibitor to receive payment for the discharge of the inhibition.
- 15 (4) But subsection (3) neither entitles the trustee to receive any payment made to the inhibitor before the date of sequestration nor affects the validity of anything done before that date in consideration of such payment.
- (5) In subsection (3), “any relevant right of challenge” means any right to challenge a deed voluntarily granted by D if it is a right which vested in the inhibitor by virtue of the inhibition.
- 20 (6) No arrestment, money attachment, interim attachment or attachment of D’s estate (including any estate vesting in the trustee under section 59(4)) executed—
- 25 (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 that date,
- is effectual to create a preference for the arrester or attacher.
- (7) The estate so arrested or attached is, or any funds released under section 73J(2) of the Debtor’s (Scotland) Act 1987 (c. 18) (autonomous release of funds) or the proceeds of sale of such estate are, to be handed over to the trustee.
- 30 (8) An arrester or attacher whose arrestment, money attachment, interim attachment or attachment is executed within the period mentioned in subsection (6)(a) is entitled to payment, out of the arrested or attached estate or out of the proceeds of the sale of such estate, of the expenses incurred—
- 35 (a) in obtaining—
- (i) warrant for interim attachment, or
- (ii) the extract of the decree or other document on which the arrestment, money attachment or attachment proceeded,
- 40 (b) in executing the arrestment, money attachment, interim attachment or attachment, and
- (c) in taking any further action in respect of the diligence.

(9) Nothing in subsections (6) to (8) applies to an earnings arrestment, a current maintenance arrangement, a conjoined arrestment order or a deduction from earnings order under the Child Support Act 1991 (c.48).

(10) No poiding of the ground in respect of D's estate (including any estate vesting in the trustee under section 59(4)) executed—

(a) within the period of 60 days before the date of sequestration, or

(b) on or after that date,

is effectual in a question with the 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 1 year immediately before the commencement of that term.

(11) The preceding provisions of this section and subsections (1) and (2) of section 20 apply to the estate of a deceased debtor which—

(a) has been sequestrated within 12 months after the date of death, or

(b) was absolutely insolvent at that date and in respect of which a judicial factor has been appointed under section 11A of the Judicial Factors (Scotland) Act 1889 (c.39) within 12 months after that date,

but with the modifications mentioned in subsection (12).

(12) The modifications are that—

(a) for any reference to the date of sequestration there is substituted a reference to the date of death, and

(b) in subsection (1) (of this section), before the word “debtor”, where it occurs for the second time, there is inserted “deceased”.

(13) It is not competent, on or after the date of sequestration, for any creditor to be confirmed as executor-creditor on the estate.

(14) Subsections (15) and (16) apply where, within 12 months after D's death—

(a) D's estate is sequestrated, or

(b) a judicial factor is appointed under section 11A of the Judicial Factors (Scotland) Act 1889 to administer D's estate and that estate is absolutely insolvent.

(15) No confirmation as executor-creditor on that estate at any time after D's death is effectual in a question with the trustee or the judicial factor.

(16) But the executor-creditor is entitled—

(a) out of the estate, or

(b) out of the proceeds of sale of the estate,

to the expenses incurred by the executor-creditor in obtaining the confirmation.

22 Registration of warrant or determination of debtor application[j100.doc]

(1) On the sheriff granting warrant under section 19(2) the sheriff clerk is, without delay, to send—

(a) a certified copy of the order granting the warrant to the keeper of the register of inhibitions for recording in that register,

- (b) a copy of that order to the Accountant in Bankruptcy (“AiB”), and
- (c) where the debtor is taking part in a debt payment programme under Part 1 of the Debt Arrangement and Attachment (Scotland) Act 2002 (asp17), a copy of that order to the DAS administrator.

- 5 (2) On awarding sequestration on a debtor application AiB is, without delay, to send a certified copy of AiB’s determination of the application to the keeper of the register of inhibitions for recording in that register.
- (3) Recording under subsection (1)(a) or (2) has the effect, as from the date of sequestration, of an inhibition of the debtor’s heritable estate at the instance of the creditors who
10 subsequently have claims in the sequestration accepted under section 88.
- (4) The effect mentioned in subsection (3) expires—
- (a) on the recording under section 23(8)(a) of a certified copy of an order refusing to award sequestration or under section 25(11)(a) of a certified copy of an order recalling an award of sequestration,
 - 15 (b) on the recording under paragraph 13(4)(a) of schedule 3 of a certified copy of a certificate discharging the debtor, or
 - (c) (if the effect has not earlier expired by virtue of paragraph (a) or (b)), at the end of the period of 3 years beginning with the date of sequestration.
- (5) But paragraph (c) of subsection (4) is subject to subsection (6).
- 20 (6) The trustee in the sequestration (if not discharged) may, before the end of the period mentioned in that paragraph, send a memorandum in a form prescribed by act of sederunt to the keeper of the register of inhibitions for recording in that register; and such recording renews the effect mentioned in subsection (3).
- (7) The effect continues to be preserved only if such a memorandum is so recorded before
25 the expiry of every subsequent period of 3 years.
- (8) In subsection (1)(c), “DAS administrator” has the meaning given by regulation 2(1) of the Debt Arrangement Scheme (Scotland) Regulations 2011 (S.S.I. 2011 No. 141).

23 Further provisions relating to award of sequestration[j101.doc]

- 30 (1) On application the sheriff may, at any time after sequestration has been awarded, transfer the sequestration to any other sheriff.
- (2) But subsection (1) is subject to subsection (3).
- (3) The debtor may, with the leave of the sheriff, appeal to the sheirff principal against such a transfer.
- (4) Where the sheriff makes an order refusing to award sequestration, the petitioner may
35 appeal against the order within 14 days after the date on which the order is made.
- (5) Where the Accountant in Bankruptcy, on determining a debtor application, refuses to award sequestration the debtor, or a creditor concurring in the application, may appeal to the sheriff against the determination within 14 days after the date on which the determination is made.
- 40 (6) An award of sequestration is not subject to review otherwise than by recall under sections 24 and 25.
- (7) But subsection (6) is without prejudice to any right to bring an action of reduction of an award of sequestration.

- (8) Where a petition for sequestration is presented by a creditor, or by a trustee acting under a trust deed, the sheriff clerk is—
- (a) on the final determination or the abandonment of any appeal under subsection (4) in relation to the petition, or (if there is no such appeal) on the expiry of the 14 days mentioned in that subsection, to send a certified copy of the order refusing to award sequestration to the keeper of the register of inhibitions for recording in that register,
- (b) to send without delay a copy of that order to—
- (i) the Accountant in Bankruptcy, and
- (ii) where the debtor is taking part in a debt payment programme under Part 1 of the Debt Arrangement and Attachment (Scotland) Act 2002 (asp17), the DAS administrator.
- (9) Where sequestration has been awarded the process of sequestration is not to fall asleep.
- (10) Where a debtor (“D”) learns, whether before or after the date of sequestration, that D may derive benefit from another estate, D is as soon as practicable after that date—
- (a) to inform the trustee in the sequestration of that fact, and
- (b) to inform the person who is administering that other estate of the sequestration.
- (11) If D fails to comply with subsection (10) then D is guilty of an offence and is liable, on summary conviction, to a fine not exceeding level 5 on the standard scale.
- (12) In subsection (8)(b)(ii), “DAS administrator” has the meaning given by regulation 2(1) of the Debt Arrangement Scheme (Scotland) Regulations 2011 (2011 No. 141).

Recall of sequestration

24 Petitions for recall of sequestration[j106.doc]

- (1) A petition for recall of an award of sequestration may be presented to the sheriff by—
- (a) the debtor, any creditor or any other person having an interest (whether or not a person who was a petitioner for, or concurred in a debtor application for, the sequestration), or
- (b) the trustee in the sequestration or the Accountant in Bankruptcy.
- (2) The petitioner is to serve upon—
- (a) the debtor,
- (b) any person who was a petitioner for, or concurred in a debtor application for, the sequestration,
- (c) the trustee, and
- (d) 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 after service of the notice.

- (3) At the same time as service is made under subsection (2), the petitioner is to publish a notice in the Edinburgh Gazette stating that—
- (a) a petition has been presented under this section, and
 - (b) any person having an interest may lodge answers to the petition within 14 days after publication of the notice.
- (4) A petition under this section may be presented—
- (a) within 10 days after the date of the award of sequestration,
 - (b) at any time if presented on any of the grounds mentioned in paragraphs (a) to (c) of section 25(2).
- (5) But subsection (4) is subject to sections 77(3) and 78(3).
- (6) Notwithstanding that a petition has been presented under this section, the proceedings in the sequestration are to continue as if the petition had not been presented until the recall is granted.
- (7) But subsection (6) is subject to section 25(9).
- (8) Where a petitioner under this section, or a person who has lodged answers to the petition, withdraws or dies, any person—
- (a) entitled to present, or
 - (b) (as the case may be) lodge answers to,
- a petition under this section may be sisted in place of the person who has withdrawn or died.

25 Recall of sequestration[j107.doc]

- (1) The sheriff may recall an award of sequestration if satisfied that in all the circumstances of the case (including those arising after the date of the award) it is appropriate to do so.
- (2) Without prejudice to the generality of subsection (1), the sheriff may recall the award if satisfied—
- (a) that the debtor (“D”) has paid D’s debts in full or has given sufficient security for their payment,
 - (b) that 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) that another award—
 - (i) of sequestration of the estate, or
 - (ii) of an analogous remedy (as defined in section 16(7)),has (or other such awards have) been granted.
- (3) Where another award of sequestration of the debtor’s estate has been granted, the sheriff may, after such intimation as the sheriff considers necessary, recall an award (whether or not the award in respect of which the petition for recall was presented).

- (4) On recalling an award of sequestration, the sheriff—
- (a) is to make provision for the payment of the outlays and remuneration of the trustee in the sequestration and of any interim trustee—
 - (i) by directing that such payment is to be made out of the debtor's estate, or
 - (ii) by requiring that a person who was a party to the petition for sequestration, or as the case may be to the debtor application, is to pay the whole or any part of those outlays and remuneration,
 - (b) may direct that payment of the expenses of a creditor who was a petitioner for sequestration, or concurred in the debtor's application for sequestration, is to be made out of the debtor's estate, and
 - (c) may make any further order the sheriff considers necessary or reasonable in all the circumstances of the case.
- (5) But paragraph (b) of subsection (4) is without prejudice to subsection (10).
- (6) The effect of the recall of an award of sequestration is, so far as practicable, to restore the debtor and any other person affected by the sequestration to the position the debtor, or as the case may be the other person, would have been in if the sequestration had not been awarded.
- (7) But subsection (6) is subject to subsection (8).
- (8) A recall of an award of sequestration is not to—
- (a) affect the interruption of prescription caused by—
 - (i) the presentation of the petition for sequestration,
 - (ii) the making of the debtor application, or
 - (iii) the submission of a claim under section 32 or 84,
 - (b) invalidate any transaction entered into before such recall by the interim trustee, or by the trustee in the sequestration, with a person acting in good faith, or
 - (c) affect a bankruptcy restrictions order which has not been annulled under section 113(1)(a).
- (9) Where the sheriff considers that it is inappropriate to recall, or to refuse to recall, an award of sequestration at once, the sheriff may order that the proceedings in the sequestration are to continue but are to be subject to such conditions as the sheriff may think fit.
- (10) The sheriff may make such order in relation to the expenses in a petition for recall as the sheriff thinks fit.
- (11) The sheriff clerk is to send—
- (a) a certified copy of any order recalling an award of sequestration to the keeper of the register of inhibitions for recording in that register, and
 - (b) a copy of any order recalling, or refusing to recall, an award of sequestration or a copy of any order under section 77(3)(b) or 78(3)(b) to—
 - (i) the Accountant in Bankruptcy, and
 - (ii) if the Accountant in Bankruptcy is not the trustee in the sequestration, to the trustee in the sequestration.

- (12) The trustee in the sequestration (whether or not the Accountant in Bankruptcy) is, on receiving a copy sent under subsection (11)(b), to insert the copy in the sederunt book.

PART 3

INITIAL STAGES OF SEQUESTRATION, STATUTORY MEETING AND TRUSTEE VOTE

Initial stages

26 Interim preservation of estate[j031.doc]

- (1) An interim trustee may, in pursuance of the function conferred by section 36(1), give general or particular directions to the debtor relating to the management of the debtor's estate.
- (2) In exercising the function so conferred, an interim trustee may—
- (a) require the debtor to deliver up to the interim trustee—
 - (i) any money or valuables, or
 - (ii) any document relating to the debtor's business or financial affairs, belonging to, or in the possession of, the debtor or under the debtor's control,
 - (b) place in safe custody anything mentioned in paragraph (a),
 - (c) require the debtor to deliver up to the interim trustee any perishable goods belonging to the debtor or under the debtor's control,
 - (d) arrange for the sale or disposal of such goods,
 - (e) make, or cause to be made, an inventory or valuation of any property belonging to the debtor,
 - (f) require the debtor to implement any transaction entered into by the debtor,
 - (g) effect or maintain insurance policies in respect of the business or property of the debtor,
 - (h) carry on any business of the debtor, or
 - (i) borrow money is so far as it is necessary for the interim trustee to do so to safeguard the debtor's estate.
- (3) Section 74 applies to an interim trustee as it applies to a trustee.
- (4) The sheriff, on the application of an interim trustee, may—
- (a) on cause shown, grant a warrant authorising the interim trustee to enter—
 - (i) the house where the debtor resides, or
 - (ii) the debtor's business premises,and to search for and take possession of anything mentioned in paragraph (a) or (c) of subsection (2) (if need be, by opening shut and lock-fast places), or
 - (b) make such other order to safeguard the debtor's estate as the sheriff thinks appropriate.

(5) The sheriff, on an application by the debtor on the grounds that a direction under subsection (1) is unreasonable, may—

- (a) if the sheriff considers the direction to be unreasonable, set it aside, and
- (b) in any event, give such directions to the debtor regarding the management of the debtor's estate as the sheriff considers appropriate,

but, subject to any interim order of the sheriff, the debtor is to comply with the direction appealed against pending the final determination of the appeal.

(6) If a debtor—

- (a) fails without reasonable excuse to comply with a direction under subsection (1) or (5)(b) or a requirement under subsection (2)(a), (c) or (f), or,
- (b) obstructs the interim trustee where the interim trustee is acting in pursuance of subsection (4)(a),

then the debtor is guilty of an offence.

(7) A person ("P") convicted of an offence under subsection (6) is liable—

- (a) on summary conviction, to a fine not exceeding the statutory maximum, or—
 - (i) in a case where P has previously been convicted of an offence inferring dishonest appropriation of property or an attempt at dishonest appropriation of property, to imprisonment for a term not exceeding 6 months, or
 - (ii) in any other case, to imprisonment for a term not exceeding 3 months,or both to a fine not exceeding the statutory maximum and to such imprisonment as is mentioned, in relation to the case in question, in sub-paragraph (i) or (ii), or
- (b) on conviction on indictment—
 - (i) to a fine, or
 - (ii) to imprisonment for a term not exceeding 2 years,or both to a fine and to such imprisonment.

27 Statement of assets and liabilities etc.[j032.doc]

(1) Where a debtor has made a debtor application then, not later than 7 days after the appointment of the trustee in the sequestration under section 37 (where the trustee is not the Accountant in Bankruptcy), the debtor is to send to the trustee such statement of assets and liabilities as was sent to the Accountant in Bankruptcy in pursuance of section 6(3).

(2) Where a petitioner for sequestration is a creditor, or a trustee acting under a trust deed, then, not later than 7 days after having been notified by the trustee as mentioned in section 37(15)(a) the debtor is to send to the trustee a statement of assets and liabilities.

(3) If the debtor—

- (a) fails to send, in accordance with subsection (1) or (2), a statement of assets and liabilities to the trustee,
- (b) fails to disclose a material fact in any such statement, or
- (c) makes a material misstatement in any such statement,

then the debtor is guilty of an offence.

- (4) A person convicted of an offence under subsection (3) is liable on summary conviction—
- (a) to a fine not exceeding level 5 on the standard scale, or
 - (b) to imprisonment for a term not exceeding 3 months,
- 5 or both to such fine and such imprisonment.
- (5) In any proceedings for an offence under subsection (3), it is a defence to show that the accused had a reasonable excuse for the failure to send, or as the case may be for the failure to disclose or for making the misstatement.

28 **Trustee's duties on receipt of list of assets and liabilities[j033.doc]**

- 10 (1) As soon as practicable after a trustee ("T") has received a statement of assets and liabilities—
- (a) T is to prepare a statement of the debtor's affairs so far as within the knowledge of T, and
 - 15 (b) if, in T's 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 90(1) T is so to indicate in the statement prepared under paragraph (a).
- (2) Not later—
- (a) than 4 days before the date fixed for the statutory meeting, or
 - 20 (b) where T does not intend to hold such a meeting, than 60 days after the date on which the sequestration is awarded,
- T is to send to the Accountant in Bankruptcy the statement, copy statement and comments mentioned in subsection (3).
- (3) The statement, copy statement and comments are—
- 25 (a) the statement of assets and liabilities (unless that statement has already been received by the Accountant in Bankruptcy by virtue of section 2(3)),
 - (b) subject to subsection (4), a copy of the statement prepared under paragraph (a) of subsection (1), and
 - 30 (c) written comments by T indicating what in T's opinion are the causes of the insolvency and to what extent the conduct of the debtor may have contributed to the insolvency.
- (4) T need not send the copy mentioned in paragraph (b) of subsection (3) if T has, in accordance with section 71(1)(c), sent a copy of the inventory and valuation to the Accountant in Bankruptcy.
- (5) The written comments made under paragraph (c) of subsection (3) are absolutely
- 35 privileged.
- (6) Subsections (2) and (5) do not apply in any case where the Accountant in Bankruptcy is the trustee.

*Statutory meeting***29 Statutory meeting[j034.doc]**

A meeting of creditors called under section 30 is, in this Act, referred to as “the statutory meeting”.

30 Calling of statutory meeting[j035.doc]

(1) The statutory meeting may be held at such time and place as the trustee in the sequestration (“T”) may determine.

(2) But subsection (1) is subject to subsections (6) and (7).

(3) Not later than—

(a) 60 days after the date on which sequestration is awarded, or

(b) such greater number of days after that date as the sheriff may, on cause shown, allow,

T is to give notice to every creditor known to T of whether or not T intends to call the statutory meeting.

(4) A notice under subsection (3)—

(a) is to be accompanied by a copy of T’s statement of the debtor’s affairs, and

(b) where T is notifying an intention not to hold the statutory meeting, is to inform creditors of the effect of subsections (5) and (6).

(5) Within 7 days after the giving of notice under subsection (3), any creditor may request T to call the statutory meeting.

(6) Where a request or requests under subsection (5) are made by not less than $\frac{1}{4}$ in value of the debtor’s creditors, T must call the statutory meeting not later than—

(a) 28 days after the date on which notice is given under subsection (3), or

(b) such greater number of days after that date as the sheriff may, on cause shown, allow.

(7) Where T gives notice under subsection (3) that T intends to call the statutory meeting, that meeting is to be called not later than 28 days after the date on which the notice is given.

(8) No fewer than 7 days before the date fixed for the statutory meeting, T—

(a) is to notify every creditor known to T of the date, time and place of the meeting, and

(b) must in the notification—

(i) invite the submission of such claims as have not already been submitted, and

(ii) inform the creditors of T’s duties under section 33(4).

- (9) The creditors may continue the statutory meeting to a date not later than—
- (a) 7 days after the date on which the period of 28 days mentioned in subsection (7) ends, or
 - (b) such greater number of days after that date as the sheriff may, on cause shown, allow.

5

31 Procedure where no statutory meeting called[j036.doc]

- (1) Where the trustee in the sequestration does not call the statutory meeting and the period of 7 days mentioned in section 30(5) expires, the trustee is, without delay, to make a report to the Accountant in Bankruptcy on the circumstance of the sequestration.
- (2) But subsection (1) does not apply if the Accountant in Bankruptcy is the trustee.

10

32 Submission of claims for voting purposes at statutory meeting[j037.doc]

- (1) For the purposes of voting at the statutory meeting a creditor (“C”) must, in accordance with this section, submit a claim to the trustee in the sequestration at or before the meeting.
- (2) C submits a claim under this section by producing to the trustee—
- (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.
- (3) But the trustee may dispense with any requirement under subsection (2) in respect of any debt or of any class of debt.
- (4) Where C neither resides, nor has a place of business, in the United Kingdom, the trustee—
- (a) is, if the trustee knows where C does reside or have a place of business and if no notification has been given to C under section 30(3), to write to C informing C that C may submit a claim under this section, and
 - (b) may allow C to submit an informal claim in writing.
- (5) If C has produced a statement of claim in accordance with subsection (2), C may at any time before the statutory meeting produce, in place of that statement of claim, another statement of claim specifying a different amount for C’s claim.
- (6) Subsections (7) and (8) apply where C produces under this section—
- (a) a statement of claim,
 - (b) account,
 - (c) voucher, or
 - (d) other evidence,
- which is false.
- (7) C is guilty of an offence unless C shows that C neither knew nor had reason to believe that the statement of claim, account, voucher or other evidence was false.

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- (8) The debtor is guilty of an offence if the debtor—
- (a) knew, or became aware, that the statement of claim, account, voucher or other evidence was false, and
 - (b) failed, as soon as practicable after acquiring such knowledge, to report to the trustee that the statement of claim, account, voucher or other evidence was false.
- (9) C may, in such circumstances as may be prescribed, state the amount of C's claim in foreign currency.
- (10) The trustee is, on production of any document to the trustee under this section—
- (a) to initial the document,
 - (b) to keep a record of it, stating the date on which it was produced to the trustee, and
 - (c) if requested by the person producing it to return it (if it is not a statement of claim) to that person.
- (11) The submission of a claim under this section bars the effect of any enactment or rule of law relating to the limitation of actions.
- (12) Schedule 1 has effect for determining the amount in respect of which C is entitled to claim.
- (13) A person ("P") convicted of an offence under subsection (7) or (8) is liable—
- (a) on summary conviction, to a fine not exceeding the statutory maximum, or—
 - (i) in a case where P has previously been convicted of an offence inferring dishonest appropriation of property or an attempt at dishonest appropriation of property, to imprisonment for a term not exceeding 6 months, or
 - (ii) in any other case, to imprisonment for a term not exceeding 3 months,or both to a fine not exceeding the statutory maximum and to such imprisonment as is mentioned, in relation to the case in question, in sub-paragraph (i) or (ii), or
 - (b) on conviction on indictment—
 - (i) to a fine, or
 - (ii) to imprisonment for a term not exceeding 2 years,or both to a fine and to such imprisonment.

33 Proceedings at statutory meeting before trustee vote[j042.doc]

- (1) At the commencement of the statutory meeting the trustee in the sequestration ("T") is to chair the meeting and, as the person chairing it, is—
- (a) for the purposes of subsection (3), to accept or reject in whole or in part the claim of each creditor (and if the amount of the claim is stated in foreign currency, to 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),
 - (b) on that being done, to invite the creditors to elect 1 of their number to chair the meeting in place of T,
 - (c) to preside over the election, and
 - (d) to arrange for a record to be made of the proceedings at the meeting.

- (2) But if no person is elected in pursuance of paragraph (b) of subsection (1) T is to chair the statutory meeting throughout.
- (3) The acceptance of a claim in whole or in part under paragraph (a) of that subsection is, subject to section 34(6), to determine the entitlement of a creditor to vote at the statutory meeting.
- (4) On the conclusion of the proceedings under subsection (1)—
- (a) T is to make available for inspection—
 - (i) the statement of assets and liabilities, and
 - (ii) the statement prepared under section 28(1),
 - (b) T is to answer to the best of T's ability any questions,
 - (c) T is to consider any representations put to T by the creditors which relate to the debtor's—
 - (i) assets and business or financial affairs, or
 - (ii) conduct in relation to such assets and affairs,
 - (d) after T considers any such representations as are mentioned in paragraph (c) if, in T's 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 90(1), T is so to indicate,
 - (e) T is to determine whether it is necessary to revise T's statement of the debtor's affairs, and
 - (f) if T does so determine, T is to revise the statement either at, or as soon as possible after, the statutory meeting.
- (5) Where T does carry out such a revision, T is as soon as possible after the statutory meeting to send a copy of the revised statement to every creditor known to T.

Trustee vote

34 Trustee vote[j056.doc]

- (1) At the statutory meeting the creditors are, at the conclusion of the proceedings under section 33(4), to proceed to a vote at which they are—
- (a) to confirm the appointment of the trustee appointed under section 37 (referred to in this section and in sections 41 to 44 as the “original trustee”), or
 - (b) to elect another person as the trustee in the sequestration (referred to in this section and in sections 38 and 41 to 47 as the “replacement trustee”).
- (2) The vote is referred to in this Act as a “trustee vote”.
- (3) None of the persons listed in subsection (5) is eligible for election as replacement trustee.
- (4) Nor is anyone who becomes a person so listed after being elected as replacement trustee qualified to continue to act as trustee.
- (5) The persons are—
- (a) the debtor,
 - (b) a person not qualified to act as an insolvency practitioner,

- (c) a person who, though qualified to act as an insolvency practitioner, is not qualified to act as such in relation to the debtor,
- (d) a person who holds an interest opposed to the general interests of the creditors,
- (e) a person who has not given an undertaking, in writing, to act as trustee, and
- 5 (f) the Accountant in Bankruptcy (“AiB”).
- (6) None of the persons listed in subsection (7) is entitled to vote in the trustee vote.
- (7) The persons are—
- (a) anyone acquiring a debt due by the debtor, otherwise than by succession, after the date of sequestration, and
- 10 (b) any creditor to the extent that the creditor’s debt is a postponed debt.
- (8) Where AiB is the original trustee, if no creditor entitled to vote in the trustee vote attends the statutory meeting or no replacement trustee is elected, AiB—
- (a) is without delay to report the proceedings at the statutory meeting to the sheriff, and
- 15 (b) is to continue to act as the trustee.
- (9) Where AiB is not the original trustee, if no creditor entitled to vote in the trustee vote attends the statutory meeting or no replacement trustee is elected, the original trustee—
- (a) is without delay—
- (i) to notify AiB accordingly, and
- 20 (ii) to report the proceedings at the statutory meeting to the sheriff, and
- (b) is to continue to act as the trustee in the sequestration.

PART 4

TRUSTEES AND COMMISSIONERS

Trustees

35 **Functions of the trustee[j088.doc]**

- (1) In every sequestration there is to be a trustee (“T”), whose general functions are—
- (a) to recover, manage and realise the estate of the debtor (“D”), whether situated in Scotland or elsewhere,
- 30 (b) to distribute the estate among D’s creditors according to their respective entitlements,
- (c) to ascertain the reasons for D’s insolvency and the circumstances surrounding it,
- (d) to ascertain the state of D’s liabilities and assets,
- (e) to maintain, for the purpose of providing an accurate record of the sequestration process, a sederunt book during T’s term of office,
- 35 (f) to keep regular accounts of T’s intromissions with D’s estate, such accounts being available for inspection at all reasonable times by the commissioners (if any), the creditors and D,

(g) whether or not T is still acting in the sequestration, to supply the Accountant in Bankruptcy (“AiB”) with such information as AiB considers necessary to enable AiB to discharge AiB’s functions under this Act.

5 (2) T, in performing T’s functions under this Act, must have regard to advice offered to him by the commissioners (if any).

(3) If T has reasonable grounds to suspect that an offence has been committed in relation to a sequestration—

(a) by D in respect of D’s assets, D’s dealings with them or D’s conduct in relation to D’s business or financial affairs, or

10 (b) by a person other than D in that person’s dealings with D, the interim trustee or T in respect of D’s assets, business or financial affairs,

T must report the matter to AiB.

15 (4) If T has reasonable grounds to believe that any behaviour on the part of D is of a kind that would result in a sheriff granting, under section 106(1), an application for a bankruptcy restrictions order, T must report the matter to AiB.

(5) A report under subsection (3) or (4) is absolutely privileged.

(6) Subsections (1)(g), (3) and (4) do not apply in any case where AiB is the trustee.

(7) T may apply to the sheriff for directions in relation to any particular matter arising in the sequestration.

20 (8) D, a creditor or any other person having an interest may, if dissatisfied with any act, omission or decision of T, apply to the sheriff.

(9) On an application under subsection (8), the sheriff may—

(a) confirm, annul or modify the act or decision in question,

(b) give T directions, or

25 (c) make such order,

as the sheriff thinks fit.

(10) T is to comply with the requirements of subsections (1)(a) to (d) and (2) only in so far as, in T’s view, to do so would be—

(a) of financial benefit to D’s estate, and

30 (b) in the interests of the creditors.

36 Functions of an interim trustee[j137.doc]

(1) An interim trustee’s general function is to safeguard the debtor’s estate pending the determination of the petition for sequestration.

35 (2) An interim trustee, whether or not still acting in the sequestration, is to supply the Accountant in Bankruptcy (“AiB”) with such information as AiB considers necessary to enable AiB to discharge AiB’s functions under this Act.

37 Appointment of trustee or of interim trustee[j029.doc]

- (1) Subsection (2) applies where the sheriff awards sequestration of the debtor's estate and the petition for the sequestration—
- (a) nominates a person (“P”) to be the trustee in the sequestration,
 - 5 (b) states that P—
 - (i) is qualified to act as an insolvency practitioner, and
 - (ii) has given an undertaking to act as the trustee in the sequestration, and
 - (c) has, annexed to it, a copy of the undertaking.
- (2) The sheriff may, if—
- 10 (a) it appears to the sheriff that P is so qualified and has given the undertaking, and
 - (b) no interim trustee is appointed under subsection (8),
- appoint P to be the trustee in the sequestration.
- (3) Where the sheriff—
- 15 (a) awards sequestration of the debtor's estate,
 - (b) does not, under subsection (2), appoint a person to be the trustee in the sequestration, and
 - (c) no interim trustee is appointed under subsection (8),
- the sheriff is to appoint the Accountant in Bankruptcy (“AiB”) to be the trustee in the sequestration.
- (4) Subsections (5) and (7) apply where the sheriff—
- 20 (a) awards sequestration of the debtor's estate, and
 - (b) an interim trustee is appointed under subsection (8).
- (5) The sheriff may appoint—
- 25 (a) the interim trustee, or
 - (b) subject to subsection (6), such other person as may be nominated by the petitioner,
- to be the trustee in the sequestration.
- (6) A person nominated under subsection (5)(b) may be appointed to be the trustee in the sequestration only if—
- 30 (a) it appears to the sheriff that the person is qualified to act as an insolvency practitioner and has given an undertaking to act as the trustee in the sequestration, and
 - (b) a copy of the undertaking has been lodged with the sheriff.
- (7) Where the sheriff does not, under subsection (5), appoint a person to be the trustee in the sequestration, the sheriff is to appoint AiB to be the trustee in the sequestration.
- (8) Where a petition for sequestration is presented by a creditor, or by a trustee acting under
- 35 a trust deed, the sheriff may appoint an interim trustee before sequestration is awarded if—
 - (a) the debtor consents, or
 - (b) the trustee acting under the trust deed or any creditor shows cause.

- (9) For the purposes of the appointment of an interim trustee under subsection (8)—
- (a) where a person is nominated as mentioned in subsection (1)(a) and the provisions of that subsection apply, the sheriff may appoint that person, and
 - (b) where such a person is not appointed, the sheriff is to appoint AiB.

5 (10) Subsection (11) applies where AiB awards sequestration of the debtor's estate and the debtor application—

- (a) nominates a person (“N”) to be the trustee,
- (b) states that N—
 - 10 (i) is qualified to act as an insolvency practitioner, and
 - (ii) has given an undertaking to act as the trustee in the sequestration, and
- (c) has, annexed to it, a copy of the undertaking.

(11) AiB may, if it appears to AiB that N is so qualified and has given that undertaking, appoint N to be the trustee in the sequestration.

(12) But subsection (11) is subject to subsection (13).

15 (13) Where—

- (a) AiB awards sequestration of the debtor's estate, and
 - (b) the debtor application is made by a debtor to whom section 2(3)(c)(ii) applies,
- AiB is not to make an appointment under subsection (11).

(14) Where AiB—

- 20 (a) awards sequestration of the debtor's estate, and
- (b) does not, under subsection (11), appoint a person to be the trustee in the sequestration,
- AiB is deemed to be appointed the trustee in the sequestration.

(15) Where—

- 25 (a) a trustee is appointed in a sequestration for which the petition is presented by a creditor, or by a trustee acting under a trust deed, or
- (b) an interim trustee is appointed under subsection (8),
- the appointee is, as soon as practicable, to notify the debtor of the appointment.

38 Resignation, removal etc. of interim trustee[j026.doc]

30 (1) This section applies where—

- (a) an interim trustee is appointed under section 37(8), and
- (b) the petition for sequestration has not been determined.

(2) Where, under section 120(4) the sheriff removes an interim trustee from office the sheriff is, on the application of the Accountant in Bankruptcy (“AiB”), to appoint a new interim trustee.

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- (3) Without prejudice to that section or to subsection (2), where the sheriff is satisfied—
- (a) that an interim trustee (“T”) is—
 - (i) for a reason mentioned in subsection (4), or
 - (ii) by, under or by virtue of any other provision of this Act,
5 unable to act, or
 - (b) that T’s conduct has been such that T should no longer continue to act,
then, on the application of the debtor, a creditor or AiB, the sheriff is to remove T from
office and appoint a new interim trustee.
- (4) The reasons are—
- 10 (a) that T is incapable (within the meaning of section 1(6) of the Adults with Incapacity (Scotland) Act 2000 (asp 4)),
 - (b) that T has some incapacity by virtue of which T is unable to act as interim trustee.
- (5) An interim trustee (not being AiB) may apply to the sheriff for authority to resign office; and if the sheriff is, in respect of the applicant, satisfied as is mentioned in subsection
15 (3), the sheriff is to grant the application.
- (6) Where, following an application under subsection (5) the interim trustee resigns office, the sheriff is to appoint a new interim trustee.
- (7) Where the interim trustee dies, the sheriff is, on the application of the debtor, a creditor or AiB to appoint a new interim trustee.
- 20 (8) No person (other than AiB) is to act as interim trustee in a sequestration who would, by virtue of section 34(3), be ineligible to be elected as replacement trustee in the sequestration.
- (9) An interim trustee who, by virtue of subsection (8), is prohibited from acting as such, is without delay to make an application under subsection (5).
- 25 (10) Subsections (1) to (3) of section 37 apply as regards the appointment of an interim trustee under this section as if, for any reference—
- (a) to the sheriff awarding sequestration of the debtor’s estate, there were substituted a reference a reference to the sheriff appointing a new interim trustee, and
 - 30 (b) to the petition for sequestration, there were substituted a reference to the application under this section for the appointment of a new interim trustee.

39 Termination of interim trustee’s functions where not appointed trustee[j028.doc]

- (1) This section applies where an interim trustee (not being the Accountant in Bankruptcy (“AiB”)) is appointed under section 37(8) and the sheriff—
- 35 (a) awards sequestration and appoints another person as trustee under subsection (5) or (7) of section 37, or
 - (b) refuses to award sequestration.

- (2) Where the sheriff awards sequestration and appoints another person as trustee in the sequestration, the interim trustee (“B”)—
- (a) is to hand over to the other person everything in B’s possession which relates to the sequestration, and
 - 5 (b) on that being done, is to cease to act in the sequestration.
- (3) The sheriff may make such order in relation to liability for the outlays and remuneration of B as may be appropriate.
- (4) Within 3 months after the sheriff awards, or refuses to award, sequestration B is to—
- (a) submit to AiB—
 - 10 (i) B’s accounts for B’s intromissions (if any) with the debtor’s estate,
 - (ii) a claim for outlays reasonably incurred by B, and
 - (iii) a claim for remuneration for work reasonably undertaken by B, and
 - (b) send a copy of B’s accounts and claims to—
 - 15 (i) the debtor,
 - (ii) the petitioner, and
 - (iii) in a case where sequestration is awarded, the trustee and all creditors known to B.
- (5) On a submission being made under subsection (4)(a), AiB is to—
- (a) audit the accounts,
 - 20 (b) issue a determination fixing the amount of the outlays and remuneration payable to B,
 - (c) send a copy of the determination to—
 - (i) the interim trustee, and
 - (ii) the persons mentioned in subsection (4)(b), and
 - 25 (d) where a trustee (not being AiB) is appointed in the sequestration, send a copy of the audited accounts and of the determination to the trustee, who is to insert them in the sederunt book.
- (6) Where AiB is appointed as the trustee in the sequestration, AiB is to insert a copy of the audited accounts and of the determination in the sederunt book.
- 30 (7) B, or any person mentioned in subsection (4)(b) may, within 14 days after the issuing of the determination under subsection (5)(b), appeal to the sheriff against the determination.
- (8) On receiving a copy of the determination sent under subsection (5)(c)(i), B may apply to AiB for a certificate of discharge.
- 35 (9) B is to send to the persons mentioned in subsection (4)(b) notice of any application under subsection (8) and is to inform them—
- (a) that they may make written representations relating to it to AiB within the period of 14 days after such notification, and
 - (b) of the effect mentioned in subsection (15).

- (10) On the expiry of the period mentioned in subsection (9)(a) AiB is, after considering any representations made to AiB, to—
- (a) grant or refuse to grant the certificate of discharge, and
 - (b) notify the persons mentioned in subsection (4)(b) accordingly.
- 5 (11) B, or any person mentioned in subsection (4)(b), may, within 14 days after the issuing of a determination under subsection (10), appeal from it to the sheriff.
- (12) If, following an appeal under subsection (11), the sheriff determines that a certificate of discharge—
- (a) which has been refused should be granted, the sheriff is to order AiB to grant it,
 - 10 (b) which has been granted should have been refused, the sheriff is to revoke the certificate.
- (13) The sheriff clerk is to send a copy of the decree of the sheriff, following an appeal under subsection (11), to AiB.
- (14) The decision of the sheriff in an appeal under subsection (7) or (11) is final.
- 15 (15) The grant of a certificate of discharge under this section by AiB has the effect of discharging B from all liability (other than any liability arising from fraud)—
- (a) to the debtor,
 - (b) to the petitioner, or
 - (c) to the creditors,
- 20 in respect of any act or omission of B in exercising the functions conferred on B by this Act.

40 Termination of Accountant in Bankruptcy's functions as interim trustee where not appointed as trustee[j030.doc]

- 25 (1) This section applies where the Accountant in Bankruptcy ("AiB") is appointed as interim trustee under section 37(8) and the sheriff—
- (a) awards sequestration and appoints another person as trustee under section 37(5), or
 - (b) refuses to award sequestration.
- 30 (2) Where the sheriff awards sequestration and appoints another person as trustee in the sequestration, AiB—
- (a) is to hand over to the other person everything in AiB's possession which relates to the sequestration, and
 - (b) on that being done, is to cease to act in the sequestration.
- 35 (3) The sheriff may make such order in relation to liability for the outlays and remuneration of AiB as may be appropriate.

- (4) Within 3 months after the sheriff awards, or refuses to award, sequestration AiB is to—
- (a) send to the debtor and the petitioner—
 - (i) AiB’s accounts for AiB’s intromissions (if any) with the debtor’s estate,
 - (ii) a determination of AiB’s fees and outlays, calculated in accordance with regulations made under section 124, and
 - (iii) the notice mentioned in subsection (8), and
 - (b) in a case where sequestration is awarded, send a copy of those accounts, that determination and that notice to all creditors known to AiB.
- (5) AiB is, unless the sheriff refuses to award sequestration, to insert a copy of those accounts and that determination in the sederunt book.
- (6) 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 (4)(b), appeal to the sheriff against –
- (a) that determination,
 - (b) the discharge of AiB in respect of AiB’s actings as interim trustee, or
 - (c) both that determination and the discharge.
- (7) The decision of the sheriff in an appeal under subsection (6) is final.
- (8) The notice is a notice in writing stating—
- (a) that AiB has commenced procedure under this Act leading to discharge in respect of AiB’s actings as interim trustee,
 - (b) that an appeal may be made to the sheriff under subsection (6), and
 - (c) expressly that “subsection (10) of section 40 of the Bankruptcy (Scotland) Act 2010 (asp 00) provides for the discharge of the Accountant in Bankruptcy in the circumstances mentioned in paragraphs (a) and (b) of subsection (9) of that section”.
- (9) Subsection (10) applies where—
- (a) the requirements of this section have been complied with, and
 - (b) no appeal is made under subsection (6) or such an appeal is made but is refused as regards the discharge of AiB.
- (10) AiB is discharged from all liability (other than any liability arising from fraud)—
- (a) to the debtor,
 - (b) to the petitioner, or
 - (c) to the creditors,
- in respect of any act or omission of AiB in exercising the functions of interim trustee conferred on AiB by this Act.

41 Appointment of replacement trustee[j052.doc]

- (1) This section applies where a replacement trustee is elected by virtue of a trustee vote.
- (2) On the election of the replacement trustee—
- 5 (a) the original trustee is without delay to make a report of the proceedings at the statutory meeting to the sheriff, and
- (b) the debtor, a creditor, the original trustee, the replacement trustee or the Accountant in Bankruptcy may, within 4 days after the statutory meeting, object to any matter connected with the election.
- (3) Any objection under paragraph (b) of subsection (2) is to be to the sheriff, specifying the
- 10 grounds on which the objection is taken.
- (4) If there is no timeous objection under that paragraph, the sheriff is without delay—
- (a) to declare, and
- (b) to make an order appointing,
- the elected person to be the trustee in the sequestration.
- 15 (5) If there is a timeous objection under paragraph (b) of subsection (2), the sheriff is without delay—
- (a) to give parties an opportunity to be heard on the objection, and
- (b) to give a decision.
- (6) If, in a decision under subsection (5)(b), the sheriff—
- 20 (a) rejects the objection, subsection (4) applies as if there had been no timeous objection,
- (b) sustains the objection, the sheriff is to order the original trustee to arrange a new meeting.
- (7) At any meeting arranged by virtue of subsection (6)(b), a new trustee vote is to be held.
- 25 (8) Sections 33 and 34 and this section apply in relation to any meeting arranged by virtue of subsection (6)(b) as they apply in relation to the statutory meeting.
- (9) Any—
- (a) declaration,
- (b) appointment, or
- 30 (c) decision,
- of the sheriff under this section is final
- (10) No expense in objecting under this section is to fall on the debtor's estate.

42 Provisions relating to termination of original trustee's functions[j053.doc]

- (1) This section applies where a replacement trustee ("RT") is appointed under section 41.
- 35 (2) The original trustee ("OT") is, on the appointment of RT, to hand over to RT everything in OT's possession which relates to the sequestration (including the statement of assets and liabilities, a copy of the statement prepared under section 28(1)(a) (as revised under section 33(4)(f) if so revised) and a copy of the written comments sent under section 28(2)); and on that being done OT ceases to act in the sequestration.

- (3) Within 3 months after the appointment of RT, OT is to—
- (a) submit to the Accountant in Bankruptcy (“AiB”)—
 - (i) OT’s accounts of OT’s intromissions (if any) with the debtor’s estate,
 - (ii) a claim for outlays reasonably incurred, and for remuneration for work reasonably undertaken, by OT, and
 - (b) send to RT a copy of what is submitted under paragraph (a).
- (4) Where OT was appointed under section 37(8) as the interim trustee in the sequestration, OT’s accounts and the claim referred to in subsection (3)(a)(ii) are to include accounts and a claim for the period of OT’s appointment as interim trustee.
- (5) On a submission being made to AiB under subsection (3), AiB—
- (a) is to audit the accounts and to issue a determination fixing the amount of the outlays and remuneration payable to OT, and
 - (b) is then to send a copy of—
 - (i) the determination to OT,
 - (ii) the audited accounts and the determination to RT.
- (6) RT is to insert in the sederunt book the copies received by virtue of subsection (5)(b)(ii).
- (7) OT, RT, the debtor or any creditor may appeal to the sheriff against a determination under subsection (5)(a) within 14 days after it is issued.
- (8) The decision of the sheriff on an appeal under subsection (7) is final.
- (9) RT, on being appointed, is to make such insertions in the sederunt book as are appropriate to provide a record of the sequestration process before that appointment but no such insertion is to relate to the written comments sent under section 28(2).
- (10) This section does not apply if OT is AiB.

43 Accountant in Bankruptcy to account for intromissions in capacity of original trustee[j054.doc]

- (1) This section applies where the Accountant in Bankruptcy (“AiB”) was the original trustee and some other person is appointed as replacement trustee (“RT”) under section 41.
- (2) AB is, on the appointment of RT, to hand over to RT everything in AiB’s possession which relates to the sequestration and which AiB obtained in the capacity of original trustee (including the statement of assets and liabilities); and on that being done AiB ceases to act as trustee.
- (3) AiB is, not later than 3 months after the appointment of RT, to supply to RT—
- (a) AiB’s accounts of AiB’s intromissions (if any) as original trustee with the debtor’s estate,
 - (b) a determination of AiB’s fees and outlays calculated in accordance with regulations under section 124, and
 - (c) a copy of the notice mentioned in subsection (4)(b).
- (4) AiB is to send to the debtor and to all creditors known to AiB—
- (a) a copy of the determination mentioned in subsection (3)(b), and

(b) a notice in writing stating—

- (i) that AiB has commenced the procedure under this Act leading to discharge in respect of AiB's actings as trustee,
- (ii) that the accounts of AiB's intromissions (if any) with the debtor's estate are available at such address as AB may determine,
- (iii) that an appeal may be made to the sheriff under subsection (5), and
- (iv) the effect of subsection (8).

(5) RT, the debtor or any creditor may appeal to the sheriff against—

- (a) the determination mentioned in subsection (3)(b)
- (b) the discharge of AiB in respect of AiB's actings as trustee, or
- (c) both such determination and discharge.

(6) An appeal under subsection (5) is not to be made more than 14 days after the issue of the notice mentioned in subsection (4)(b).

(7) The decision of the sheriff on an appeal under subsection (5) is final.

(8) Where—

- (a) the requirements of this section have been complied with, and
- (b) either no appeal is made under subsection (5) or any such appeal is refused as regards the discharge of AiB,

AiB is to be discharged from all liability (other than liability arising from fraud) to the creditors or to the debtor in respect of any act or omission of AiB in exercising the functions of trustee in the sequestration.

(9) RT, on being appointed, is to make such insertions in the sederunt book as are appropriate to provide a record of the sequestration process before the appointment.

44 Discharge of original trustee[j055.doc]

(1) On receiving a copy of the determination of the Accountant in Bankruptcy ("AiB") sent under subsection (5)(b)(i) of section 42 the original trustee ("OT") may apply to AiB for a certificate of discharge.

(2) OT is to send notice of the application to the debtor, to all creditors known to OT and to the replacement trustee and is to inform the debtor—

- (a) that the debtor, the replacement trustee or any creditor may, in relation to the application, make written representations to AiB within 14 days after such notification,
- (b) that the audited accounts of OT's intromissions (if any) with the debtor's estate are available for inspection at OT's office and that a copy of those accounts has been sent to the replacement trustee for insertion in the sederunt book, and
- (c) of the effect mentioned in subsection (8).

- (3) On the expiry of the 14 days mentioned in subsection (2)(a) AB, after considering any representations duly made to AiB, is—
- (a) to grant or refuse to grant the certificate of discharge, and
 - (b) to notify accordingly (in addition to OT) the debtor, the replacement trustee and all creditors who have made such representations.
- (4) OT, the replacement trustee, the debtor or any creditor who has made representations by virtue of subsection (2)(a) may, within 14 days after notification under subsection (3)(b), appeal against AiB's grant or refusal to the sheriff.
- (5) If, on such appeal, the sheriff determines that a certificate of discharge which has been refused should be granted the sheriff is to order AiB to grant it.
- (6) The sheriff clerk is to send a copy of the sheriff's decree to AiB.
- (7) The decision of the sheriff on an appeal under subsection (4) is final.
- (8) The grant of a certificate of discharge under this section by AiB has the effect of discharging OT 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 OT in exercising the functions conferred on OT by this Act.
- (9) Where a certificate of discharge is granted under this section, the replacement trustee is to make an appropriate entry in the sederunt book.
- (10) This section does not apply where the Accountant in Bankruptcy is the original trustee.

45 Resignation and death of trustee[j057.doc]

- (1) The trustee in the sequestration ("T") may apply to the Accountant in Bankruptcy ("AiB") for authority to resign office and AiB is to grant the application where satisfied that—
- (a) T is unable to act (whether by, under or by virtue of a provision of this Act of from any other cause whatsoever), or
 - (b) T's conduct has been such that T should no longer continue to act.
- (2) AiB may make the granting of an application under subsection (1) subject—
- (a) to the election of a new trustee, and
 - (b) to such conditions as AiB thinks appropriate in all the circumstances of the case.
- (3) Where AiB grants an application under subsection (1), then—
- (a) except where paragraph (b) applies, the commissioners are, or if there are no commissioners AiB is, to call a meeting of the creditors, to be held not more than 28 days after T resigns,
 - (b) if the application is granted subject to the election of a new trustee, T is to call a meeting of the creditors, to be held not more than 28 days after the granting of the application,
- for the election by the creditors of a new trustee.
- (4) Where the commissioners become, or if there are no commissioners AiB becomes, aware that T has died, they or as the case may be AiB are, as soon as practicable after becoming so aware, to call a meeting of creditors for the election by the creditors of a new trustee.

- (5) The preceding provisions of this Part in relation to the election of a replacement trustee and the appointment of that trustee also apply, subject to any necessary modifications, in relation to the election and appointment of a new trustee in pursuance of subsections (1) to (3) or subsection (4).
- 5 (6) Where, at a meeting called under subsection (3) or (4), no new trustee is elected—
- (a) AiB, or
 - (b) a person nominated by AiB and consenting to the nomination (and not being a person listed in section 34(5)),
- may apply to the sheriff for appointment as trustee in the sequestration.
- 10 (7) On an application under subsection (6), the sheriff is to make an order appointing the applicant as trustee in the sequestration.
- (8) The new trustee (“NT”) may require—
- (a) delivery to NT of all documents relating to the sequestration and in the possession of T or T’s representatives (except that, in the case of T’s accounts, NT is entitled to delivery only of a copy),
 - (b) T or T’s representatives to submit T’s accounts for audit to the commissioners or, if there are no commissioners, to AiB.
- 15 (9) The commissioners are, or if there are no commissioners AiB is, to issue a determination fixing the amount of the outlays and remuneration payable to T or T’s representatives in accordance with section 94.
- 20 (10) T or T’s representatives, NT, the debtor or any creditor may within 14 days after a determination under subsection (9) is issued—
- (a) by the commissioners, appeal against it to AiB,
 - (b) by AiB, appeal against it to the sheriff.
- 25 (11) A decision of AiB under subsection (10)(a) is appealable to the sheriff.
- (12) The decision of the sheriff on an appeal under subsection (10)(b) or (11) is final.

46 Replacement of trustee acting in 2 or more sequestrations[j081.doc]

- (1) This section applies where a trustee acting as such in 2 or more sequestrations—
- (a) dies, or
 - (b) ceases, by virtue of section 34(4), to be qualified to continue to act as trustee.
- 30 (2) The Accountant in Bankruptcy (“AiB”) may, by a single petition to the Court of Session, apply—
- (a) in a case where subsection (1)(b) applies, for the removal of the trustee from office in each sequestration in which the trustee has ceased to be qualified, and
 - (b) for the appointment, as the trustee in each sequestration in which the trustee was acting, of—
- (i) AiB, or
 - (ii) such person as may be nominated by AiB (being a person who is not, by virtue of section 34(3), ineligible for election as replacement trustee) if that
- 35 person consents to the nomination.
- 40

- (3) The procedure in a petition under subsection (2) is to be such as may be prescribed by act of sederunt.
- (4) Any such act of sederunt may, in particular, make provision as to the intimation to each sheriff—
- 5 (a) who awarded sequestration, or
- (b) to whom, under section 23(1), sequestration was transferred,
- of the appointment by the Court of Session of a trustee in the sequestration.

47 Removal of trustee and provision for where trustee is unable to act or should no longer continue to act[j108.doc]

- 10 (1) The trustee in the sequestration may be removed from office—
- (a) by the creditors at a meeting called for the purpose if they also elect, then and there, a new trustee, or
- (b) by order of the sheriff, on the application of—
- (i) the Accountant in Bankruptcy (“AiB”),
- 15 (ii) the commissioners, or
- (iii) a person representing not less than $\frac{1}{4}$ in value of the creditors,
- if the sheriff is satisfied that cause has been shown on the basis of circumstances other than those mentioned in subsection (10).
- (2) Paragraph (b) of subsection (1) is without prejudice to section 120(4).
- 20 (3) “Creditors”, in subsection (1)(a), does not include—
- (a) anyone acquiring a debt due by the debtor, other than by succession, after the date of sequestration, or
- (b) any creditor to the extent that the creditor’s debt is a postponed debt.
- (4) The sheriff—
- 25 (a) is to order any application under subsection (1)(b) to be served on the trustee and intimated in the Edinburgh Gazette, and
- (b) before disposing of the application is to give the trustee the opportunity of being heard.
- (5) On an application under subsection (1)(b) the sheriff may—
- 30 (a) in ordering, or
- (b) instead of ordering,
- the removal of the trustee from office, make such further order as the sheriff thinks fit.
- (6) The trustee, AiB, the commissioners or any creditor may, within 14 days after the decision of the sheriff on an application under subsection (1)(b), appeal against that
- 35 decision.

- (7) If the trustee has been removed from office—
- (a) under subsection (1)(b),
 - (b) under section 120(4), or
 - (c) following an appeal under subsection (6),
- 5 the commissioners are (or if there are no commissioners AiB is) to call a meeting of creditors, to be held no more than 28 days after the removal, for the election by the creditors of a new trustee.
- (8) Where the sheriff is satisfied of any of the circumstances mentioned in subsection (10), the sheriff may, on the application of a commissioner, the debtor, a creditor or AiB, and after such intimation as the sheriff considers necessary—
- (a) declare the office of trustee to have become or to be vacant, and
 - (b) make any necessary order—
 - (i) to enable the sequestration to proceed, or
 - (ii) to safeguard the estate pending the election of a new trustee.
- 15 (9) And on that being done the commissioners are, or if there are no commissioners AiB is, to call a meeting of creditors, to be held not more than 28 days after the declaration mentioned in subsection (8)(a), for the election by the creditors of a new trustee.
- (10) The circumstances are that the 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 engaged in such conduct that the trustee should no longer continue to act in the sequestration.
- 20
- (11) Subsection (8) is without prejudice to section 120(4).
- (12) The preceding provisions of this Part in relation to the election of a replacement trustee and the appointment of that trustee also apply, subject to any necessary modifications, in relation to the election and appointment of a new trustee in pursuance of subsection (7) or (9).
- 25
- (13) Where, at a meeting called under subsection (7) or (9), no new trustee is elected—
- (a) AiB, or
 - (b) a person nominated by AiB and consenting to the nomination (and not being a person listed in section 34(5)),
- 30 may apply to the sheriff for appointment as trustee in the sequestration.
- (14) On an application under subsection (13), the sheriff is to make an order appointing the applicant as trustee in the sequestration.
- 35
- (15) The new trustee (“NT”) may require—
- (a) delivery to NT of all documents relating to the sequestration and in the possession of T or T’s representatives (except that, in the case of T’s accounts, NT is entitled to delivery only of a copy),
 - (b) T or T’s representatives to submit T’s accounts for audit to the commissioners or, if there are no commissioners, to AiB.
- 40

- (16) The commissioners are, or if there are no commissioners AiB is, to issue a determination fixing the amount of the outlays and remuneration payable to T or T's representatives in accordance with section 94.
- (17) T or T's representatives, NT, the debtor or any creditor may within 14 days after a determination under subsection (16) is issued—
- (a) by the commissioners, appeal against it to AiB,
 - (b) by AiB, appeal against it to the sheriff.
- (18) A decision of AiB under subsection (17)(a) is appealable to the sheriff.
- (19) The decision of the sheriff on an appeal under subsection (17)(b) or (18) is final.
- (20) This section does not apply where AiB is the trustee.

Commissioners

48 Commissioners[j058.doc]

In any sequestration commissioners, whose general functions are—

- (a) to supervise the intrusions of the trustee in the sequestration with the sequestrated estate, and
- (b) to advise the trustee,

may be elected in accordance with section 49.

49 Election, resignation and removal of commissioners[j059.doc]

- (1) At the statutory meeting or at any subsequent meeting of creditors, the creditors (other than any such person as is listed in section 34(7)) may, from among the creditors or their mandatories, elect a commissioner or commissioners (or a new or additional commissioner or new or additional commissioners).
- (2) No more than 5 commissioners are to hold office in any one sequestration at any one time.
- (3) None of the persons listed in subsection (5) is eligible for election as a commissioner.
- (4) Nor is anyone who becomes a person so listed after being elected as a commissioner entitled to continue to act as a commissioner.
- (5) The persons are—
- (a) any person listed in paragraph (a) or (d) of section 34(5), and
 - (b) a person who is an associate of the debtor or of the trustee in the sequestration.
- (6) A commissioner may resign office at any time.
- (7) A commissioner may be removed from office—
- (a) by a person whose mandatory the commissioner is, recalling the mandate and intimating in writing to the trustee that it is recalled, or
 - (b) by the creditors (other than any such person as is listed in section 34(7)) at a meeting called for the purpose.
- (8) Subsection (7) is without prejudice to section 120(4).

PART 5

VESTING

*Vesting***50 Vesting of estate at date of sequestration[j086.doc]**

- 5 (1) The whole estate of the debtor vests for the benefit of the creditors in the trustee in the sequestration (“T”), by virtue of T’s appointment, as at the date of sequestration.
- (2) But subsection (1) is subject to section 61 and to section 91(3) of the Pensions Act 1995 (c.26).
- (3) It is not competent for—
- 10 (a) T, or
- (b) any person deriving title from T,
- to complete title, before the expiry of the period mentioned in subsection (4), to any heritable property in Scotland vested in T by virtue of T’s appointment.
- (4) The period is that of 28 days (or such other period as may be prescribed) which begins with the day on which the certified copy of—
- 15 (a) the order of the sheriff granting warrant is recorded under subsection (1)(a) of section 22 in the register of inhibitions, or
- (b) the determination of the Accountant in Bankruptcy awarding sequestration is recorded under subsection (2) of that section in that register.
- 20 (5) The exercise by T of any power conferred on T by this Act, in respect of any heritable estate vested in T by virtue of T’s appointment, is not challengeable on the ground of a prior inhibition.
- (6) Where the debtor has an uncompleted title to any heritable estate in Scotland, T may complete title to that estate either in T’s own name or in the name of the debtor.
- 25 (7) But completion of title in the name of the debtor does not validate by accretion any unperfected right in favour of a person other than T.
- (8) Moveable property in respect of which, but for this subsection—
- (a) delivery or possession, or
- (b) intimation of assignation,
- 30 would be required in order to complete title vests in T, by virtue of T’s appointment, as if at the date of sequestration (as the case may be) T had taken delivery or possession of the property or had made intimation of its assignation to T.
- (9) Any non-vested contingent interest which the debtor has vests in T as if an assignation of that interest had been executed by the debtor (and intimation of assignation made) at the date of sequestration.
- 35 (10) Any non-vested contingent interest vested in T by virtue of subsection (9) is, where it remains so vested as at the date on which the debtor’s discharge becomes effective, re-invested in the debtor as if an assignation of that interest had been executed by T (and intimation of assignation made) at that date.

- (11) A person claiming a right to any estate claimed by T may apply to the sheriff for the estate to be excluded from such vesting, a copy of the application being served on T.
- (12) The sheriff is to grant the application if satisfied that the estate should not be so vested.
- (13) 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 sheriff may on the application of the trustee (“T”) order the successor to convey such estate to T.

51 Provision supplementary to section 50[j138.doc]

- (1) In subsection (1) of section 50, the “whole estate of the debtor” means the debtor’s whole estate at the date of sequestration (wherever situated) including—
- (a) any income or estate vesting in the debtor on the date of sequestration,
 - (b) any property of the debtor title to which has not been completed by another person deriving right from the debtor, and
 - (c) the capacity to exercise and to take proceedings for exercising all such powers in, over or in respect of any property as—
 - (i) might have been exercised by the debtor for the debtor’s own benefit as at, or on, the date of sequestration, or
 - (ii) might be exercised on a relevant date.
- (2) But subsection (1) is subject to subsection (3) and to section 145.
- (3) The “whole estate of the debtor” does not include any interest of the debtor as tenant under—
- (a) a tenancy which is an assured tenancy within the meaning of Part 2 of the Housing (Scotland) Act 1988 (c.43),
 - (b) a protected tenancy within the meaning of the Rent (Scotland) Act 1984 (c.58) in respect of which, by virtue of Part 8 of that Act, no premium can lawfully be required as a condition of assignation, or
 - (c) a Scottish secure tenancy within the meaning of the Housing (Scotland) Act 2001 (asp 10).
- (4) But on the date on which T serves notice to the effect on the debtor, the interest of the debtor as tenant under any of the tenancies referred to in subsection (3) forms part of the debtor’s estate and vests in T as if it had vested in T under section 57(4).
- (5) In subsection (1)(c)(ii) “relevant date” means a date after the date of sequestration and before the date on which the debtor’s discharge becomes effective.

52 Property subject to restraint order[j069.doc]

- (1) Subsection (2) 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, 67A, 128, 131A, 198 or 215A of that Act has not been made in respect of the property,
 - (c) the restraint order is discharged, and

(d) immediately after the discharge of the restraint order the property is not detained under or by virtue of section 44A, 47J, 122A, 127J, 193A or 195J of that Act.

- (2) The property vests in the trustee in the sequestration 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).

53 Property released from detention[j155.doc]

- (1) Subsection (2) applies where—
- (a) property is excluded from the debtor's estate by virtue of section 420(2)(b) of the Proceeds of Crime Act 2002 (property detained under certain provisions),
- (b) no order is in force in respect of the property under section 41, 50, 120, 128, 190 or 198 of that Act, and
- (c) the property is released.
- (2) The property vests in the trustee in the sequestration as part of the debtor's estate.

54 Property in respect of which receivership or administration order is made[j071.doc]

- (1) Subsection (2) applies where—
- (a) property is excluded from the debtor's estate by virtue of section 420(2)(c) 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),
- (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 trustee in the sequestration as part of the debtor's estate.

55 Property in respect of which realisation order is made[j154.doc]

- (1) Subsection (2) applies where—
- (a) property is excluded from the debtor's estate by virtue of section 420(2)(d) of the Proceeds of Crime Act 2002 (property in respect of which an order has been made authorising realisation of the property by an appropriate officer),
- (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 appropriate officer.
- (2) The property vests in the trustee in the sequestration as part of the debtor's estate.

56 Property subject to certain orders where confiscation order discharged or quashed[j079.doc]

(1) Subsection (2) 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 excluded from debtor's estate),

(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 such property vests in the trustee in the sequestration as part of the debtor's estate if it is in the hands of—

(a) a receiver appointed under Part 2 or 4 of that Act,

(b) an administrator appointed under Part 3 of that Act, or

(c) an appropriate officer (within the meaning of section 41A, 120A or 190A of that Act).

(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).

57 Vesting of estate after sequestration[j080.doc]

(1) 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 trustee in the sequestration, is to vest in the debtor.

(2) But subsection (1) is subject to subsection (3) and to section 58(1).

(3) Notwithstanding anything in section 11 or 12 of the Welfare Reform and Pension Act 1999, the sheriff, on the application of the 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.

(4) If the debtor's income is in excess of the total amount so allowed, the sheriff is—

(a) to fix the amount of the excess, and

(b) order that amount to be paid to the trustee.

(5) No application may be made under subsection (3) after the date on which the debtor's discharge becomes effective.

(6) But subsection (5) is subject to section 58(10).

(7) An order under subsection (4) is to specify the period during which it has effect and that period—

(a) may end after the date on which the debtor's discharge becomes effective, and

(b) is to end no later than 3 years after the date on which the order is made.

- (8) An order under subsection (4) may provide that a third person is to pay to the trustee a specified proportion of money due to the debtor by way of income.
- (9) Where a third person pays a sum of money to the trustee under subsection (8), the third person is discharged of any liability to the debtor to the extent of the sum so paid.
- 5 (10) A debtor who fails to comply with an order under subsection (4) is guilty of an offence and liable on summary conviction—
- (a) to a fine not exceeding level 5 on the standard scale,
 - (b) to imprisonment for a term not exceeding 3 months, or
 - (c) both to such fine and to such imprisonment.
- 10 (11) The amount allowed for the purposes specified in paragraphs (a) and (b) of subsection (3) is not to 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 the debtor's protected rights as a member of a pension scheme.
- 15 (12) In subsection (11), "guaranteed minimum pension" and "protected rights" have the same meanings as in the Pension Schemes Act 1993 (c.48).
- (13) The debtor's relevant obligations referred to in paragraph (b) of subsection (3) are, any obligation—
- (a) of aliment owed by the debtor ("obligation of aliment" having the same meaning as in the Family Law (Scotland) Act 1985 (c.37)),
 - 20 (b) of the debtor to make a periodical allowance to a former spouse or former civil partner, and
 - (c) of the debtor to pay child support maintenance under the Child Support Act 1991 (c.48).
- 25 (14) But any amount allowed under subsection (3) for the relevant obligations referred to in paragraphs (a) and (b) of subsection (13) need not be sufficient for compliance with a subsisting order or agreement as regards the aliment or periodical allowance in question.
- (15) In the event of any change in the debtor's circumstances the sheriff, on the application of—
- (a) the trustee,
 - 30 (b) the debtor, or
 - (c) any other interested party,
- may vary or recall an order under subsection (4).
- (16) The sheriff clerk is to send a copy of any order made under subsection (4) (and a copy of any variation or recall of such an order) to the Accountant in Bankruptcy.
- 35 (17) In this section and in sections 59 and 60, a "relevant date" means a date after the date of sequestration and before the date on which the debtor's discharge becomes effective.

58 Debtor's agreement[j139.doc]

- (1) Where no order has been made under section 57(4), a debtor may enter into an agreement in writing with the trustee in the sequestration (such agreement being in this section referred to as a “debtor's agreement”) which provides—
- 5 (a) that the debtor is to pay to the trustee an amount equal to a specified part or proportion of the debtor's income, or
- (b) that a third person is to pay to the trustee a specified proportion of money due to the debtor by way of income.
- (2) Where a third person pays a sum of money to the trustee under subsection (1)(b), the
- 10 third person is discharged of any liability to the debtor to the extent of the sum so paid
- (3) No debtor's agreement is to be entered into after the date on which the debtor's discharge becomes effective.
- (4) Subsection (7) of section 57 applies to a debtor's agreement as it applies to an order made under subsection (4) of that section.
- 15 (5) A debtor's agreement may, if subsection (9) has been complied with, be enforced as if it were an order made under section 57(4).
- (6) But subsection (10) of section 57 does not apply as respects the enforcement of a debtor's agreement.
- (7) A debtor's agreement may be varied—
- 20 (a) by written agreement between the parties, or
- (b) by the sheriff, on the application of the trustee, the debtor or any other interested party.
- (8) The sheriff—
- 25 (a) is not to vary a debtor's agreement so as to include provision of a kind which could not be included in an order made under subsection (4), and
- (b) is to grant an application to vary a debtor's agreement if and to the extent that the sheriff thinks variation is necessary to determine a suitable amount to allow for the purposes specified in paragraphs (a) and (b) of section 57(3), being an amount not to be included in the amount paid to the trustee.
- 30 (9) The trustee (unless the Accountant in Bankruptcy) is to send a copy of any debtor's agreement (and a copy of any variation of such an agreement) to the Accountant in Bankruptcy.
- (10) If the debtor fails to comply with a debtor's agreement the sheriff, on the application of the trustee, may make an order under subsection 57(4)—
- 35 (a) ending on the date on which the agreement would, had the debtor continued to comply with it, have ended, and
- (b) on the same terms as the agreement.

59 Further provision as regards vesting of estate after sequestration[j140.doc]

- (1) Diligence in respect of a debt or obligation mentioned in subsection (2) is not competent
- 40 against income vesting in the debtor under section 57(1).
- (2) The debt or obligation is one in respect of which the debtor, if discharged under section 98, would be discharged under section 100.

- (3) For the purposes of subsection (1), diligence includes the making of a deduction from earnings order under the Child Support Act 1991 (c.48).
- (4) Any estate, wherever situated, which—
- (a) is acquired by the debtor on a relevant date, and
- (b) would have vested in the trustee in the sequestration if it had been part of the debtor's estate on the date of sequestration,
- vests in the trustee for the benefit of the creditors as at the date of acquisition.
- (5) A person who holds estate vesting in the trustee under subsection (4) is, on production to the person of a copy of the order certified by the sheriff clerk, or as the case may be by the Accountant in Bankruptcy, appointing the trustee, to convey or deliver the estate to the trustee.
- (6) But if such a person has, in good faith and without knowledge of the sequestration, conveyed the estate to—
- (a) the debtor, or
- (b) to anyone on the instructions of the debtor,
- the person incurs no liability to the trustee except to account for any proceeds of the conveyance which are in the person's hands.
- (7) Subsection (4) is without prejudice to section 57(1).
- (8) Subsections (4) and (5) are without prejudice to any right acquired in the estate in good faith and for value.

60 Dealings and circumstances of debtor after sequestration[j141.doc]

- (1) The debtor must immediately notify the trustee in the sequestration—
- (a) of any assets acquired by the debtor on a relevant date, or
- (b) of any other change in the debtor's financial circumstances.
- (2) A debtor who fails to comply with subsection (1) is guilty of an offence and liable on summary conviction—
- (a) to a fine not exceeding level 5 on the standard scale,
- (b) to imprisonment for a term not exceeding 3 months, or
- (c) both to such fine and to such imprisonment.
- (3) Any dealing of, or with, the debtor and relating to the debtor's estate vested in the trustee under section 50 or 59 is of no effect in a question with the trustee.
- (4) But subsection (3) is subject to subsections (5) and (6).
- (5) Subsection (3) does not apply where the person seeking to uphold the dealing establishes that the trustee—
- (a) has abandoned to the debtor the property to which the dealing relates,
- (b) has expressly or impliedly authorised the dealing, or
- (c) is otherwise personally barred from challenging the dealing.

- (6) Nor does that subsection apply where the person seeking to uphold the dealing establishes both—
- (a) 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 trustee,
- (iii) a banking transaction in the ordinary course of business between the banker and the debtor, or
- (iv) one which satisfies the conditions mentioned in subsection (9), and
- (b) 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.
- (7) Where the trustee has abandoned heritable property to the debtor, notice (in such form as may be prescribed) given to the debtor by the trustee is sufficient evidence that the property is vested in the debtor.
- (8) Where notice is given under subsection (7), the trustee is as soon as reasonably practicable after giving it to record a certified copy of it in the register of inhibitions.
- (9) The conditions are that—
- (a) the dealing constitutes—
- (i) the transfer of incorporeal moveable property, or
- (ii) the creation, transfer, variation or extinguishing of a real right in heritable property,
- for which the person dealing with the debtor has given adequate consideration to the debtor or is willing to give adequate consideration to the trustee,
- (b) the dealing requires the delivery of a deed, and
- (c) the delivery occurs during the period beginning with the date of sequestration and ending 7 days after the day on which—
- (i) the certified copy of the order of the sheriff granting warrant is recorded in the register of inhibitions under subsection (1)(a) of section 22, or
- (ii) the certified copy of the determination of the Accountant in Bankruptcy awarding sequestration is recorded in that register under subsection (2) of that section.

Limitation on vesting

61 Limitation on vesting[j082.doc]

- (1) The following property of the debtor does not vest in the trustee in the sequestration—
- (a) any property—
- (i) kept outside a dwellinghouse, and
- (ii) in respect of which attachment is, by virtue of section 11(1) of the Debt Arrangement and Attachment (Scotland) Act 2002 (asp 17), incompetent,

- (b) any property—
 - (i) kept inside a dwellinghouse, and
 - (ii) not a non-essential asset for the purposes of Part 3 of that Act, and
- (c) property held on trust by the debtor for any other person.

- 5 (2) The vesting of the debtor's estate in the trustee in the sequestration does not affect the right of hypothec of a landlord.
- (3) Sections 50 and 57 are without prejudice to the right of any secured creditor which is preferable to the rights of the trustee.

PART 6

SAFEGUARDING INTERESTS OF CREDITORS

Gratuitous alienations and unfair preferences

62 Gratuitous alienations[j085.doc]

- 10 (1) Subsection (2) applies where—
- 15 (a) by an alienation (whether before or after the coming into force of this Act) by a debtor—
- (i) any of the debtor's property has been transferred, or
 - (ii) any claim or right of the debtor has been discharged or renounced,
- (b) any of the following has occurred—
- 20 (i) the debtor's estate has been sequestrated (other than, in the case of a natural person, after the debtor has died),
 - (ii) the debtor has granted a trust deed which has become a protected trust deed,
 - (iii) the debtor has died and within twelve months after the date of death the debtor's estate has been sequestrated, or
 - 25 (iv) the debtor has died, the debtor's estate was absolutely insolvent at the date of death and within those twelve months a judicial factor has been appointed under section 11A of the Judicial Factors (Scotland) Act 1889 (c.39) to administer that estate, and
- (c) the alienation took place on a relevant day.
- 30 (2) The alienation is challengeable by—
- (a) any creditor who is a creditor by virtue of a debt incurred on or before (as the case may be) the date of sequestration, the granting of the trust deed or the date of death, or
 - (b) (as the case may be) the trustee in the sequestration, the trustee acting under the trust deed or the judicial factor.
- 35 (3) For the purposes of paragraph (c) of subsection (1), the day on which an alienation takes place is the day on which the alienation becomes completely effectual.

- (4) 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, or
 - (b) any other person, a day not earlier than 2 years before,
- (as the case may be) the date of sequestration, the granting of the trust deed or the date of death.
- (5) On a challenge being brought under subsection (2), the court is to grant decree—
- (a) of reduction, or
 - (b) for such restoration of property to the debtor’s estate, or such other redress, as may be appropriate.
- (6) Except that the court is not to grant such 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 the debtor’s liabilities,
 - (b) that the alienation was made for adequate consideration, or
 - (c) that the alienation was—
 - (i) a birthday, Christmas or other conventional gift, or
 - (ii) a gift made, for a charitable purpose, to a person who is not an associate of the debtor,being a gift which, having regard to all the circumstances, it was reasonable for the debtor to make.
- (7) Subsection (6) is without prejudice to any right acquired, in good faith and for value, from or through the transferee in the alienation.
- (8) In subsection (5), “charitable purpose” means any charitable, benevolent or philanthropic purpose whether or not it is charitable within the meaning of any rule of law.
- (9) For the purposes of subsections (1) to (8), an alienation in implementation of a prior obligation is 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.
- (10) This section is without prejudice to the operation of section 2 of the Married Women’s Policies of Assurance (Scotland) Act 1880 (c.26) (which provides that a policy of assurance may be effected in trust for spouse, future spouse and children) including the operation of that section as applied by section 132 of the Civil Partnership Act 2004 (c.33).
- (11) A trustee in a sequestration, a trustee acting under a protected trust deed or a judicial factor appointed under section 11A of the Judicial Factors (Scotland) Act 1889 (c.39) has 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.
- (12) The trustee in the sequestration is to insert in the sederunt book a copy of any decree under this section affecting the sequestrated estate.

63 Unfair preferences[j084.doc]

- 5 (1) Subsection (5) applies to a transaction entered into (whether before or after the coming into force of this Act) by a debtor 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—
- 10 (a) the date of sequestration of the debtor's estate (if, in the case of a natural person, a date within the debtor's lifetime),
 - (b) the granting by the debtor of a trust deed which has become a protected trust deed,
 - (c) the debtor's death where, within twelve months after the date of death—
 - 10 (i) the debtor's estate is sequestrated,
 - (ii) a judicial factor is appointed under section 11A of the Judicial Factors (Scotland) Act 1889 (c.39) to administer the debtor's estate and that estate was absolutely insolvent at the date of death.
- 15 (2) But subsection (5) does not apply to—
- 15 (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,
 - (c) a transaction by which the parties undertake reciprocal obligations (whether the performance by the parties of their respective obligations is to occur at the same time or at different times),
 - 20 (d) the granting of a mandate by a debtor authorising an arrestee to pay over the arrested funds, or part of the arrested funds, to the arrester where—
 - (i) there has been a decree for payment or a warrant for summary diligence, and
 - 25 (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) Paragraph (b) or (c) of subsection (2) is to be disregarded if the transaction in question was collusive with the purpose of prejudicing the general body of creditors.
- (4) For the purposes of subsection (1), the day on which a preference is created is the day on which it becomes completely effectual.
- 30 (5) The transaction is challengeable by—
- (a) any creditor who is a creditor by virtue of a debt incurred on or before (as the case may be) the date of sequestration, the granting of the protected trust deed or the debtor's death, or
 - 35 (b) (as the case may be) the trustee in the sequestration, the trustee acting under the protected trust deed or the judicial factor.
- (6) On a challenge being brought under subsection (5) the court, if satisfied that the transaction challenged is a transaction to which that subsection applies, is to grant decree—
- 40 (a) of reduction, or
 - (b) for such restoration of property to the debtor's estate, or such other redress, as may be appropriate.

- (7) Subsection (6) is without prejudice to any right acquired, in good faith and for value, from or through the creditor in whose favour the preference was created.
- (8) A trustee, a trustee acting under a protected trust deed or a judicial factor appointed under section 11A of the Judicial Factors (Scotland) Act 1889 (c.39) has the same right as a creditor has under any rule of law to challenge a preference created by a debtor.
- (9) The trustee in the sequestration is to insert in the sederunt book a copy of any decree under this section affecting the sequestrated estate.

Recall of certain orders

64 Recall of order for payment of capital sum on divorce or on dissolution of civil partnership[j083.doc]

- (1) This section applies where—
- (a) a court has—
- (i) under section 5 of the Divorce (Scotland) Act 1976 (c.39) or section 8(2) of the Family Law (Scotland) Act 1985 (c.37), made an order (whether before or after the coming into force of this Act) for the payment by a debtor of a capital sum, or
- (ii) under the said section 8(2), made an order for the transfer of property by the debtor 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 on the death of the debtor,
- (ii) the debtor has granted a trust deed which has (whether or not within the 5 years) become a protected trust deed,
- (iii) the debtor has died and, within 12 months after the date of death, the debtor's estate has been sequestrated, or
- (iv) the debtor has died and, within those 12 months, a judicial factor has been appointed under section 11A of the Judicial Factors (Scotland) Act 1889 (c.39) to administer the debtor's estate.
- (2) The court, on the application of (as the case may be) the trustee in the sequestration, the trustee acting under the trust deed or the judicial factor, may make an order for recall of the order in question and—
- (a) for the repayment to the applicant of the whole or part of any sum already paid under the order,
- (b) for the return to the applicant of all or part of any property already transferred under the order, or
- (c) (where such property has been sold) for payment to the applicant of all or part of the proceeds of sale.

- (3) But before making an order under subsection (2), the court is to have regard to all the circumstances including, without prejudice to the generality of this subsection, the financial and other circumstances (in so far as made known to the court) of the person against whom the order would be made.
- 5 (4) Where an application is brought under this section in a case where the debtor's estate has been sequestrated, the trustee in the sequestration is to insert a copy of any decree of recall in the sederunt book.

Excessive contributions

65 Recovery of excessive pension contributions[j066.doc]

- 10 (1) Where a debtor's estate has been sequestrated and the debtor—
- (a) has rights under an approved pension arrangement, or
 - (b) has excluded rights under an unapproved pension arrangement,
- the trustee in the sequestration may apply to the court for an order under this section.
- (2) If the court is satisfied—
- 15 (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.
- 20 (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—
- (a) the arrangement, or
 - (b) any other pension arrangement,
- 25 having at any time become subject to a debit under section 29(1)(a) of the 1999 Act (debts giving effect to pension-sharing), less than it would otherwise have been.
- (4) Where this subsection applies—
- (a) any relevant contributions which were represented by the rights which became subject to the debit are, for the purposes of subsection (2), to 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) are to be treated as excessive contributions before any which are so represented by virtue of that
- 35 paragraph.
- (5) In subsections (2) to (4), "relevant contributions" means contributions to the arrangement or to any other pension arrangement—
- (a) which the debtor has at any time made on the debtor's own behalf, or
 - (b) which have at any time been made on the debtor's behalf.
- 40

- (6) The court is, in determining whether it is satisfied under subsection (2)(b), to consider in particular—
- (a) whether any of the contributions were made for the purpose of putting assets beyond the reach of, or of any of, the debtor's creditors, and
 - 5 (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,
- 10 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 of sections 66 and 67, rights of a debtor under an unapproved pension arrangement are excluded rights if they are rights which are excluded from the debtor's estate by virtue of regulations under section 12 of the 1999 Act.
- 15 (8) In the recovery provisions—
- “the 1999 Act” means the Welfare Reform and Pensions Act 1999,
 - “approved pension arrangement” has the same meaning as in section 11 of that Act, and
 - 20 “unapproved pension arrangement” has the same meaning as in section 12 of that Act.

66 Orders under section 65[j067.doc]

- (1) Without prejudice to the generality of subsection (2) of section 65, an order under that section may include provision—
- 25 (a) requiring the person responsible for the arrangement to pay an amount to the 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,
 - 30 (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 67(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.
- 35 (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 1999 Act (pension sharing orders).

- (4) The maximum amount which the person responsible for an arrangement may be required to pay by an order under section 65 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 the debtor's excluded rights under the arrangement (if the arrangement is an unapproved pension arrangement).
- (5) An order under section 65 which requires the person responsible for an arrangement to pay an amount ("the restoration amount") to the 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 65 in respect of an arrangement—
- (a) is 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.

67 Orders under section 65: supplementary[j068.doc]

- (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,
- must, on the trustee in the sequestration making a written request, provide the trustee with such information about the arrangement and rights as the trustee may reasonably require for, or in connection with, the making of applications under section 65.
- (2) Nothing in—
- (a) any provision of section 159 of the Pensions Schemes Act 1993 or section 91 of the Pensions Act 1995 (which prevent assignation and the making of orders that restrain a person from receiving anything which the person is prevented from assigning),
 - (b) any provision of any enactment (whether passed or made before or after the passing of the 1999 Act) corresponding to any of the provisions mentioned in paragraph (a), or
 - (c) any provision of the arrangements in question corresponding to any of those provisions,
- applies to a court exercising its powers under section 65.
- (3) Where any sum is required by an order under section 65 to be paid to the trustee, that sum is to be comprised in the debtor's estate.

- (4) Regulations made by the Secretary of State 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 66(4)(b),
 - (b) any such amounts as are mentioned in section 66(6)(a) and (b).
- 5 (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 from time to time prepared by a prescribed person.
- 10 (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, in relation to the arrangement, functions corresponding to those of a trustee, manager or provider.
- 15 (7) In this section and in section 65 “the recovery provisions” means this section and sections 65 and 66.
- (8) Regulations under subsection (4) may contain such incidental, supplemental and transitional provisions as appear to the Secretary of State necessary or expedient.

68 Recovery of excessive contributions in pension-sharing cases[j109.doc]

- 20 (1) For the purposes of section 62, a pension-sharing transaction is taken—
- (a) to be a transaction, entered into by the transferor (TR) with the transferee (TE), by which the appropriate amount is transferred by TR to TE, 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.
- 25 (2) For the purposes of section 63, a pension-sharing transaction is taken—
- (a) to be something (namely a transfer of the appropriate amount to TE) done by TR, and
 - (b) to be capable of being an unfair preference given to TE only so far as it is a transfer of so much of the appropriate amount as is recoverable.
- 30 (3) For the purposes of section 64, a pension-sharing transaction is 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.
- 35 (4) Where—
- (a) an alienation is challenged under section 62,
 - (b) a transaction is challenged under section 63, or
 - (c) an application is made under section 64 for the recall of an order made in divorce proceedings,

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 is to be determined in accordance with subsections (5) to (9).

5 (5) The court is first to determine the extent, if any, to which TR'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 TR has at any time made on TR's own behalf, or

(b) which have at any time been made on TR's behalf,

to the shared arrangement or any other pension arrangement.

10 (6) Where it appears that those rights were to any extent the fruits of personal contributions, the court is then to determine the extent, if any, to which those rights appear to have been the fruits of personal contributions whose making has unfairly prejudiced TR's creditors ("the unfair contributions").

15 (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.

20 (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 is to consider in particular—

(a) whether any of the personal contributions were made for the purpose of putting assets beyond the reach of TR's creditors or any of them, and

25 (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 TR's circumstances when those contributions were made.

(10) In this section and sections 69 and 70—

30 "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 (c.30) (creation of pension credits and debits),

35 "pension-sharing transaction" means an order or provision falling within section 28(1) of that Act (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" (or "TE"), in relation to a pension-sharing transaction, means the person for whose benefit the transaction is made, and

40 "transferor" (or "TR"), in relation to a pension-sharing transaction, means the person to whose rights the transaction relates.

69 Excessive contributions in pension-sharing cases: recovery orders[j110.doc]

- (1) In this section and section 70, “recovery order” means—
- (a) a decree granted under section 62(5),
 - (b) a decree granted under section 63(6), or
 - (c) an order made under section 64(2),
- in any proceedings to which section 68 applies.
- (2) A recovery order may include provision—
- (a) requiring the person responsible for a pension arrangement in which TE has acquired rights derived directly or indirectly from the pension-sharing transaction to pay an amount to the trustee,
 - (b) adjusting the liabilities of the pension arrangement in respect of TE,
 - (c) adjusting any liabilities of the pension arrangement in respect of any other person that derive, directly or indirectly, from rights of TE 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 70(1) or in giving effect to the order.
- (3) Subsection (2) is without prejudice to the generality of section 62(5), 63(6) or 64(2).
- (4) 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.
- (5) 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 is recoverable in accordance with section 68,
 - (b) so much, if any, of the amount of the unfair contributions (within the meaning given by section 68(6)) as is not recoverable by way of an order under section 65 containing provision such as is mentioned in section 66(1)(a), and
 - (c) the value of the debtor’s rights under the arrangement acquired by TE as a consequence of the transfer of the appropriate amount.
- (6) A recovery order which requires the person responsible for an arrangement to pay an amount (“the restoration amount”) to the trustee must provide for the liabilities of the arrangement to be correspondingly reduced.
- (7) For the purposes of subsection (6), liabilities are correspondingly reduced if the difference between—
- (a) the amount of the liabilities immediately before the reduction, and
 - (b) their amount immediately after the reduction,
- is equal to the restoration amount.

- (8) A recovery order in respect of an arrangement—
- (a) is 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.

5 **70 Recovery orders: supplementary[j111.doc]**

- 10 (1) The person responsible for a pension arrangement under which TE has, at any time, acquired rights by virtue of the transfer of the appropriate sum is, on the trustee making a written request, to provide the trustee with such information about the arrangement and the rights under it of TR and TE as the trustee may reasonably require for, or in connection with, the making of an application for a recovery order.
- (2) Nothing in the provisions mentioned in subsection (3) applies to a court exercising its power to make a recovery order.
- (3) The provisions are—
- 15 (a) any provision of section 159 of the Pension Schemes Act 1993 (c.48) or section 91 of the Pensions Act 1995 (c.26) (which prevent assignation and the making of orders which restrain a person from receiving anything the person 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 (c.30)) corresponding to any of the provisions mentioned in paragraph (a), or
 - 20 (c) any provision of the arrangement in question corresponding to any of those provisions.
- (4) Regulations may, for the purposes of the recovery provisions, make provision about the calculation and verification of—
- 25 (a) any such value as is mentioned in section 69(5)(c), or
 - (b) any such amounts as are mentioned in section 69(7)(a) and (b).
- (5) The power conferred by subsection (4) includes power to provide for calculation or verification—
- 30 (a) in such manner as may, in the particular case, be approved by a prescribed person, or
 - (b) in accordance with guidance from time to time prepared by a prescribed person.
- (6) References in the recovery provisions to the person responsible for a pension arrangement are to—
- 35 (a) the trustees, managers or providers 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—
- “prescribed” means prescribed by regulations,
 - “the recovery provisions” means this section and sections 62, 64, 63 and 69, and
 - 40 “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.

PART 7

ADMINISTRATION OF ESTATE BY TRUSTEE

General

71 Taking possession of estate by trustee[j090.doc]

- (1) The trustee in the sequestration (“T”) is—
- (a) for the purpose of recovering the estate of the debtor (“D”) under section 35(1)(a), to take possession as soon as may be after T’s appointment—
 - (i) of D’s whole estate so far as vesting in T under sections 50 and 57, and
 - (ii) of any document in D’s possession or control relating to D’s assets or D’s business or financial affairs,
 - (b) to make up and maintain, and record in the sederunt book, an inventory and valuation of the estate, and
 - (c) on that being done, to send a copy of the inventory and valuation to the Accountant in Bankruptcy.
- (2) Paragraph (a) of subsection (1) is subject to section 76.
- (3) T is entitled to have access to, and to make a copy of, any document relating to the assets or the business or financial affairs of D—
- (a) sent by or on behalf of D to a third party, and
 - (b) in the third party’s hands.
- (4) If a person obstructs T in T’s exercise, or attempted exercise, of a power conferred by subsection (3), the sheriff may, on T’s application, order the person to cease obstructing T.
- (5) T may require delivery to T of any title deed or other document of D, even if a right of lien is claimed over it.
- (6) Subsection (5) is without prejudice to any preference of the holder of the lien.

72 Management and realisation of estate[j121.doc]

- (1) The trustee in the sequestration (“T”), as soon as may be after T’s appointment, is to consult with the Accountant in Bankruptcy (“AiB”) concerning the exercise of T’s functions under section 35(1)(a).
- (2) T is to comply with any general or specific directions given to T (as the case may be)—
- (a) by the creditors,
 - (b) on the application under this subsection of the commissioners, by the sheriff, or
 - (c) by AiB,
- as to the exercise by T of such functions.
- (3) But subsection (2) is subject to subsections (4), (9) and (12).
- (4) Subsections (1) and (2) do not apply where T is AiB.

- (5) T may do any of the following things—
- (a) carry on or close down 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,,
 - 5 (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,
 - (e) borrow money in so far as it is necessary for T to do so to safeguard the debtor's estate,
 - 10 (f) effect or maintain insurance policies in respect of the business or property of the debtor.
- (6) Any sale of the debtor's estate by T may either be by public sale or by private bargain.
- (7) The following rules 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
- 15 creditor or creditors are preferable to those of T—
- (a) T may sell that part only with the concurrence of every such creditor unless T obtains a sufficiently high price to discharge every such security,
 - (b) the following acts are precluded—
 - 20 (i) the taking of steps by a creditor to enforce the creditor's security over the part after T has intimated to the creditor that T intends to sell the part,
 - (ii) the commencement by T of the procedure for the sale of the part after the creditor has intimated to T that the creditor intends to commence the procedure for its sale,
 - 25 (c) except that where T or a creditor has given intimation under paragraph (b) but has unduly delayed in proceeding with the sale then, if authorised by the sheriff in the case of—
 - (i) sub-paragraph (i) of that paragraph, any creditor to whom intimation has been given may enforce the creditor's security, or
 - (ii) sub-paragraph (ii) of that paragraph, T may sell the part.
- 30 (8) The function of T under section 35(1)(a) to realise the debtor's estate includes the function of selling, with or without recourse against the estate, debts owing to the estate.
- (9) T may sell any perishable goods without complying with any directions given to T under subsection (2)(a) or (c) if T considers that compliance with such directions would adversely affect the sale.
- 35 (10) The validity of the title of any purchaser is not challengeable on the ground that there has been a failure to comply with a requirement of this section.
- (11) It is not competent for T or an associate of T, or for any commissioner, to purchase any of the debtor's estate in pursuance of this section.

(12) T—

(a) is to comply with the requirements of subsection (7) of this section, and

(b) may do anything permitted by this section,

only in so far as, in T's view, it would be of financial benefit to the estate of the debtor, and in the interests of the creditors, to do so.

Contractual powers and money received

73 Contractual powers of trustee[j091.doc]

(1) The trustee in the sequestration ("T") may, as respects any contract entered into by the debtor before the date of sequestration—

(a) adopt it (except where adoption is precluded by its express or implied terms) if T considers that its adoption would be beneficial to the administration of the debtor's estate, or

(b) refuse to adopt it.

(2) But subsection (1) is subject to subsections (3) and (4).

(3) T is, as respects any contract entered into by the debtor, to adopt or refuse to adopt the contract—

(a) within 28 days after receiving a request in writing in that regard, from a party to the contract, or

(b) within such longer period after such receipt as the sheriff, on application by T, may allow.

(4) If, within the period of 28 days or as the case may be within the longer period allowed, T does not reply in writing to a request under subsection (3), T is deemed to have refused to adopt the contract.

(5) T may enter into any contract where T considers that to do so would be beneficial for the administration of the debtor's estate.

74 Money received by trustee[j092.doc]

(1) All money received by the trustee in the sequestration ("T") in the exercise of T's functions are to be deposited by T in the name of the debtor's estate in an interest-bearing account in an appropriate bank or institution.

(2) But subsection (1) is subject to subsections (3) and (5).

(3) In any case where T is the Accountant in Bankruptcy, all money received by T in the exercise of T's functions as trustee are to be deposited by T—

(a) in the name of the debtor's estate, or

(b) in the name of the Scottish Ministers,

in an interest-bearing account in an appropriate bank or institution.

(4) But subsection (3) is subject to subsection (5).

(5) T may at any time retain in T's hands a sum not exceeding £200 or such other sum as may be prescribed.

*Debtor's home***75 Debtor's home ceasing to form part of sequestrated estate[j117.doc]**

- (1) This section applies where a debtor's sequestrated estate includes any right in the debtor's family home.
- 5 (2) At the end of the period of 3 years beginning with the date of sequestration, the right—
- (a) ceases to form part of the debtor's sequestrated estate, and
 - (b) is reinvested in the debtor (without disposition, conveyance, assignation or other transfer).
- (3) Subsection (2) does not apply if—
- 10 (a) during the period mentioned in subsection (2)—
- (i) the trustee in the sequestration ("T") disposes of or otherwise realises the right,
 - (ii) T concludes missives for sale of the right,
 - 15 (iii) T sends a memorandum to the keeper of the register of inhibitions under section 22(6),
 - (iv) T completes title in the Land Register of Scotland, or as the case may be in the Register of Sasines, in relation to the right,
 - (v) T commences proceedings to obtain the authority of the sheriff under section 76(1)(b) to sell or dispose of the right,
 - 20 (vi) T commences proceedings in an action for division and sale of the family home,
 - (vii) T commences proceedings in an action for the purpose of obtaining vacant possession of the family home,
 - 25 (viii) T and the debtor enter into an agreement such as is mentioned in subsection (4), or
 - (ix) T commences an action under section 62 in respect of the right, or
- (b) T—
- (i) does not, at any time during the period mentioned in subsection (2), know about the facts giving rise to a right of action under section 62, but
 - 30 (ii) commences an action under that section reasonably soon after becoming aware of those facts.
- (4) The agreement referred to in subsection (3)(a)(viii) is an agreement that the debtor is to incur a specified liability to the debtor's estate (with or without interest from the date of the agreement) in consideration of which the right is to—
- 35 (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).
- (5) If the debtor does not inform T of the right before the end of the period mentioned in subsection (2) then the period so mentioned is to be taken, for the purposes of subsections (2) and (3)—
- 40 (a) not to begin with the date of sequestration, but

(b) to begin instead with the date on which T becomes aware of it.

(6) The sheriff may, on T's application, substitute for the period mentioned in subsection (2) a longer period—

(a) in prescribed circumstances, and

(b) in such other circumstances as the sheriff thinks appropriate.

(7) The Scottish Ministers may, by regulations—

(a) make provision for this section to have effect with the substitution, in such circumstances as may be specified in the regulations, of a shorter period for the period mentioned in subsection (2),

(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 T 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), or

(g) modify paragraph (a) of subsection (3) so as to—

(i) add or remove a matter, or

(ii) vary a matter,

referred to in that paragraph.

(8) In this section, “family home” has the same meaning as in section 76.

76 Power of trustee in relation to the debtor's family home[j094.doc]

(1) Before the trustee in the sequestration (“T”), or the trustee acting under the trust deed (“TU”), sells or disposes of any right in the debtor's family home, T or TU is—

(a) to obtain the relevant consent, or

(b) where unable to obtain that consent, to obtain the authority of the sheriff in accordance with subsection (2).

(2) Where T or TU requires to obtain the authority of the sheriff in terms of subsection (1)(b), the sheriff, 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,

(b) the needs and financial resources of the debtor's civil partner or former civil partner,

(c) the needs and financial resources of any child of the family,

- (d) the interests of the creditors, and
- (e) 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 paragraphs (a) to (c),

5 may refuse to grant the application or may postpone the granting of the application for such period (not exceeding 3 years) as the sheriff may consider reasonable in the circumstances or may grant the application subject to such conditions as the sheriff may prescribe.

(3) Subsection (2) applies to an action brought by T or TU—

10 (a) for division and sale of, or

(b) for the purpose of obtaining vacant possession of,

the debtor's family home as that subsection applies to an application under subsection (1)(b).

15 (4) Before commencing proceedings to obtain the authority of the sheriff under subsection (1)(b), T or TU must give notice of the proceedings to the local authority in whose area the home is situated.

(5) Notice under subsection (4) must be given in such form and manner as may be prescribed.

20 (6) For the purposes of subsection (3), any reference in subsection (2) to the granting of the application is to be construed as a reference to the granting of decree in the action.

(7) In this section—

“family home” means any property in which, at the relevant date, the debtor had a right (whether alone or in common with another person), being property which was occupied at that date as a residence—

25 (a) by—

(i) the debtor and the debtor's spouse or civil partner,

(ii) the debtor's spouse or civil partner,

(iii) the debtor's former spouse or former civil partner,

in any of those cases, whether with or without a child of the family, or

30 (b) by the debtor with a child of the family,

“child of the family” includes—

(a) any child or grandchild of either—

(i) the debtor, or

(ii) the debtor's spouse or civil partner (or former spouse or civil partner),
and

35

- (b) any person who has been brought up or accepted by either—
- (i) the debtor, or
 - (ii) the debtor's spouse or civil partner (or former spouse or civil partner),
- as if a child of the debtor, spouse, civil partner or former spouse or civil partner,

(whatever age the child, grandchild or person may be),

“local authority” means a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c.39),

“relevant consent” means, in relation to the sale or disposal of any right in a family home—

- (a) in a case where the family home is occupied by the debtor's spouse or civil partner (or former spouse or civil partner), the consent of the spouse or civil partner (or as the case may be former spouse or civil partner) whether or not the family home is also occupied by the debtor,
- (b) where paragraph (a) 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

“relevant date” means the day immediately preceding the date of sequestration or, as the case may be, the day immediately preceding the date the trust deed was granted.

Rights of spouse or civil partner

77 Protection of rights of spouse against arrangements intended to defeat them[j104.doc]

- (1) Subsections (2) and (3) apply where a debtor's sequestrated estate includes a matrimonial home in respect of which—
- (a) the debtor, immediately before the date the order was made appointing the trustee, was an entitled spouse, and
 - (b) the other spouse is a non-entitled spouse.
- (2) Where the trustee in the sequestration knows—
- (a) that the debtor is married to the non-entitled spouse, and
 - (b) where the non-entitled spouse is residing,

the trustee is to inform the non-entitled spouse, within the period of 14 days beginning with the date mentioned in subsection (1)(a), of the fact that sequestration of the debtor's estate has been awarded, of the right of petition which exists under section 24 and of the effect of subsection (3).

- (3) On the petition under section 24 of the non-entitled spouse presented either within the period of 40 days beginning with the date mentioned in subsection (1)(a) or within the period of 10 weeks beginning with the date of the award of sequestration the sheriff, if satisfied that the purpose of the petition for sequestration, or as the case may be the debtor application, was wholly or mainly to defeat the occupancy rights of the non-entitled spouse, may—
- (a) under section 25, recall the sequestration, or
 - (b) make such order as the sheriff thinks appropriate to protect the occupancy rights of the non-entitled spouse.
- (4) The reference in subsection (1)(a) to the date the order is made appointing the trustee is, in a case where more than 1 trustee is appointed in the sequestration, to be construed as a reference to the date the first order is made appointing a trustee.
- (5) In subsection (1)—
- “entitled spouse” and “non-entitled spouse” are to be construed in accordance with section 6 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (c.59),
- “matrimonial home” has the meaning assigned by section 22 of that Act, and
- “occupancy rights” has the meaning assigned by section 1(4) of that Act.

78 Protection of rights of civil partner against arrangements intended to defeat them[j105.doc]

- (1) Subsections (2) and (3) apply where a debtor’s sequestrated estate includes a family home in respect of which—
- (a) the debtor, immediately before the date the order was made appointing the trustee, was an entitled partner, and
 - (b) the other partner in the civil partnership is a non-entitled partner.
- (2) Where the trustee in the sequestration knows—
- (a) that the debtor is in civil partnership with the non-entitled partner, and
 - (b) where the non-entitled partner is residing,
- the trustee is to inform the non-entitled partner, within the period of 14 days beginning with the date mentioned in subsection (1)(a), of the fact that sequestration of the debtor’s estate has been awarded, of the right of petition which exists under section 24 and of the effect of subsection (3).
- (3) On the petition under section 24 of the non-entitled partner presented either within the period of 40 days beginning with the date mentioned in subsection (1)(a) or within the period of 10 weeks beginning with the date of the award of sequestration the sheriff, if satisfied that the purpose of the petition for sequestration, or as the case may be the debtor application, was wholly or mainly to defeat the occupancy rights of the non-entitled partner, may—
- (a) under section 25, recall the sequestration, or
 - (b) make such order as the sheriff thinks appropriate to protect the occupancy rights of the non-entitled partner.

- (4) The reference in subsection (1)(a) to the date the order is made appointing the trustee is, in a case where more than 1 trustee is appointed in the sequestration, to be construed as a reference to the date the first order is made appointing a trustee.
- (5) In subsection (1)—
- 5 “entitled partner” and “non-entitled partner” are to be construed in accordance with section 101 of the Civil Partnership Act 2004 (c.33),
- “family home” has the meaning assigned by section 135 of that Act, and
- “occupancy rights” means the rights conferred by section 101(1) of that Act.

Account of state of affairs

79 Debtor’s requirement to give account of state of affairs[j093.doc]

- (1) This section applies to a debtor who—
- (a) has not been discharged under this Act, or
- (b) is subject to—
- 15 (i) an order made by the sheriff under subsection (4) of section 57, or
- (ii) an agreement entered into under subsection (1) of that section.
- (2) The trustee in the sequestration is, at the end of—
- (a) the period of 6 months beginning with the date of sequestration, and
- (b) each subsequent period of 6 months,
- 20 to require the debtor to give an account in writing, in such form as may be prescribed, of the debtor’s current state of affairs.

PART 8

EXAMINATION OF DEBTOR

Private and public examination

80 Private examination[j039.doc]

- (1) The trustee in the sequestration may request—
- (a) the debtor (“D”) to appear before the trustee and to give information relating to D’s assets, D’s dealings with them or D’s conduct in relation to D’s business or financial affairs, or
- 30 (b) D’s spouse or civil partner, or any other person who the trustee believes can give such information (in this Act such spouse, civil partner or other person being referred to as a “relevant person”) to give that information.
- (2) The trustee may, if the trustee considers it necessary, apply to the sheriff for an order to be made under subsection (3)
- 35 (3) On application to the sheriff under subsection (2), the sheriff may make an order requiring D or a relevant person to attend for private examination before the sheriff on a date and at a time specified in the order.
- (4) But subsection (3) is subject to section 82(3).

- (5) A date specified in an order under subsection (3) is to be not earlier than 8 days nor later than 16 days after the date of the order.
- (6) If a person fails without reasonable excuse to comply with an order under subsection (3) then the person is guilty of an offence and is liable, on summary conviction—
- 5 (a) to a fine not exceeding level 5 on the standard scale, or
- (b) to imprisonment for a term not exceeding 3 months,
- or both to such fine and such imprisonment.
- (7) Where D is an entity whose estate may be sequestrated by virtue of section 4(1), the references, in this section and in sections 81 to 83, to D are to be construed, unless the
- 10 context otherwise requires, as references to a person representing the entity.

81 Public examination[j040.doc]

- (1) At least 8 weeks before the end of the first accounting period the trustee in the sequestration—
- (a) may, or
- 15 (b) if requested to do so by the Accountant in Bankruptcy or by the commissioners (if any) or by $\frac{1}{4}$ in value of the creditors, shall,
- apply to the sheriff for an order for the public examination before the sheriff of the debtor (“D”), or of a relevant person, relating to D’s assets, D’s dealings with those assets or D’s conduct in relation to D’s business or financial affairs.
- 20 (2) Except that on cause shown such application may be made by the trustee at any time.
- (3) On an application under subsection (1) the sheriff is to make an order requiring D or the relevant person to attend for examination before the sheriff in open court on a date and at a time specified in the order.
- (4) But subsection (3) is subject to section 82(3).
- 25 (5) A date specified in an order under subsection (3) is to be not earlier than 8 days nor later than 16 days after the date of the order.
- (6) On the sheriff making an order under subsection (3), the trustee is to—
- (a) publish in the Edinburgh Gazette a notice in such form, and containing such particulars, as may be prescribed,
- 30 (b) send a copy of the notice—
- (i) to every creditor known to the trustee, and
- (ii) where the order is in respect of a relevant person, to the debtor, and
- (c) inform each person sent a copy under paragraph (b) that the person may participate in the examination.
- 35 (7) If a person fails without reasonable excuse to comply with an order under subsection (3) then the person is guilty of an offence and is liable, on summary conviction—
- (a) to a fine not exceeding level 5 on the standard scale, or
- (b) to imprisonment for a term not exceeding 3 months,
- or both to such fine and such imprisonment.

82 Provisions ancillary to sections 80 and 81[j041.doc]

- 5 (1) If a debtor or relevant person is residing in Scotland, the sheriff may on the application of the trustee grant a warrant (which may be executed by a judicial officer anywhere in Scotland) to apprehend the debtor or relevant person and to have the apprehended or arrested person taken to the place of the examination.
- (2) But a warrant under subsection (1) is not to be granted unless the sheriff is satisfied that it is necessary to grant it to secure the attendance of the debtor or relevant person at the examination.
- 10 (3) If the debtor or relevant person is for any good reason prevented from attending for examination, the sheriff may grant a commission to take the examination of the debtor or relevant person (the commissioner being, in this section and in section 83, referred to as an “examining commissioner”).
- (4) Subsection (3) is without prejudice to subsection (5).
- 15 (5) The sheriff or the examining commissioner may at any time adjourn the examination to such day as the sheriff or examining commissioner may fix.
- (6) The sheriff or examining commissioner may order the debtor (“D”) or a relevant person to produce for inspection any document—
- (a) in the custody or control of the person so ordered, and
 - (b) relating to D’s assets, D’s dealings with those assets or D’s conduct in relation to D’s business or financial affairs,
- 20 and to deliver the document or a copy of the document to the trustee in the sequestration for further examination by the trustee.

*Conduct of examination***83 Conduct of examination[j038.doc]**

- 25 (1) The examination, whether before the sheriff or an examining commissioner, is to be taken on oath.
- (2) At the examination—
- 30 (a) the trustee in the sequestration (or a solicitor or counsel acting on behalf of the trustee) and, in the case of public examination, any creditor may question the debtor (“D”) or a relevant person, and
 - (b) D may question a relevant person,
- as to any matter relating to the D’s assets, D’s dealings with those assets or D’s conduct in relation to D’s business or financial affairs.
- (3) D or a relevant person—
- 35 (a) is required to answer any question relating to D’s assets, D’s dealings with those assets or D’s conduct in relation to D’s business or financial affairs, and
 - (b) is not excused from answering any such question on the ground—
- (i) that the answer may incriminate, or tend to incriminate, the person questioned, or
 - 40 (ii) of confidentiality.

- (4) Except that—
- (a) a statement made by D or a relevant person in answer to any such question is not admissible in evidence in any subsequent criminal proceedings against the person making it (except where the proceedings are in respect of a charge of perjury relating to the statement, and
 - (b) a person subject to examination is not required to disclose any information received from a person not called for examination if the information is confidential between the 2 persons.
- (5) The rules relating to the recording of evidence in ordinary causes specified in the First Schedule to the Sheriff Courts (Scotland) Act 1907 (c.51) apply in relation to the recording of evidence at the examination before the sheriff or examining commissioner.
- (6) D's deposition at the examination is to be—
- (a) subscribed by D and by the sheriff (or as the case may be the examining commissioner), and
 - (b) inserted in the sederunt book.
- (7) The trustee is to—
- (a) insert a copy of the record of the examination in the sederunt book, and
 - (b) send a copy of the record to the Accountant in Bankruptcy.
- (8) A relevant person is entitled, as if the person were a witness in an ordinary civil cause in the sheriff court, to fees or allowances in respect of the person's attendance at the examination.
- (9) Except that the sheriff may disallow or restrict the entitlement to such fees or allowances if the sheriff thinks it appropriate to do so in all the circumstances.

PART 9

CLAIMS, DIVIDENDS AND DISTRIBUTION ETC.

Submission and adjudication of claims

84 Submission of claims to trustee[j119.doc]

- (1) A creditor ("C"), in order to obtain an adjudication as to C's 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,
- is to submit a claim in accordance with this section to the trustee in the sequestration ("T").
- (2) Where the claim is by virtue of—
- (a) paragraph (a) of subsection (1), it is to be submitted at or before the meeting,
 - (b) paragraph (b) of that subsection, it is to be submitted not later than 8 weeks before the end of the accounting period.
- (3) But subsection (1) is subject to subsection (4) and to section 92(6) to (8).

- (4) A claim submitted by C—
- (a) under section 32 and accepted in whole or in part by T for the purpose of voting at the statutory meeting, or
 - (b) under this section and not rejected in whole,
- 5 is deemed to have been re-submitted for the purpose of obtaining an adjudication as to C's 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 of any subsequent accounting period.
- (5) C submits a claim under this section by producing to T—
- 10 (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.
- (6) But T, with the consent of the commissioners if any, may dispense with any requirement under subsection (5) in respect of any debt or of any class of debt.
- 15 (7) Where C neither resides, nor has a place of business, in the United Kingdom, T—
- (a) is, if T knows where C does reside or have a place of business and if no notification has been given to C under section 30(3), to write to C informing C that C may submit a claim under this section, and
 - (b) may allow C to submit an informal claim in writing.
- 20 (8) Where C has submitted a claim under this section (or under section section 32 a statement of claim which has been deemed re-submitted as mentioned in subsection (4)), C may at any time submit a further claim under this section specifying a different amount for C's claim.
- 25 (9) But a secured creditor is not entitled to produce a further claim specifying a different value for the security at any time after T requires the creditor to discharge, or convey or assign, the security under paragraph 5(3) of schedule 1.

85 Evidence as to validity or amount of claim[j142.doc]

- (1) The trustee in the sequestration ("T"), for the purpose of being satisfied as to the validity or amount of a claim submitted by a creditor ("C") under section 84, may require—
- 30 (a) C to produce further evidence, or
 - (b) any other person who T believes can produce relevant evidence to produce such evidence,
- and if C (or as the case may be the other person) refuses or delays to do so, T may apply to the sheriff for an order requiring C (or the other person) to attend for private examination before the sheriff.
- 35 (2) At any private examination under subsection (1)—
- (a) a solicitor or counsel may act on behalf of T, or
 - (b) T may appear on T's own behalf.
- 40 (3) Sections 80(3) to (6) and 83(1) apply, subject to any necessary modifications, to the examination of C (or the other person) as they apply to the examination of a relevant person.

- (4) References in subsections (1) and (3) to C in a case where C is an entity mentioned in section 4(1) are to be construed, unless the context otherwise requires, as references to a person representing the entity.

86 False claims etc.[j143.doc]

- 5 (1) Subsections (2) and (3) apply where a creditor (“C”) produces under section 84 or 85—
- (a) a statement of claim,
 - (b) account,
 - (c) voucher, or
 - (d) other evidence,
- 10 which is false.
- (2) C is guilty of an offence unless C shows that C neither knew nor had reason to believe that the statement of claim, account, voucher or other evidence was false.
- (3) The debtor is guilty of an offence if the debtor—
- (a) knew, or became aware, that the statement of claim, account, voucher or other
- 15 evidence was false, and
- (b) failed, as soon as practicable after acquiring such knowledge, to report to the trustee that the statement of claim, account, voucher or other evidence was false.
- (4) A person (“P”) convicted of an offence under subsection (2) or (3) is liable—
- (a) on summary conviction, to a fine not exceeding the statutory maximum, or—
- 20 (i) in a case where P has previously been convicted of an offence inferring dishonest appropriation of property or an attempt at dishonest appropriation of property, to imprisonment for a term not exceeding 6 months, or
- (ii) in any other case, to imprisonment for a term not exceeding 3 months,
- 25 or both to a fine not exceeding the statutory maximum and to such imprisonment as is mentioned, in relation to the case in question, in sub-paragraph (i) or (ii), or
- (b) on conviction on indictment—
- (i) to a fine, or
 - (ii) to imprisonment for a term not exceeding 2 years,
- or both to a fine and to such imprisonment.

30 **87 Further provision as to claims[j144.doc]**

- (1) A creditor (“C”) may, in such circumstances as may be prescribed, state the amount of C’s claim under section 84 in foreign currency.
- (2) The trustee in the sequestration (“T”) is, on production of any document to T for the
- 35 purposes of any of sections 84 to 86—
- (a) to initial the document,
 - (b) to make an insertion relating to it in the sederunt book, stating the date on which it was produced to T, and

(c) if requested by the person producing it to return it (if it is not a statement of claim) to that person.

(3) The submission of a claim under section 84 bars the effect of any enactment or rule of law relating to the limitation of actions.

5 (4) Schedule 1 has effect for determining the amount in respect of which C is entitled to claim.

88 Adjudication of claims[j076.doc]

10 (1) At the commencement of every meeting of creditors (other than the statutory meeting) the trustee in the sequestration (“T”) is, for the purposes of section 89 so far as it relates to voting at the meeting, to accept or reject the claim of each creditor.

(2) Subsection (3) applies where funds are available for payment of a dividend out of the debtor’s estate in respect of an accounting period.

(3) For the purpose of determining who is entitled to such a dividend, T—

15 (a) is, not later than 4 weeks before the end of the period, to accept or reject every claim submitted (or deemed to have been re-submitted) to T under this Act, and

(b) is at the same time to make a decision on any matter required to be specified under paragraph (a) or (b) of subsection (7).

20 (4) T is then, as soon as reasonably practicable, to send a list of every claim so accepted or rejected (including its amount and whether it has been accepted or rejected) to the debtor and to every creditor known to T.

(5) If the amount of a claim is stated in foreign currency, T in adjudicating under subsection (1) or (3) on the claim is to 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.

25 (6) Where T rejects a claim, T is without delay to notify the claimant, giving reasons for the rejection.

(7) Where T accepts or rejects a claim, T is to record in the sederunt book T’s decision on the claim, specifying—

(a) the amount of the claim accepted by T,

30 (b) the category of debt, and the value of any security, as decided by T, and

(c) if T is rejecting the claim, T’s reasons for doing so.

(8) The debtor or any creditor may—

(a) if dissatisfied with the acceptance or rejection of any claim, appeal to the sheriff against that acceptance or rejection, or

35 (b) in relation to the acceptance or rejection of any claim, if dissatisfied with a decision in respect of any matter requiring to be specified under subsection (7)(a) or (b), appeal to the sheriff against the decision.

(9) Except that—

40 (a) a debtor may appeal under subsection (8) if, and only if, the debtor satisfies the sheriff that the debtor has, or is likely to have, a pecuniary interest in the outcome of the appeal,

- (b) if the acceptance or rejection is under subsection (1), any appeal under subsection (8) must be brought within 2 weeks after the acceptance or rejection, and
- (c) if the acceptance or rejection is under subsection (3), any such appeal must be brought not later than 2 weeks before the end of the accounting period.

- 5 (10) It is to record the sheriff's decision in the sederunt book.
- (11) Any reference in this section to the acceptance or rejection of a claim is to be construed as a reference to the acceptance or rejection of the claim in whole or in part.

Entitlement to vote and draw a dividend

89 Entitlement to vote and draw a dividend[j103.doc]

- 10 (1) A creditor whose claim has been accepted in whole or in part by the trustee in the sequestration or on appeal under subsection (8) of section 88 is entitled, in a case where the acceptance is under (or on appeal arising from)—
- (a) subsection (1) of that section, to vote on any matter at the meeting of creditors for the purpose of voting at which the claim is accepted, or
 - 15 (b) subsection (3) of that section, 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
- (2) But—
- (a) paragraph (a) of subsection (1) is subject to sections 47(1)(a) and 49(1) and (7)(b), and
 - 20 (b) the entitlement mentioned in paragraph (b) of that subsection arises only in so far as the estate has funds available, having regard to section 90, to make the payment in question.
- (3) No vote is to be cast, by virtue of a debt, more than once on any resolution put to a meeting of creditors.
- 25 (4) Where a creditor—
- (a) is entitled to vote under this section,
 - (b) has lodged the creditor's claim in 1 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 is to be counted.
- 30 (5) Subsection (6) applies where—
- (a) a creditor has lodged the creditor's claim in more than 1 set of other proceedings, and
 - (b) more than 1 member State liquidator seeks to vote by virtue of the claim.
- (6) The entitlement to vote by virtue of the claim is exercisable by the member State liquidator in main proceedings whether or not the creditor has lodged the claim in those
- 35 proceedings.
- (7) For the purposes of subsections (4) to (6), "other proceedings" means main proceedings, secondary proceedings or territorial proceedings in a member State other than the United Kingdom.

*Distribution***90 Order of priority in distribution[j102.doc]**

- (1) The funds of the debtor's estate are to be distributed by the trustee in the sequestration to meet the following debts in the order in which they are mentioned—
- 5 (a) the outlays and remuneration of an interim trustee in the administration of the debtor's estate,
- (b) the outlays and remuneration of the trustee in the sequestration in the administration of the debtor's estate,
- (c) where the debtor has died—
- 10 (i) deathbed and funeral expenses reasonably incurred, and
- (ii) expenses reasonably incurred in administering the deceased's estate,
- (d) the expenses reasonably incurred by a creditor who is a petitioner for, or concurs in a debtor application for, sequestration,
- (e) preferred debts (excluding any interest which has accrued on those debts to the date of sequestration),
- 15 (f) ordinary debts (that is to say, debts which are neither secured debts nor debts mentioned in any other paragraph of this subsection),
- (g) interest, between the date of sequestration and the date of payment of the debt, at the rate specified in subsection (10) on—
- 20 (i) the preferred debts, and
- (ii) the ordinary debts,
- (h) any postponed debt.
- (2) In this Act, "preferred debt" means a debt listed in Part 1 of schedule 2 to this Act.
- (3) Part 2 of that schedule has effect for the interpretation of Part 1 of that schedule.
- 25 (4) In this Act, "postponed debt" means—
- (a) a loan made to the debtor, in consideration of a share of the profits in the debtor's business, which is postponed under section 3 of the Partnership Act 1890 (c.39) to the claims of other creditors,
- (b) a loan made to the debtor by the debtor's spouse or civil partner, or
- 30 (c) a creditor's right to—
- (i) anything vesting in the trustee by virtue of a successful challenge under section 62, or
- (ii) the proceeds of sale of anything so vesting.
- (5) A debt falling within any of paragraphs (c) to (h) of subsection (1) has 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 in question to be paid in full, those debts are to abate in equal proportions.
- 35 (6) Any surplus remaining after all the debts mentioned in this section have been paid in full is to be made over to the debtor or the debtor's assignees.

- (7) In subsection (6), “surplus”—
- (a) includes any kind of estate, but
 - (b) does not include any unclaimed dividend.
- (8) Subsection (6) is subject to Article 35 of the EC Regulation (which provides that any surplus in secondary proceedings is to be transferred to main proceedings).
- (9) Nothing in this section affects—
- (a) any right of a secured creditor which is preferable to the rights of the trustee,
 - (b) any preference of the holder of a lien over a title deed, or other document, which has been delivered to the trustee in accordance with a requirement under section 71(5).
- (10) The rate of interest referred to in paragraph (g) of subsection (1) is 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.

91 Accounting periods[j116.doc]

- (1) The trustee in the sequestration (“T”) is to make up accounts of T’s intrusions with the debtor’s estate in respect of each accounting period.
- (2) In this Act, “accounting period” is to be construed as follows—
- (a) the first accounting period is the period of 12 months beginning with the date on which sequestration is awarded, and
 - (b) subject to the exception mentioned in subsection (4), any subsequent accounting period is the period of 12 months beginning when its immediately preceding accounting period ends.
- (3) But—
- (a) paragraph (a) of subsection (2) is subject to subsection (4), and
 - (b) paragraph (b) of subsection (2) is subject to the exception that—
 - (i) in a case where the Accountant in Bankruptcy is not the trustee, T and the commissioners (or, if there are no commissioners, T and the Accountant in Bankruptcy) agree, or
 - (ii) in a case where the Accountant in Bankruptcy is the trustee, T determines, that an accounting period is to be some other period beginning when its immediately preceding accounting period ends, it is that other period.
- (4) Where T was appointed under section 37(8) as interim trustee in the sequestration, the first accounting period is the period—
- (a) beginning with the date of the appointment as interim trustee, and
 - (b) ending on the date 12 months after that on which sequestration is awarded.

- (5) An agreement under sub-paragraph (i), or determination under sub-paragraph (ii), of subsection (3)(b)—
- (a) may be made in respect of 1 accounting period or more,
 - (b) may be made before the beginning of the accounting period in relation to which it has effect and, in any event, is not to 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 duration, and
 - (d) is to be recorded in the sederunt book by T.

92 Estate to be distributed in accordance with accounting periods[j146.doc]

- (1) The trustee in the sequestration (“T”) is—
- (a) if the funds of the debtor’s estate are sufficient, and
 - (b) after making allowance for future contingencies,
- to pay, under section 93(1), a dividend out of the estate in respect of each accounting period.
- (2) But subsection (1) is subject to the following provisions of this section.
- (3) T may pay—
- (a) the debts mentioned in paragraphs (a) to (d) of section 90(1), other than T’s 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.
- (4) If, in respect of an accounting period, T—
- (a) is not ready to pay a dividend, or
 - (b) considers it would be inappropriate to pay a dividend because the expense of doing so would be disproportionate to the amount of the dividend,
- T may, with the consent of the commissioners or, if there are no commissioners, of the Accountant in Bankruptcy, postpone the payment to a date not later than the time for payment of a dividend in respect of the next accounting period.
- (5) Where an appeal is taken under section 88(9)(c) against the acceptance or rejection of a creditor’s claim T is, at the time of payment of dividends and until the appeal is determined, to 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.

- (6) Where a creditor—
- (a) has failed to produce evidence in support of the creditor's claim earlier than 8 weeks before the end of an accounting period on being required to do so under section 84(1), and
- 5 (b) has given a reason for such failure which is acceptable to T,
- T is to set aside, for such time as is reasonable to enable the creditor to produce that evidence or any other evidence that will enable T to be satisfied under that section, an amount which would be sufficient, were the claim accepted in full, to pay a dividend in respect of that claim.
- 10 (7) Where a creditor submits a claim to T 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 future contingencies, funds are available for the payment of a dividend, T is, if T accepts the claim in whole or in part, to pay to the creditor—
- 15 (a) the same dividend as has, or dividends as 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 the creditor in respect of the subsequent accounting period mentioned above.
- (8) But paragraph (a) of subsection (7) is without prejudice to any dividend which has
- 20 already been paid.
- (9) In the declaration of, and payment of, a dividend, no payments are to be made more than once by virtue of the same debt.
- (10) Any dividend paid in respect of a claim is to be paid to the creditor.

Procedure after end of accounting period

- 25 **93 Submission of accounts and scheme of division[j112.doc]**
- (1) Within 2 weeks after the end of an accounting period the trustee in the sequestration ("T") is, in respect of that period, to submit to the commissioners (or, if there are no commissioners, to the Accountant in Bankruptcy ("AiB"))—
- 30 (a) T's accounts of T's intromissions with the estate of the debtor ("D") for audit and, where funds are available after making allowance for future contingencies, a scheme of division of the divisible funds, and
- (b) a claim for the outlays reasonably incurred by T and for T's remuneration.
- (2) Where documents mentioned in subsection (1) are submitted to the commissioners, T is to send a copy of them to AiB.
- 35 (3) All accounts in respect of legal services incurred by T are, before they are paid by T, to be submitted for taxation to the auditor of the court before which the sequestration is pending.
- (4) But subsection (3) is subject to subsection (5).

- (5) Where—
- (a) any such account has been agreed between T and the person entitled to payment in respect of that account (“P”),
 - (b) T is not an associate of P, and
 - (c) the commissioners have (or, if there are no commissioners, AiB has) determined that the account need not be submitted for taxation,
- T may pay the account without submitting it for taxation.

94 Audit of accounts and determination as to outlays and remuneration payable to trustee[j147.doc]

- (1) Within 6 weeks after the end of an accounting period—
- (a) the commissioners (or, as the case may be, the Accountant in Bankruptcy (“AiB”))—
 - (i) may audit the accounts, and
 - (ii) are (or is) to issue a determination fixing the amount of the outlays and the remuneration payable to the trustee in the sequestration (“T”), and
 - (b) T is to make the audited accounts, scheme of division and that determination available for inspection by the debtor (“D”) and the creditors.
- (2) The basis for fixing the amount of the remuneration payable to T may be a commission calculated by reference to the value of D’s estate which has been realised by T.
- (3) But there is in any event to be taken into account—
- (a) the work which, having regard to that value, was reasonably undertaken by T, and
 - (b) the extent of T’s responsibilities in administering D’s estate.
- (4) In fixing the amount of such remuneration in respect of any accounting period, the commissioners (or, as the case may be, AiB) may take into account any adjustment which the commissioners or AiB may wish to make in the amount of remuneration fixed in respect of any earlier accounting period.

95 Appeal against determination as to outlays and remuneration payable to trustee[j148.doc]

- (1) Not later than 8 weeks after the end of an accounting period the trustee in the sequestration (“T”), the debtor (“D”) or any creditor may appeal against a determination issued under subsection (1)(a)(ii)—
- (a) to the Accountant in Bankruptcy (“AiB”) where it is a determination of the commissioners, and
 - (b) to the sheriff where it is a determination of AiB.
- (2) But subsection (1) is subject to subsection (4).
- (3) The determination of AiB in an appeal under paragraph (a) of subsection (1) is appealable to the sheriff (whose decision on an appeal under this subsection or under paragraph (b) of subsection (1) is final).

- (4) D may appeal under subsection (1) if, and only if, D satisfies AiB, or as the case may be the sheriff, that D has, or is likely to have, a pecuniary interest in the outcome of the appeal.
- (5) Before D or a creditor appeals under subsection (1) or (3), D or as the case may be the creditor must give notice to T of the intention to appeal.

96 Further provision as to procedure after end of accounting period[j149.doc]

- (1) On—
- (a) the expiry of the 8 weeks mentioned in section 95(1), or
- (b) if there is an appeal under that subsection, on the final determination of the last such appeal,
- the trustee in the sequestration (“T”) is to pay to the creditors their dividends in accordance with the scheme of division.
- (2) Any dividend—
- (a) allocated to a creditor but not cashed or uplifted, or
- (b) dependent on a claim in respect of which an amount has been set aside under subsection (5) or (6) of section 92,
- is to be deposited by T in an appropriate bank or institution.
- (3) If a creditor’s claim is revalued, T may—
- (a) in paying any dividend to that creditor, make such adjustment to it as T considers necessary to take account of that revaluation, or
- (b) require the creditor to repay to T the whole or part of a dividend already paid to the creditor.
- (4) T is to insert in the sederunt book the audited accounts, the scheme of division and the final determination in relation to T’s outlays and remuneration.

97 Procedure after end of accounting period where Accountant in Bankruptcy is trustee[j113.doc]

- (1) In any case where the Accountant in Bankruptcy (“AiB”) is the trustee in the sequestration, AiB is at the end of each accounting period to prepare accounts of AiB’s intromissions with the estate of the debtor (“D”) and is to make a determination of AiB’s fees and outlays calculated in accordance with regulations under section 124.
- (2) Such accounts and determination are to be available for inspection by D and the creditors by 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), AiB may take into account any adjustment which AiB may wish to make in the amount of AiB’s remuneration fixed in respect of any earlier accounting period.
- (4) Not later than 8 weeks after the end of an accounting period D or any creditor may appeal to the sheriff against AiB’s determination.
- (5) But subsection (4) is subject to subsection (7).
- (6) The decision of the sheriff on an appeal under subsection (4) is final.

- (7) D may appeal under subsection (4) if, and only if, D satisfies the sheriff that D has, or is likely to have, a pecuniary interest in the outcome of the appeal.
- (8) Before D or a creditor appeals under subsection (4), D or as the case may be the creditor must give notice to AiB of the intention to appeal.
- 5 (9) On the expiry of the 8 weeks mentioned in subsection (4), AiB is to pay to the creditors their dividends in accordance with the scheme of division.
- (10) Any dividend—
- (a) allocated to a creditor but not cashed or uplifted, or
- (b) dependent on a claim in respect of which an amount has been set aside under
- 10 subsection (5) or (6) of section 92,
- is to be deposited by AiB in an appropriate bank or institution.
- (11) If a creditor's claim is revalued, AiB may—
- (a) in paying any dividend to that creditor, make such adjustment to it as AiB considers necessary to take account of that revaluation, or
- 15 (b) require the creditor to repay to AiB the whole or part of a dividend already paid to the creditor.
- (12) AiB is to insert in the sederunt book AiB's accounts, the scheme of division and the final determination in relation to AiB's outlays and remuneration.

PART 10

DISCHARGE

Discharge of debtor

98 Automatic discharge of debtor[j114.doc]

- (1) The debtor ("D") is to be discharged on the expiry of 1 year after the date of sequestration.
- 25 (2) But subsection (1) is subject to subsection (3) and to section 99.
- (3) If D has been discharged under or by virtue of this section, D may apply to the Accountant in Bankruptcy for a certificate that D has been so discharged and the Accountant in Bankruptcy, if satisfied of such discharge, is to grant a certificate of discharge in the prescribed form.

99 Deferral of automatic discharge[j145.doc]

- (1) The trustee in the sequestration ("T") or any creditor may, not later than 9 months after the date of sequestration, apply to the sheriff for a deferment of the discharge of a debtor ("D") by virtue of section 98(1).
- (2) On any such application the sheriff is to order—
- 35 (a) the applicant to serve the application on D and (if T is not the applicant and has not been discharged) on T, and

(b) D to lodge in court a declaration—

- (i) that D has made a full and fair surrender of D's estate and a full disclosure of all claims which D is entitled to make against other persons, and
- (ii) that D has delivered to T every document under D's control relating to D's estate or D's business or financial affairs.

(3) If D fails to lodge the declaration in court within 14 days of being so ordered to do so, the sheriff is to defer D's discharge, without a hearing, for a period not exceeding 2 years.

(4) If D lodges the declaration within that 14 days, the sheriff is to—

- (a) fix a date for hearing not earlier than 28 days after the declaration is lodged, and
- (b) order the applicant to notify—
 - (i) D, and
 - (ii) T (or, if T has been discharged, the Accountant in Bankruptcy), of the date so fixed.

(5) T (or, if T has been discharged, the Accountant in Bankruptcy) is, not later than 7 days before the date so fixed, to lodge in court a report upon—

- (a) D's assets and liabilities,
- (b) D's financial and business affairs and D's conduct in relation to those affairs, and
- (c) the sequestration and D's conduct in the course of it.

(6) After considering at the hearing any representations made by the applicant, by D or by any creditor, the sheriff is to make an order either—

- (a) deferring the discharge for such period not exceeding 2 years as the sheriff thinks appropriate, or
- (b) dismissing the application.

(7) The applicant or D may, within 14 days after an order under subsection (6) is made, appeal against that order.

(8) Where the discharge is deferred under subsection (3) or (6) the clerk of the court is to send—

- (a) a certified copy of the order deferring discharge to the keeper of the register of inhibitions for recording in that register, and
- (b) a copy of that order—
 - (i) to the Accountant in Bankruptcy, and
 - (ii) to T (if not discharged) for insertion in the sederunt book.

(9) If D's discharge has been deferred under subsection (3) or (6), D may—

- (a) at any time after that deferral, and
- (b) provided D lodges in court a declaration as to the matters mentioned in subparagraphs (i) and (ii) of subsection (2)(b), petition the sheriff for discharge.

- (10) Subsections (4) to (8) apply, with any necessary modifications, in relation to the proceedings which follow the lodging of a declaration under subsection (9)(b) as they apply in relation to the proceedings which follow the timeous lodging of a declaration under subsection (2)(b).
- 5 (11) T 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.
- (12) Subsections (2) to (11) apply in relation to any such further deferment.

100 Effect of discharge under section 98[j115.doc]

- 10 (1) On the discharge of the debtor (“D”) under section 98, D is discharged of all debts and obligations contracted by D, or for which D was liable, at the date of sequestration.
- (2) Subsection (1) is subject to subsections (3) and (5).
- (3) D is not discharged by virtue of subsection (1) from—
- 15 (a) any liability to pay a fine or other penalty due to the Crown,
- (b) any liability to pay a fine imposed in a justice of the peace court (or a district court),
- (c) any liability under a compensation order (within the meaning of section 249 of the Criminal Procedure (Scotland) Act 1995 (c.46)),
- (d) any liability to forfeiture of a sum of money deposited in court under section 24(6) of the Criminal Procedure (Scotland) Act 1995 (c.46),
- 20 (e) any liability incurred by reason of fraud or breach of trust,
- (f) any obligation to pay—
- (i) aliment, or any sum of an alimentary nature, under any enactment or rule of law, or
- 25 (ii) any periodical allowance payable on divorce by virtue of a court order or under an obligation, or
- (g) the obligation imposed on D by section 131.
- (4) The obligations mentioned in paragraph (f) of subsection (3) do not include—
- (a) aliment, or a periodical allowance, which could be included in the amount of a creditor’s claim under paragraph 2 of schedule 1, or
- 30 (b) child support maintenance within the meaning of the Child Support Act 1991 (c.48) which was unpaid in respect of any period before the date of sequestration of—
- (i) any person by whom it was due to be paid, or
- (ii) any employer by whom it was, or was due to be, deducted under section 31(5) of that Act.
- 35 (5) The discharge of D under section 98 does not affect any right of a secured creditor for an obligation in respect of which D has been discharged, to enforce the security in respect of the obligation.
- (6) In subsection (3)(a), 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 40 2002 (c.29).

- (7) In construing subsection (3)(b), paragraph 33(1) of the schedule to the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 (asp 6) (construction of references to the district court) is to be disregarded.

101 Discharge on composition[j096.doc]

5 Schedule 3 to this Act has effect in relation to—

- (a) an offer of composition by or on behalf of the debtor (“D”) to the trustee in the sequestration in respect of D’s debts, and
 (b) where the offer is approved, D’s discharge and the discharge of the trustee.

Discharge of trustee

10 **102 Discharge of trustee[j050.doc]**

- (1) After the trustee in the sequestration (“T”) has made a final division of the debtor’s estate and has inserted T’s final audited accounts in the sederunt book, T—

(a) is to deposit any unclaimed dividends and any unapplied balances in an appropriate bank or institution,

15 (b) on that being done—

(i) is to send to the Accountant in Bankruptcy (“AiB”) the sederunt book, a copy of the audited accounts and a receipt for the deposit of the unclaimed dividends and unapplied balances, and

(ii) may at the same time apply to AiB for a certificate of discharge.

20 (2) T is to send, to the debtor and to all the creditors known to T, notice of any application under subsection (1)(b)(ii) and is to inform the debtor and such creditors—

(a) that written representations relating to the application may be made by them to AiB within the period of 14 days after the notification,

25 (b) that the sederunt book is available for inspection at the office of AiB and contains the audited accounts of, and scheme of division in, the sequestration, and

(c) of the effect mentioned in subsection (7).

- (3) On the expiry of the period mentioned in subsection (2)(a), AiB, after examining the documents sent to AiB and considering any representations duly made to AiB, is to—

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

30 (b) notify accordingly (in addition to T)—

(i) the debtor, and

(ii) all creditors who made such representations.

- (4) Within 14 days after the issuing of the determination under subsection (3)—

(a) T,

35 (b) the debtor, or

(c) any creditor who made representations under subsection (2)(a),

may appeal against the determination to the sheriff.

- (5) If, on an appeal under subsection (4), the sheriff determines that a certificate of discharge which has been refused should be granted—
- (a) the sheriff is to order AiB to grant it, and
 - (b) the sheriff clerk is to send AiB a copy of the sheriff's decree.
- 5 (6) The decision of the sheriff on an appeal under subsection (4) is final.
- (7) The grant of a certificate of discharge under this section has the effect of discharging T from all liability (other than any liability arising from fraud)—
- (a) to the debtor, or
 - (b) to the creditors,
- 10 in respect of any act or omission of T in exercising the functions conferred on T by this Act (including, where T was also the interim trustee, the functions so conferred on him as interim trustee).
- (8) Where a certificate of discharge is granted under this section, AiB is to make an appropriate entry in—
- 15 (a) the register of insolvencies, and
 - (b) in the sederunt book.
- (9) The provisions of this section apply (subject to any necessary modifications)—
- (a) where a trustee has died, to the trustee's executor, or
 - (b) where a trustee has resigned office or been removed from office, to that trustee,
- 20 as they apply to a trustee who has made a final division of the debtor's estate in accordance with the preceding provisions of this Act.
- (10) This section does not apply in any case where AiB is T.

103 Unclaimed dividends[j074.doc]

- 25 (1) Any person ("A") producing evidence of A's right may apply to the Accountant in Bankruptcy ("AiB") to receive a dividend deposited under section 102(1)(a) or 104(3) if the application is made not later than 7 years after the date of deposit.
- (2) If AiB is satisfied of A's right to the dividend, AiB is to authorise the bank or institution in which the deposit was made to pay A the amount of the dividend and of any interest which has accrued on the dividend.
- 30 (3) AiB is, at the expiry of 7 years from the date of deposit of any unclaimed dividend or unapplied balance under section 102(1)(a) or 104(3), to hand over the deposit receipt or other voucher relating to the dividend or balance to the Scottish Ministers who on that being done are entitled to payment of the amount due (principal and interest) from the bank or institution in which the deposit was made.

35 104 Discharge of Accountant in Bankruptcy[j073.doc]

- (1) This section applies where the Accountant in Bankruptcy ("AiB") has acted as the trustee in the sequestration.
- (2) After AiB has made a final division of the debtor's estate, AiB is to insert in the
- 40 (a) AiB's final accounts of his intromissions (if any) with the debtor's estate,

- (b) the scheme of division (if any), and
 - (c) a determination of AiB's fees and outlays, calculated in accordance with regulations made under section 124 of this Act.
- (3) AiB is to deposit any unclaimed dividends and any unapplied balances in an appropriate bank or institution.
- (4) AiB is to send to the debtor and to all creditors known to AiB—
 - (a) a copy of the determination mentioned in subsection (2)(c),
 - (b) a notice in writing stating—
 - (i) that AiB has commenced the procedure under this Act leading to discharge in respect of AiB's actings as trustee,
 - (ii) that the sederunt book relating to the sequestration is available for inspection at such address as AiB may determine,
 - (iii) that an appeal may be made to the sheriff under subsection (5), and
 - (iv) what the effect of subsections (8) and (9) is.
- (5) The debtor or any creditor may appeal to the sheriff against—
 - (a) the determination of AiB mentioned in subsection (2)(c),
 - (b) the discharge of AiB in respect of AiB's actings as trustee, or
 - (c) both such determination and discharge.
- (6) Any appeal under subsection (5) is to be made not more than 14 days after the issue of the notice mentioned in subsection (4)(b).
- (7) The decision of the sheriff in an appeal under subsection (5) is final.
- (8) Subsection (9) applies where—
 - (a) the requirements of this section have been complied with, and
 - (b) no appeal is made under subsection (5) or such an appeal is made but is refused as regards the discharge of AiB.
- (9) AiB is discharged from all liability (other than any liability arising from fraud)—
 - (a) to the debtor, or
 - (b) to the creditors,in respect of any act or omission of AiB in exercising the functions of trustee in the sequestration.
- (10) Where AiB is discharged from all liability as mentioned in subsection (9), AiB is to make an entry in the sederunt book recording the discharge.

PART 11BANKRUPTCY RESTRICTIONS ORDERS, INTERIM BANKRUPTCY RESTRICTIONS ORDERS AND
BANKRUPTCY RESTRICTIONS UNDERTAKINGS*Bankruptcy restrictions orders*

- 5 **105 Bankruptcy restrictions order[j097.doc]**
- (1) Where sequestration of a living debtor's estate is awarded, an order (to be known as a "bankruptcy restrictions order") in respect of the debtor may be made by the sheriff.
- (2) A bankruptcy restrictions order may be made only on the application of the Accountant in Bankruptcy.
- 10 **106 Grounds for making bankruptcy restrictions order[j118.doc]**
- (1) The sheriff is to grant an application for a bankruptcy restrictions order if the sheriff thinks it appropriate having regard to the conduct, whether before or after the date of sequestration, of the debtor ("D").
- (2) The sheriff is, in particular, to take into account any of the following kinds of behaviour on the part of D—
- 15 (a) failing to keep records which account for a loss of property—
- (i) by D, or
- (ii) by a business carried on by D,
- 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,
- 20 (b) Failing to produce records of that kind on demand by—
- (i) the Accountant in Bankruptcy ("AiB"),
- 25 (ii) the interim trustee, or
- (iii) the trustee in the sequestration,
- (c) making a gratuitous alienation or any other alienation—
- (i) for no consideration, or
- (ii) for no adequate consideration,
- 30 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, where the failure has given rise to a claim submitted by a creditor under section 32 or 84,
- 35 (g) trading at a time before the date of sequestration when D knew, or ought to have known, that D was unable to meet D's debts,
- (h) incurring, before the date of sequestration, a debt which D had no reasonable expectation of being able to pay,

(i) failing to account satisfactorily to the sheriff, AiB, the interim trustee or the trustee, for—

- (i) a loss of property, or
- (ii) an insufficiency of property to meet D's debts,

5 (j) carrying on any gambling, speculation or extravagance—

- (i) which may have contributed materially to, or increased the extent of, D's debts, or
- (ii) 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

10 (k) neglect of business affairs, being neglect of a kind which may have contributed materially to, or increased the extent of, D's debts,

(l) fraud or breach of trust,

(m) failing to co-operate with—

- 15 (i) AiB,
- (ii) the interim trustee, or
- (iii) the trustee in the sequestration.

(3) The sheriff is also, in particular, to consider whether D—

(a) has previously been sequestrated, and

20 (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)—

“excessive pension contribution” is to be construed in accordance with section 65, and

25 “gratuitous alienation” means an alienation challengeable under section 62.

107 Bankruptcy restrictions order: application of section 134(8)[j051.doc]

(1) Where the sheriff thinks it appropriate, the sheriff may specify in a bankruptcy restrictions order that section 134(8) is to apply to the debtor, during the period the debtor is subject to the order, as if the debtor were a debtor within the meaning of section 134(10)(a).

(2) But for the purposes of subsection (1), section 134(10) has effect as if, for paragraph (c) of that section, there were substituted—

“(c) the “relevant information” about the status of D is the information that (as the case may be)—

- 35 (i) D is subject to a bankruptcy restrictions order, or
- (ii) where D's estate has been sequestrated and D has not been discharged, that fact.”.

108 Timing of application for bankruptcy restrictions order[j043.doc]

- (1) Any application for a bankruptcy restrictions order must be made within the period which begins with the date of sequestration and ends with the date on which the debtor's discharge becomes effective.
- 5 (2) Except that, with the permission of the sheriff, such an application may be made after the end of the period referred to in subsection (1).

109 Duration of bankruptcy restrictions order and application for annulment[j044.doc]

- (1) A bankruptcy restrictions order—
- 10 (a) comes into force when made, and
- (b) ceases to have effect at the end of a day specified in the order.
- (2) The day specified under subsection (1)(b) must not be a day—
- (a) before the end of the period of 2 years, or
- (b) after the end of the period of 15 years,
- which begins on the day the order is made.
- 15 (3) On application by the debtor, the sheriff may—
- (a) annul a bankruptcy restrictions order, or
- (b) vary it.
- (4) Variation under subsection (3)(b) may include providing for such an order to cease to have effect at the end of a day earlier than that specified under subsection (1)(b).

20 *Interim bankruptcy restrictions orders*

110 Interim bankruptcy restrictions orders[j045.doc]

- (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.
- 25 (2) The sheriff may make an interim bankruptcy restrictions order if the sheriff thinks—
- (a) that there are *prima facie* grounds to suggest that the application for the bankruptcy restrictions order will be successful, and
- (b) that it is in the public interest to make an interim bankruptcy restrictions order.
- (3) An interim bankruptcy restrictions order—
- 30 (a) may be made only on the application of the Accountant in Bankruptcy,
- (b) has the same effect as a bankruptcy restrictions order, and
- (c) comes into force when made.

- (4) An interim bankruptcy restrictions order ceases to have effect—
- (a) on the determination of the application for a bankruptcy restrictions order,
 - (b) on the acceptance of a bankruptcy restrictions undertaking made by the debtor, or
 - (c) if the sheriff discharges the interim bankruptcy restrictions order on the application of the Accountant in Bankruptcy or of the debtor.
- (5) Where a bankruptcy restrictions order is made in respect of a debtor who is subject to an interim bankruptcy restrictions order, subsection (2) of section 109 has effect in relation to the bankruptcy restrictions order as if the reference in that subsection to the day the order is made were a reference to the day the interim bankruptcy restrictions order is made.

Bankruptcy restriction undertakings

111 Bankruptcy restrictions undertakings[j046.doc]

- (1) A living debtor not subject to a bankruptcy restrictions order may offer an undertaking (to be known as a “bankruptcy restrictions undertaking”) to the Accountant in Bankruptcy (“AiB”).
- (2) In determining whether to accept a bankruptcy restrictions undertaking, AiB is to have regard to the matters specified in section 106(2) and (3).
- (3) A bankruptcy restrictions undertaking—
- (a) takes effect on being accepted by AiB, and
 - (b) ceases to have effect at the end of a day specified in the undertaking.
- (4) The day specified under subsection (3)(b) must not be a day—
- (a) before the end of the period of 2 years, or
 - (b) after the end of the period of 15 years,
- which begins on the day the undertaking is accepted.
- (5) On application by the debtor, the sheriff may—
- (a) annul a bankruptcy restrictions undertaking, or
 - (b) vary it.
- (6) Variation under subsection (5)(b) may include providing for such an undertaking to cease to have effect at the end of a day earlier than that specified under subsection (3)(b).

112 Bankruptcy restrictions undertakings: application of section 134(8)[j047.doc]

- (1) A debtor may, with the agreement of the Accountant in Bankruptcy, specify in a bankruptcy restrictions undertaking that subsection (8) of section 134 is to apply to the debtor, during the period the undertaking has effect, as if the debtor were a debtor within the meaning of subsection (10)(a) of that section.

- (2) But for the purposes of subsection (1), section 134 has effect as if, for paragraph (c) of subsection (10) of that section, there were substituted—

“(c) the “relevant information” about the status of D is the information that (as the case may be)—

- (i) D is subject to a bankruptcy restrictions undertaking, or
(ii) where D’s estate has been sequestrated and D has not been discharged, that fact.”.

113 Bankruptcy restrictions orders, interim bankruptcy restrictions orders and bankruptcy restrictions undertakings: effect of recall of sequestration[j048.doc]

- (1) Where an award of sequestration of a debtor’s estate is recalled under section 25(1) (or (2))—

(a) the sheriff may annul any bankruptcy restrictions order, interim bankruptcy restrictions order or bankruptcy restrictions undertaking in force in respect of the debtor,

(b) no new bankruptcy restrictions order or interim bankruptcy restrictions 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, under subsection (1)(a), a bankruptcy restrictions order, interim bankruptcy restrictions order or bankruptcy restrictions undertaking the debtor may, no later than 28 days after that on which the award of sequestration is recalled, appeal to the sheriff principal against the refusal.

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

Effect of discharge on approval of offer of composition

114 Effect of discharge on approval of offer of composition[j049.doc]

- (1) This section applies where a certificate of discharge is granted, under paragraph 13(1) of schedule 3 to this Act, discharging a debtor.

(2) The debtor remains subject to any bankruptcy restrictions order, interim bankruptcy restrictions order or bankruptcy restrictions undertaking in force in respect of the debtor.

(3) But subsection (2) is subject to sections 109(3)(a), 110(4)(c) and 111(5)(a).

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

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

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

PART 12

VOLUNTARY TRUST DEEDS FOR CREDITORS

115 Voluntary trust deeds for creditors[j065.doc]

Schedule 4 has effect in relation to trust deeds executed after 1 April 1986 (the date of commencement of section 59 of the Bankruptcy (Scotland) Act 1985 (c.66)).

116 Petition for conversion into sequestration[j064.doc]

- (1) This section applies where a member State liquidator proposes to petition the sheriff for the conversion under Article 37 of the EC Regulation (conversion of earlier proceedings) of a protected trust deed into sequestration.
- (2) An affidavit complying with section 117 must be—
 - (a) prepared and sworn, and
 - (b) lodged in court in support of the petition.
- (3) The petition and affidavit required under subsection (2) are to be served upon—
 - (a) the debtor,
 - (b) the trustee, and
 - (c) such other person as may be prescribed.

117 Contents of affidavit required under section 116(2)[j063.doc]

- (1) An affidavit required under section 116(2) must—
 - (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 protected trust deed into a sequestration would prove to be in the interests of the creditors in the main proceedings,
 - (c) contain such other information as the member State liquidator considers will be of assistance to the sheriff—
 - (i) in deciding whether to make an order under section 118, and
 - (ii) if the sheriff were to do so, in considering the need for any consequential provision that would be necessary or desirable, and
 - (d) contain such other matters as may be prescribed.
- (2) Any affidavit under this section must be sworn by, or on behalf of, the member State liquidator.

118 Power of sheriff on petition for conversion of trust deed[j060.doc]

- (1) On hearing the petition for conversion of a trust deed into a sequestration, the sheriff may make such order as the sheriff thinks fit.
- (2) If the sheriff makes an order for conversion into sequestration, the order may contain all such consequential provisions as the sheriff thinks necessary or desirable.

- (3) The provisions of this Act apply to an order made by the sheriff under subsection (1) as if the order were a determination by the Accountant in Bankruptcy of a debtor application—
- (a) under section 19(1), and
 - (b) in relation to which the member State liquidator is a concurring creditor.
- (4) On the sheriff making an order for conversion into sequestration under subsection (1), any expenses properly incurred as expenses of the administration of the trust deed in question become a first charge on the debtor's estate.

PART 13

ACCOUNTANT IN BANKRUPTCY

Appointment

119 The Accountant in Bankruptcy[j027.doc]

- (1) The Accountant in Bankruptcy is to be appointed by the Scottish Ministers and is an officer of the court.
- (2) The Scottish Ministers may appoint a member of the staff of the Accountant in Bankruptcy—
- (a) to be Depute Accountant in Bankruptcy, and
 - (b) as Depute Accountant in Bankruptcy, to exercise all the functions of the Accountant in Bankruptcy at any time when the Accountant in Bankruptcy is unable to do so.

Functions

120 Supervisory functions of the Accountant in Bankruptcy[j089.doc]

- (1) The Accountant in Bankruptcy (“AiB”) has, in the administration of sequestration and personal insolvency, the following general functions—
- (a) as regards interim trustees (not being AiB), trustees in sequestrations (not being AiB), trustees under protected trust deeds and commissioners—
 - (i) supervision of the performance by them of the functions conferred on them by this Act, or by any other enactment or by any rule of law, and
 - (ii) the investigation of any complaints made against them,
 - (b) the determination of debtor applications,
 - (c) the maintenance of a register (in this Act referred to as the “register of insolvencies”), in such form as may be prescribed by act of sederunt,
 - (d) the preparation of an annual report, and
 - (e) such other functions as may from time to time be conferred on AiB by the Scottish Ministers.
- (2) The register of insolvencies is to contain particulars of—
- (a) estates which have been sequestrated,
 - (b) trust deeds sent to AiB for registration,

- (c) bankruptcy restrictions orders, interim bankruptcy restrictions orders and bankruptcy restrictions undertakings,
- (d) orders made under subsection (4)(b) of section 57 and agreements made under subsection (1) of section 58, and
- 5 (e) the receivership of incorporated companies which the Court of Session has jurisdiction to wind up.
- (3) The annual report is to be presented to the Scottish Ministers and the Court of Session and is to contain—
- (a) statistical information relating to—
- 10 (i) the state of all sequestrations,
- (ii) the receivership of incorporated companies of which particulars have been registered in the register of insolvencies during the year to which the report relates,
- (b) particulars of trust deeds registered as protected trust deeds in that year, and
- 15 (c) particulars of the performance of AiB's functions under this Act.
- (4) If it appears to AiB that a person ("P") mentioned in paragraph (a) of subsection (1) has failed, without reasonable excuse, to perform a duty imposed on P by any provision of this Act, or by any other enactment or by any rule of law, AiB is to report the matter to the sheriff who, after hearing P on the matter, may—
- 20 (a) remove P from office,
- (b) censure P, or
- (c) make such other order as the circumstances of the case may require.
- (5) Where AiB has reasonable grounds to suppose that an offence has been committed—
- (a) by a person mentioned in paragraph (a) of subsection (1),
- 25 (b) in relation to a sequestration, by the debtor ("D") in respect of D's assets, D's dealings with them or D's conduct in relation to D's business or financial affairs, or
- (c) in relation to a sequestration, by a person other than D in that person's dealings with D, the interim trustee or the trustee in the sequestration in respect of D's
- 30 assets or D's business or financial affairs,
- AiB is to report the matter to the Lord Advocate.
- (6) AiB is to—
- (a) make the register of insolvencies available for inspection at all reasonable times, and
- 35 (b) provide any person, on request, with a certified copy of an entry in the register.

121 Performance of certain functions of the Accountant in Bankruptcy[j061.doc]

- (1) The functions of the Accountant in Bankruptcy ("AiB"), other than functions conferred by section 120, may be carried out on AiB's behalf by any member of AiB's staff authorised by AiB to do so.

- (2) Without prejudice to subsection (1), AiB may appoint, on such terms and conditions as AiB considers appropriate, such persons as AiB considers fit to perform on AiB's behalf any of AiB's functions in respect of the sequestration of the estate of any debtor.
- (3) A person appointed under subsection (2) must comply with such general or specific directions as AiB may from time to time give to such person as to the performance of those functions.
- (4) AiB may pay a person so appointed such fee as AiB may consider appropriate.

122 Further duty of Accountant in Bankruptcy[j020.doc]

The Accountant in Bankruptcy is, on receiving any notice under section 109(1) of the Insolvency Act 1986 (c.45) in relation to a community interest company, to forward a copy of that notice to the Regulator of Community Interest Companies.

Directions to Accountant in Bankruptcy

123 Directions to Accountant in Bankruptcy[j087.doc]

- (1) The Scottish Ministers may, after consultation with the Lord President of the Court of Session, give the Accountant in Bankruptcy general directions as to the performance of the Accountant in Bankruptcy's functions under this Act.
- (2) Directions under this section may be given in respect of—
- (a) all cases, or
 - (b) any class or description of cases,
- but are not to be given in respect of a particular case.
- (3) The Accountant in Bankruptcy must comply with any directions given under this section.

Fees for Accountant in Bankruptcy

124 Fees for Accountant in Bankruptcy[j098.doc]

The Scottish Ministers may prescribe—

- (a) the fees and outlays to be payable to the Accountant in Bankruptcy ("AiB") in respect of the exercise of any of AiB's functions under this Act or the Insolvency Act 1986,
- (b) the time at or by which, and the manner in which, such fees and outlays are to be paid, and
- (c) the circumstances, if any, in which AiB may allow—
 - (i) exemption from payment, or
 - (ii) the remission or modification of payment,of any fees or outlays payable to AiB.

PART 14

MISCELLANEOUS AND GENERAL

*Miscellaneous***125 Liabilities and rights of co-obligants[j062.doc]**

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

126 Member State liquidator deemed creditor[j024.doc]

25 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 a debtor is deemed to be a creditor in the sum due to creditors in proceedings in relation to which the member State liquidator holds office.

127 Trustee’s duty to provide certain notices and copies of documents to member State liquidator[j023.doc]

- 30 (1) This section applies where a member State liquidator has been appointed in relation to a debtor.
- (2) Where an interim trustee or a trustee in the sequestration is obliged—
- 35 (a) to give notice to, or
- (b) provide a copy of a document to,
- the sheriff or the Accountant in Bankruptcy, the interim trustee or trustee in the sequestration is also to give such notice, or provide such a copy, to the member State liquidator.

- (3) Subsection (2) is without prejudice to the generality of the obligations imposed by Article 31 of the EC Regulation (duty to co-operate and communicate information).
- (4) In subsection (2)(b), “document” includes an order of court.

5 **128 Extortionate credit transactions[j022.doc]**

- (1) This section applies where—
 - (a) a debtor (“D”) is, or has been, party to a transaction for, or involving, the provision to D of credit, and
 - (b) D’s estate is sequestrated.
- 10 (2) The sheriff may, on the application of the trustee in the sequestration, make an order with respect to the transaction if the transaction—
 - (a) is, or was, extortionate, and
 - (b) was not entered into more than 3 years before the date of sequestration.
- 15 (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 the transaction 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) the transaction otherwise grossly contravened ordinary principles of fair dealing;and it is to 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.
- 20 (4) An order under this section with respect to a transaction may contain such 1 or more of the following as the sheriff thinks fit—
 - 25 (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,
 - 30 (c) provision requiring any person who is a party to the transaction to pay to the trustee any sums paid to that person, by virtue of the transaction, by the debtor,
 - (d) provision requiring any person to surrender to the trustee any property held by the person as security for the purposes of the transaction,
 - (e) provision directing accounts to be taken between any persons.
- 35 (5) Any sums required to be paid, or property required to be surrendered, to the trustee in accordance with an order under this section vest in the trustee.
- (6) But the powers conferred by this section are exercisable, in relation to a transaction, concurrently with any powers exercisable under this Act in relation to that transaction as a gratuitous alienation or unfair preference.
- 40 (7) In this section, “credit” has the same meaning as in the Consumer Credit Act 1974 (c.39).

129 Sederunt book and other documents[j021.doc]

- (1) Whoever by virtue of this Act for the time being holds the sederunt book is to make it available for inspection at all reasonable hours by any interested party; but this subsection is subject to subsection (2).
- 5 (2) As regards any case in which the person on whom a duty is imposed by subsection (1) is the Accountant in Bankruptcy (“AiB”), 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 is to be carried out.
- 10 (3) An entry in the sederunt book is sufficient evidence of the facts stated in that entry, (except where the entry is founded on by the trustee in the sequestration in the trustee’s own interest).
- (4) Notwithstanding any provision of this Act, the trustee is not bound to insert in the sederunt book a document of a confidential nature.
- 15 (5) The trustee is not bound to exhibit to a person other than a commissioner or AiB any document in the trustee’s possession which is of a confidential nature.
- (6) An extract from the register of insolvencies bearing to be signed by AiB is sufficient evidence of the facts stated in the extract.

130 Power to cure defect in procedure[j018.doc]

- (1) On the application of a person having an interest, the sheriff may—
- 20 (a) if there has been a failure to comply with a requirement of this Act (or of regulations under this Act), make an order—
- (i) waiving the failure, and
 - (ii) so far as practicable, restoring any person prejudiced by the failure to the position that person would have been in but for the failure, or
- 25 (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 the thing to be done.
- (2) In an order under subsection (1), the sheriff may impose such conditions, including conditions as to expenses, as the sheriff thinks fit and may—
- 30 (a) authorise, or dispense with, the performance of any act in the sequestration process,
- (b) appoint as trustee on the debtor’s estate a person who would be eligible to be elected under section 34 (whether or not in place of an existing trustee),
 - (c) extend or waive a time limit specified in or under this Act.

- (3) An application under subsection (1)—
- (a) may at any time be remitted by the sheriff to the Court of Session—
 - (i) of the sheriff's own accord, or
 - (ii) on an application by a person having an interest, and
 - (b) is to be so remitted, if the Court of Session so directs on an application by any such person,
- where the sheriff considers, or as the case may be the Court of Session consider, that the remit is desirable because of the importance or complexity of the matters raised by the application.
- (4) The trustee in the sequestration is to record in the sederunt book the decision of the sheriff or of the Court of Session under this section.

131 Debtor to co-operate with trustee[j017.doc]

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

132 Arbitration and compromise[j014.doc]

- (1) The trustee in the sequestration may (but if there are commissioners then only with their consent or with the consent of the creditors or of the sheriff)—
- 5 (a) refer to arbitration any claim or question, of whatever nature, arising 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.
- (2) Where a claim or question is referred to arbitration under this section, the Accountant in Bankruptcy may vary any time limit for carrying out a procedure under this Act.
- 10 (3) A decree arbitral on a reference under paragraph (a) of subsection (1), or a compromise under paragraph (b) of that subsection, is binding on the creditors and on the debtor.
- (4) And the trustee is to insert a copy of the decree arbitral, or record the compromise, in the sederunt book.

133 Meetings of creditors and commissioners[j016.doc]

15 Part 1 of schedule 5 has effect in relation to meetings of creditors other than the statutory meeting, part 2 in relation to all meetings of creditors and part 3 in relation to meetings of commissioners.

134 General offences by debtor etc.[j015.doc]

- (1) If during the relevant period a debtor (“D”) makes—
- 20 (a) to a creditor, or
- (b) to a person concerned in the administration of D’s estate,
- a false statement in relation to D’s assets or financial or business affairs then, unless D shows that D neither knew nor had reason to believe that the statement was false, D is guilty of an offence.
- 25 (2) If during the relevant period a debtor, or some other person acting in the debtor’s interest (whether or not with the debtor’s authority)—
- (a) destroys,
- (b) damages,
- (c) conceals,
- 30 (d) disposes of, or
- (e) removes from Scotland,
- any part of the debtor’s estate or any document relating to the debtor’s assets or business or financial affairs then, unless the perpetrator (“P”) shows that it was not done with intent to prejudice the creditors, P is guilty of an offence.
- 35 (3) If, after the date of sequestration of the estate of a debtor (“D”), D who is absent from Scotland fails when required by the court to come to Scotland for any purpose connected with the administration of that estate, then D is guilty of an offence.

- 5
- (4) If during the relevant period a debtor, or some other person acting in the debtor's interest (whether or not with the debtor's authority), falsifies any document relating to the debtor's assets or business or financial affairs, then the perpetrator ("P") is guilty of an offence unless P shows that P had no intention to mislead the trustee, a commissioner or any creditor.
- (5) If a debtor ("D") whose estate is sequestrated—
- 10
- (a) knows that a person has falsified a document relating to D's assets or business or financial affairs, and
- (b) fails, within 1 month of acquiring that knowledge, to report it to the trustee in the sequestration,
- then D is guilty of an offence.
- (6) If, during the relevant period, a person ("P") who is absolutely insolvent—
- 15
- (a) transfers anything to another person for an inadequate consideration, or
- (b) grants an unfair preference to any of P's creditors,
- then, unless P shows that it was not done with intent to prejudice P's creditors, P is guilty of an offence.
- (7) If, at any time in the period of 1 year ending with the sequestration of the estate of a debtor ("D") who is engaged in trade or business, D otherwise than in the ordinary course of the trade or business pledges or disposes of property which D has obtained on credit and has not paid for then, unless D shows that it was not done with intent to prejudice D's creditors, D is guilty of an offence.
- 20
- (8) If a debtor ("D"), either alone or jointly with another person, obtains credit—
- (a) to the extent of £500 or such other sum as may be prescribed or more, or
- 25
- (b) of any amount where, at the time the credit is obtained, D has debts amounting to £1,000 or such other sum as may be prescribed or more,
- without giving the person from whom the credit is obtained the relevant information about D's status, then D is guilty of an offence.
- (9) For the purpose of calculating an amount of credit mentioned in subsection (8), or of debts mentioned in paragraph (b) of that subsection, no account is to be taken of any credit obtained or, as the case may be, of any liability for charges in respect of—
- 30
- (a) any of the supplies mentioned in section 137(4), and
- (b) any council tax (within the meaning of section 99(1) of the Local Government Finance Act 1992 (c.14).
- (10) For the purposes of subsection (8)—
- 35
- (a) "debtor" means—
- (i) a person whose estate has been sequestrated,
- (ii) a person who has been adjudged bankrupt in England and Wales or in Northern Ireland, or
- 40
- (iii) a person subject to a bankruptcy restrictions order, or a bankruptcy restrictions undertaking, made in England and Wales,
- being, in the case of a person mentioned in sub-paragraph (i) or (ii), a person who has not been discharged,

- (b) the reference to D obtaining credit includes a reference to a case where goods—
- (i) are hired to D under a hire-purchase agreement, or
 - (ii) are agreed to be sold to D under a conditional sale agreement, and
- (c) the “relevant information” about the status of D is the information that (as the case may be)—
- (i) D’s estate has been sequestrated and that D has not been discharged,
 - (ii) D is an undischarged bankrupt in England and Wales or in Northern Ireland, or
 - (iii) D is subject to a bankruptcy restrictions order, or a bankruptcy restrictions undertaking, made in England and Wales.

(11) In this section—

“the relevant period” means the period commencing 1 year immediately before the date of sequestration of D’s estate and ending with D’s discharge, and references to intent to prejudice creditors include references to intent to prejudice an individual creditor.

(12) If a person does, or fails to do, in England and Wales or in Northern Ireland anything which if done, or as the case may be not done, in Scotland is an offence under subsection (1), (2), (4), (5), (6) or (7), then that person is guilty of an offence under the subsection in question.

(13) A person (“P”) convicted of an offence under this section is liable—

- (a) on summary conviction, to a fine not exceeding the statutory maximum, or—
- (i) in a case where P has previously been convicted of an offence inferring dishonest appropriation of property or an attempt at dishonest appropriation of property, to imprisonment for a term not exceeding 6 months, or
 - (ii) in any other case, to imprisonment for a term not exceeding 3 months,
- or both to a fine not exceeding the statutory maximum and to such imprisonment as is mentioned, in relation to the case in question, in sub-paragraph (i) or (ii), or
- (b) on conviction on indictment, to a fine, or—
- (i) in the case of an offence under subsection (1), (2), (4) or (7), to imprisonment for a term not exceeding 5 years, or
 - (ii) in any other case, to imprisonment for a term not exceeding 2 years,
- or both to a fine and to such imprisonment as is mentioned, in relation to the case in question, in sub-paragraph (i) or (ii).

135 Summary proceedings[j013.doc]

- (1) Summary proceedings for an offence under this Act may be commenced at any time within the period of 12 months after the date on which evidence sufficient in the opinion of the Lord Advocate to justify the proceedings comes to the Lord Advocate’s knowledge.
- (2) But no such proceedings are to be commenced by virtue of this section more than 3 years after the commission of the offence.

- (3) Subsection (3) of section 136 of the Criminal Procedure (Scotland) Act 1995 (c.40) (date of commencement of summary proceedings) has effect for the purposes of this section as it has for the purposes of that section.
- (4) For the purposes of subsection (1), a certificate of the Lord Advocate as to the date on which the evidence in question came to the Lord Advocate's knowledge is conclusive evidence of the date on which it did so.

136 **Outlays of insolvency practitioner in actings as interim trustee or trustee[j095.doc]**

The Scottish Ministers may, by regulations, provide for the premium (or a proportionate part of the premium) 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 practitioner in the practitioner's actings as an interim trustee or as trustee in the sequestration.

137 **Supplies by utilities[j099.doc]**

- (1) This section applies where on any day ("the relevant day")—
- (a) sequestration is awarded in a case where a debtor application was made,
 - (b) a warrant is granted under section 19(2) in a case where the petition was presented by a creditor or by a trustee acting under a trust deed, or
 - (c) the debtor grants a trust deed.
- (2) If a request falling within subsection (3) is made for the giving, after the relevant day, of any of the supplies mentioned in subsection (4), the supplier—
- (a) may make it a condition of the giving of the supply that the office holder personally guarantee the payment of any charges in respect of the supply, and
 - (b) is not—
 - (i) to make it a condition, or
 - (ii) to 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 are—
- (a) a supply of gas by a gas supplier, within the meaning of Part 1 of the Gas Act 1986,
 - (b) a supply of electricity by an electricity supplier, within the meaning of Part 1 of the Electricity Act 1989,
 - (c) a supply of water by Scottish Water, and
 - (d) a supply of communications services by a provider of a public electronic communications service.

- (5) In subsection (4)(d) “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).
- (6) In this section, “the office holder” means, as the case may be—
- (a) the interim trustee,
 - (b) the trustee in the sequestration, or
 - (c) the trustee acting under a trust deed.

138 Edinburgh Gazette[j019.doc]

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

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

139 Disqualification provisions: power to make orders[j072.doc]

- (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) a relevant debtor or a category of relevant debtors from—
- (a) being elected or appointed to an office or position,
 - (b) holding an office or position, or
 - (c) becoming or remaining a member of a body or group.
- (3) In subsection (2), the reference to a provision which disqualifies a person conditionally includes a reference to a provision which enables the person to be dismissed.
- (4) An order under subsection (1) may repeal or revoke the disqualification provision.
- (5) An order under subsection (1) may amend, or modify the effect of, the disqualification provision—
- (a) so as to reduce the category of relevant debtors to whom the disqualification provision applies,
 - (b) so as to extend the disqualification provision to some or all natural persons who are subject to a bankruptcy restrictions order,
 - (c) so that the disqualification provision applies only to some or all natural persons 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) 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).

- (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
 - 5 (c) a bankruptcy restrictions undertaking entered into under paragraph 7 of that Schedule.
- (9) In this section, “relevant debtor” means a debtor—
- (a) whose estate has been sequestrated,
 - (b) who has granted (or on whose behalf has been granted) a trust deed,
 - 10 (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 the debtor’s creditors—
- (i) for a composition in satisfaction of the debtor’s debts,
 - 15 (ii) for a scheme of arrangement of the debtor’s affairs, or
 - (iii) for some other kind of settlement or arrangement.
- (10) An order under this section may make—
- (a) provision generally or for a specified purpose only,
 - (b) different provision for different purposes, and
 - 20 (c) transitional, consequential or incidental provision.
- (11) An order under this section—
- (a) is to be made by statutory instrument, and
 - (b) is not made unless a draft is laid before, and approved by a resolution of, the Scottish Parliament.

25 *General*

140 Regulations[j129.doc]

- (1) Any power of the Scottish Ministers to make regulations under this Act is exercisable by statutory instrument.
- (2) A statutory instrument containing regulations made under this Act by the Scottish Ministers is subject to annulment in pursuance of a resolution of the Scottish Parliament.
- 30 (3) Except that regulations under—
 - (a) section 2(3)(a) or 5(1), 7, 8(5) or 75(7)(g), or
 - (b) paragraph 6 of schedule 4,are not made unless a draft of the statutory instrument containing them has been laid before, and approved by a resolution of, the Scottish Parliament.
- 35 (4) Regulations made under this Act by the Scottish Ministers, being regulations made other than under section 2(3)(a), 5(1) or 7, may make different provision for different cases or classes of case.

- (5) Subsection (4) is without prejudice to section 7(2)(e).

141 Modification of regulation making powers[j078.doc]

Any power in a provision of this Act to make regulations may, in so far as the 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.

142 Variation of references to time, money etc.[j075.doc]

For any reference in this Act to—

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

there may be prescribed, in substitution, some other period or as the case may be some other amount or fraction.

143 Interpretation[j123.doc]

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

“Accountant in Bankruptcy” is to be construed in accordance with section 119,

“accounting period” is to be construed in accordance with section 91(2),

“apparent insolvency” and “apparently insolvent” are to be construed in accordance with section 15,

“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 (c.8) 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,

“associate” is to be construed in accordance with section 144,

“bankruptcy restrictions order” has the meaning given by section 105,

“bankruptcy restrictions undertaking” has the meaning given by section 111,

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

“centre of main interests” has the same meaning as in the EC Regulation,

“commissioner”, except in the expression “examining commissioner”, is to be construed in accordance with section 48,

“court” means Court of Session or sheriff,

“creditor” includes a member State liquidator deemed to be a creditor under section 126,

“date of sequestration” has the meaning assigned by section 19(8),

“debtor” includes, without prejudice to the expression’s generality, an entity whose estate may be sequestrated by virtue of section 4, a deceased debtor, a deceased debtor’s executor or a person entitled to be appointed a deceased debtor’s executor,

“debtor application” means an application for sequestration made to the Accountant in Bankruptcy under section 2(1)(a) or section 4(3)(a), (4)(a) or (6)(a),

“the EC Regulation” means Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings,

“establishment” has the meaning given by Article 2(h) of the EC Regulation,

“examination” means a public examination under section 81 or a private examination under section 80,

“examining commissioner” is to be construed in accordance with section 82(3),

“interim trustee” is to be construed in accordance with section 37(8),

“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 that regulation and—

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

“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” is to be construed in accordance with section 90(1)(f),

“original trustee” is to be construed in accordance with section 34(1)(a),

“postponed debt” has the meaning assigned by section 90(4),

“preferred debt” has the meaning assigned by section 90(2),

“prescribed” means prescribed by regulations made by the Scottish Ministers,

“protected trust deed” means a trust deed which has been granted protected status in accordance with regulations made under paragraph 6 of schedule 4,

“qualified creditor” and “qualified creditors” are to be construed in accordance with section 5(1),

“qualified to act as an insolvency practitioner” is to be construed in accordance with section 390 of the Insolvency Act 1986 (c.45) (persons not qualified to act as insolvency practitioners),

“register of insolvencies” has the meaning assigned by section 120(1)(c),

“relevant person” has the meaning assigned by section 80(1)(b),

“replacement trustee” is to be construed in accordance with section 34(1)(b),

“secondary proceedings” means proceedings opened in accordance with Articles 3(2) and 3(3) of the EC Regulation, falling within the definition of winding-up proceedings in Article 2(c) of that regulation and—

(a) in relation to England and Wales and Scotland, set out in Annex B to that regulation under the heading “United Kingdom”, and

(b) in relation to another member State, set out in Annex B to that regulation under the heading relating to that member State,

“secured creditor” means a creditor who holds a security for a 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 35(1)(e),

“sequestration proceedings” includes a debtor application (and analogous expressions are to be construed accordingly),

“statement of assets and liabilities” means a document (including a copy of a document) in such form as may be prescribed containing—

(a) a list of the debtor’s assets and liabilities,

(b) a list of the debtor’s income and expenditure, and

(c) such other information as may be prescribed,

“statutory meeting” has the meaning assigned by section 29,

“temporary administrator” means a temporary administrator referred to by Article 38 of the EC Regulation,

“territorial proceedings” means any proceedings opened in accordance with Articles 3(2) and 3(4) of the EC Regulation, falling within the definition of insolvency proceedings in Article 2(a) of that regulation and—

(a) in relation to England and Wales and Scotland, set out in Annex A to that regulation under the heading “United Kingdom”, and

(b) in relation to another member State, set out in Annex A to that regulation under the heading relating to that member State,

“trust deed” means—

(a) a voluntary trust deed granted by or on behalf of a debtor (“D”) whereby D’s estate (other than such of D’s estate as would not, under section 61(1), vest in the trustee were D’s estate sequestrated) is conveyed to the trustee (“T”) for the benefit of D’s creditors generally, and

(b) any other trust deed which would fall within paragraph (a) but for—

(i) the exclusion from the estate conveyed to T of the whole or part of D’s dwellinghouse, where a secured creditor holds a security over it, and

(ii) the fact that D’s estate is not conveyed to T for the benefit of creditors generally because the secured creditor has, at D’s request, agreed before the trust deed is granted not to claim under the trust deed for any of the debt in respect of which the security is held,

“trustee vote” is to be construed in accordance with section 34(1) and (2), and

“unfair preference” means a preference created as is mentioned in subsection (1) of section 63 by a transaction to which subsection (5) of that section applies.

(2) The expressions in the definition of “appropriate bank or institution” in subsection (1) must be read with—

- (a) section 22 of the Financial Services and Markets Act 2000 (c.8),
- (b) any relevant order under that section, and
- (c) Schedule 2 to that Act.

(3) In paragraph (b) of the definition of “trust deed” in subsection (1), “D’s dwellinghouse” means a dwellinghouse (including any yard, garden, outbuilding or other pertinents) which, on the day immediately preceding the date the trust deed was granted—

- (a) D (whether alone or in common with any other person)—
 - (i) owned, or
 - (ii) leased under a long lease (“long lease” having the same meaning as in section 28(1) of the Land Registration (Scotland) Act 1979 (c.33)), and

(b) was D’s sole or main residence.

(4) For the purposes of subsection (3)(b), a dwellinghouse may be D’s sole or main residence irrespective of whether it is used, to any extent, by D for the purposes of any profession, trade or business.

(5) Any reference in this Act to a debtor being absolutely insolvent is to be construed as a reference to the debtor’s liabilities being greater than the debtor’s assets; and any reference to a debtor’s estate being absolutely insolvent is to be construed accordingly.

(6) 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.

(7) Any reference in this Act to “the creditors” in the context of their giving consent or doing any other thing is, unless the context otherwise requires, to be construed as a reference to the majority in value of such creditors as vote in that context at a meeting of creditors.

(8) 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, namely—

- (a) the presentation of a petition for sequestration,
- (b) the concurrence in a debtor application, and
- (c) the submission of a claim,

is to be construed as a reference to that act having the same effect, for the purposes of that enactment or rule of law, as an effective acknowledgement of the creditor’s claim.

(9) Any reference in this Act to any such enactment as is mentioned in subsection (8) does not include a reference to an enactment which implements or gives effect to any international agreement or obligation.

(10) Any reference in this Act, however expressed, to the time when a petition for sequestration is presented is to be construed as a reference to the time when the petition is received by the sheriff clerk.

(11) Any reference in this Act, however expressed, to the time when a debtor application is made is to be construed as a reference to the time when the application is received by the Accountant in Bankruptcy.

144 Meaning of “associate”[j122.doc]

- 5 (1) For the purposes of this Act, any question whether a person is an associate of another person is to be determined in accordance with the following provisions of this section (any reference, whether in those provisions or in regulations under subsection (15), to a person being an associate of another person being taken to be a reference to their being associates of each other).
- (2) But subsection (1) is subject to subsection (15).
- (3) A person (“A”) is an associate of a natural person (“B”) if A is—
- 10 (a) B’s husband, wife or civil partner,
- (b) a relative of B or of B’s husband, wife or civil partner, or
- (c) the husband, wife or civil partner of such a relative.
- (4) A person (“C”) is an associate of any person (“D”) with whom C is in partnership and of any person who is an associate of D.
- (5) A firm is an associate of any person who is a member of the firm.
- 15 (6) For the purposes of this section, a person (“E”) is a relative of a natural person (“F”) if E is F’s brother, sister, uncle, aunt, nephew, niece, lineal ancestor or lineal descendant treating any relationship of the half blood as a relationship of the whole blood and the stepchild or adopted child of someone (“S”) as S’s child.
- (7) References in this section to a husband, wife or civil partner include references to a former husband, wife or civil partner and a reputed husband, wife or civil partner.
- 20 (8) A person (“G”) is an associate of any person whom G employs or by whom G is employed.
- (9) For the purposes of subsection (8), any director or other officer of a company is to be treated as employed by the company.
- 25 (10) A company is an associate of another company if—
- (a) the same person has control of both, or if a person (“H”) has control of one and persons who are H’s associates have control of the other, or
- (b) a group of 2 or more persons has control of each company and the groups either—
- 30 (i) consist of the same persons, or
- (ii) could be regarded as consisting of the same persons by treating (in 1 case or more) a member of either group as replaced by a person of whom that member is an associate.
- (11) A company is an associate of another person (“J”) if—
- (a) J has control of it, or
- 35 (b) J and persons who are J’s associates together have control of it.
- (12) For the purposes of this section, a person (“K”) is taken to have control of a company—
- (a) if 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 K’s directions or instructions, or

(b) if K is entitled to exercise, or control the exercise of, $\frac{1}{3}$ or more of the voting power at any general meeting of the company or of another company which has control of the company.

5 (13) Where 2 or more persons together satisfy either of the conditions mentioned in subsection (12), they shall be taken to have control of the company.

(14) In subsections (9) to (13), “company” includes any body corporate (whether incorporated in Great Britain or elsewhere).

(15) The Scottish Ministers may by regulations—

10 (a) amend the preceding 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 (3) to (14) (or any subsection added by virtue of paragraph (a))—

(i) is to cease to apply, whether in whole or in part, or

15 (ii) is to apply subject to such modifications as they may specify in the regulations.

(16) The Scottish Ministers may in the regulations make such incidental or transitional provision as they consider appropriate.

145 Proceedings under EC Regulation: modified definition of “estate”[j070.doc]

20 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.

146 Crown application[j077.doc]

This Act binds the Crown as creditor only.

25 147 Re-enactment[j152.doc]

Schedule 6, derived from Part 2 of Schedule 7 to the Bankruptcy (Scotland) Act 1985 (c.66) (and re-enacting sections 10 and 189 of the Bankruptcy (Scotland) Act 1913 (c.20)), has effect.

148 Modifications, repeals, savings, revocations and transitional provisions[j130.doc]

30 (1) Schedule 7 makes provision for the modification of enactments.

(2) The enactments mentioned in schedule 8 to this Act are repealed, or as the case may be revoked, to the extent mentioned in the second column of that schedule.

(3) Nothing in this Act affects any of the enactments repealed, revoked or amended by this Act in their operation in relation to a sequestration as regards which the award was made
35 before the coming into force of this Act.

(4) The apparent insolvency of a debtor may be constituted for the purposes of this Act even though the circumstance founded upon for such constitution occurred on a date before the coming into force of this Act; and for those purposes the apparent insolvency is taken to have been constituted on the date in question.

- 5 (5) If a debtor whose estate is sequestrated after the coming into force of this Act is liable, by virtue of a transaction entered into before the date on which section 102 of the Bankruptcy (Scotland) Act 1913 (c.20) was repealed, to pay royalties or a share of the profits to any person in respect of copyright, or interest in copyright, comprised in the sequestrated estate, then that section applies in relation to the trustee in the sequestration as it applied, before its repeal, in relation to any trustee in bankruptcy (within the meaning of that Act).
- 10 (6) Where sequestration of a debtor's estate is awarded under this Act a person—
- (a) is not guilty of an offence under any provision of this Act in respect of anything done before the date of commencement of that provision, but
- (b) is guilty instead of an offence under the Bankruptcy (Scotland) Act 1985 (c.66) (or as the case may be under the Bankruptcy (Scotland) Act 1913 (c.20)) in respect of anything so done which would have been an offence under that Act if the award of sequestration had been made under that Act.
- 15 (7) Unless the context otherwise requires, any reference in any enactment or document—
- (a) to notour bankruptcy, or to a person being notour bankrupt, is to be construed as a reference to apparent insolvency, or to a person being apparently insolvent, within the meaning of section 15 of this Act,
- 20 (b) to a person's estate being sequestrated under the Bankruptcy (Scotland) Act 1913 or the Bankruptcy (Scotland) Act 1985 is to be construed as, or as including, a reference to its being sequestrated under this Act, and
- (c) to a trustee in sequestration or to a trustee in bankruptcy, is to be construed as a reference to a trustee in a sequestration within the meaning of this Act, (analogous references being construed accordingly).
- 25 (8) Unless the context otherwise requires, any reference in any enactment or document—
- (a) to a "gratuitous alienation" is to be construed as including a reference to an alienation challengeable under section 62(2), or
- (b) to a "fraudulent preference" or to an "unfair preference" is to be construed as including a reference to an unfair preference within the meaning of this Act.

30

149 Continuity of the law[j157.doc]

- (1) The repeal and re-enactment of a provision by this Act does not affect the continuity of the law.
- 35 (2) Anything done, or having effect as if done, under (or for the purposes of or in reliance on) a provision repealed by this Act, being a provision in force or effective immediately before the coming into force of this Act, has effect after that coming into force as if done under (or for the purposes of or in reliance on) the corresponding provision of this Act.
- 40 (3) Any reference (express or implied) in this Act or in any other enactment or document to a provision of this Act is to be construed, so far as the context permits, as including, as respects times, circumstances or purposes in relation to which the corresponding repealed provision had effect, a reference to that corresponding provision.
- 45 (4) Any reference (express or implied) in any enactment or document to a provision repealed by this Act is to be construed, so far as the context permits, as including, as respects times, circumstances or purposes in relation to which the corresponding provision of this Act has effect, a reference to that corresponding provision.

- (5) Subsections (1) to (4) have effect in place of section 17(2) of the Interpretation Act 1978 (c.30) (repeal and re-enactment); but nothing in this section affects any other provision of that Act.
- 5 (6) This section is without prejudice to section 148(3) and to any specific transitional provision or saving contained in this Act.
- (7) References in this section to this Act include subordinate legislation made under or by virtue of this Act.

150 Short title and commencement[j012.doc]

- 10 (1) This Act may be cited as the Bankruptcy (Scotland) Act 2011.
- (2) This Act comes into force at the end of the period of 3 months beginning with the day on which the Bill for the Act receives Royal Assent.
- (3) This Act applies to sequestrations as regards which the petition is presented, or the debtor application is made—
- 15 (a) on or after the date on which the Act comes into force, or
- (b) before that date, but in respect of which no award of sequestration has been made by that date.

SCHEDULE 1
(introduced by sections 5(4), 32(12) and 87(4))

DETERMINATION OF AMOUNT OF CREDITOR'S CLAIM[J124S.DOC]

5 *Amount which may be claimed generally*

- 1 (1) Subject to the provisions of this schedule, the amount in respect of which a creditor is entitled to claim is the accumulated sum of principal and any interest which is due on the debt as at the date of sequestration.
- 10 (2) If a debt does not depend on a contingency but would not be payable but for the sequestration until after the date of the sequestration, the amount of the claim is to be calculated as if the debt were payable on that date but subject to the deduction of interest at the rate specified in section 90(10) from that date until the date for payment of the debt.
- 15 (3) In calculating the amount of a creditor's claim, the creditor is to deduct any discount (other than any discount for payment in cash) which is allowable by contract or course of dealing between the creditor and the debtor or by the usage of trade.

Claims for aliment and for periodical allowance on divorce or on dissolution of civil partnership

- 20 2 (1) A person entitled to aliment, however arising, from a living debtor as at the date of sequestration, or from a deceased debtor immediately before the debtor's death, is not entitled to include in the amount of the person's claim—
- 25 (a) any unpaid aliment for any period before the date of sequestration unless the amount of the aliment has been quantified by court decree or by any legally binding obligation which is supported by evidence in writing, and—
- (i) in the case of spouses (or, where the aliment is payable to a divorced person in respect of a child, former spouses), or
- (ii) in the case of civil partners (or, where the aliment is payable to a former civil partner in respect of a child after dissolution of a civil partnership, former civil partners),
- they were living apart during that period, or
- 30 (b) any aliment for a period after the date of sequestration.
- (2) Sub-paragraph (1) applies to a periodical allowance payable on divorce or on dissolution of a civil partnership—
- (a) by virtue of a court order, or
- (b) under any legally binding obligation which is supported by evidence in writing,
- 35 as it applies to aliment and as if, for heads (i) and (ii) of that sub-paragraph and the word "they" which immediately follows those heads, there were substituted "the payer and payee".

Debts depending on contingency

- 40 3 (1) The amount which a creditor is entitled to claim does not include a debt in so far as its existence or amount depend upon a contingency.

- (2) But sub-paragraph (1) is subject to sub-paragraph (3).
- (3) On an application by the creditor—
- (a) to the trustee in the sequestration, or
 - (b) if there is no trustee, to the sheriff,
- 5 the trustee, or sheriff, is to put a value on the debt in so far as it is contingent.
- (4) The amount in respect of which the creditor is then entitled to claim is that value but no more.
- (5) And where the contingent debt is an annuity, a cautioner may not then be sued for more than that value.
- 10 (6) An interested person may appeal to the sheriff against a valuation under sub-paragraph (3) by the trustee; and the sheriff may affirm or vary that valuation.

Debts due under composition contracts

- 4 Where in the course of a sequestration the debtor is discharged following approval of a composition by the debtor but the sequestration is subsequently revived, the amount in
- 15 respect of which a creditor is entitled to claim is the same amount as if the composition had not been so approved less any payment already made to the creditor under the composition contract.

Secured debts

- 5 (1) A secured creditor, in calculating the amount of the secured creditor's claim, is to deduct the value of any security as estimated by the secured creditor.
- 20 (2) But if the secured creditor surrenders, or undertakes in writing to surrender, a security for the benefit of the debtor's estate, the secured creditor is not required to make a deduction of the value of that security.
- 25 (3) The trustee in the sequestration may, at any time after the expiry of 12 weeks after the date of sequestration, require the secured creditor, at the expense of the debtor's estate, to discharge the security or convey or assign it to the trustee on payment to the creditor of the value specified by the creditor.
- (4) The amount in respect of which the creditor is then entitled to claim is any balance of the creditor's debt remaining after receipt of the payment.
- 30 (5) A creditor whose security has been realised, in calculating the amount of the creditor's claim, is to deduct the amount (less the expenses of realisation) which the creditor has received, or is entitled to receive, from the realisation.

Valuation of claims against partners for debts of the partnership

- 6 (1) Where a creditor claims, in respect of a debt of a partnership, against the estate of one of its partners, the creditor is to estimate the value of—
- 5 (a) the debt to the creditor from the firm's estate where that estate has not been sequestrated, or
- (b) the creditor's claim against that estate where it has been sequestrated, and to deduct that value from the creditor's claim against the partner's estate.
- (2) The amount in respect of which the creditor is entitled to claim on the partner's estate is the balance remaining after that deduction is made.

SCHEDULE 2

(introduced by section 90(2) and (3))

PREFERRED DEBTS[J125S.DOC]

PART 1

LIST OF PREFERRED DEBTS

Contributions to occupational pension schemes etc.

- 15 1 Any sum which is owed by the debtor and is a sum to which Schedule 4 to the Pension Schemes Act 1993 (c.48) (contributions to occupational pension scheme and state scheme premiums) applies.

Remuneration of employees etc.

- 20 2 (1) So much of any amount which—
- (a) is owed by the debtor to a person who is or has been an employee of the debtor, and
- (b) is payable by way of remuneration in respect of the whole or any part of the period of 4 months which immediately precedes the relevant date,
- 25 as does not exceed the prescribed amount.
- (2) An amount owed by way of accrued holiday remuneration, in respect of any period of employment before the relevant date, to a person whose employment by the debtor has been terminated (whether before, on or after that date).
- (3) So much of any amount owed in respect of money advanced for the purpose as has been
- 30 applied for the payment of a debt which, if it had not been paid, would have been a debt falling within sub-paragraph (1) or (2).
- 3 So much of any amount which—
- (a) is ordered, whether before or after the relevant date, to be paid by the debtor under the Reserve Forces (Safeguard of Employment) Act 1985 (c.17), and
- 35 (b) is so ordered in respect of a default made by the debtor before that date in the discharge of the debtor's obligations under that Act,
- as does not exceed such amount as may be prescribed.

Levies on coal and steel production

- 4 Any sums due at the relevant date from the debtor in respect of—
- (a) the levies on the production of coal and steel referred to in Articles 49 and 50 of the Treaty establishing the European Coal and Steel Community, or
 - 5 (b) any surcharge for delay provided for in Article 50(3) of that Treaty and Article 6 of Decision 3/52 of the High Authority of that Community.

PART 2

INTERPRETATION OF PART 1

Meaning of “the relevant date”

- 10 5 In Part 1, “the relevant date” means—
- (a) in relation to a debtor other than a deceased debtor, the date of sequestration, and
 - (b) in relation to a deceased debtor, the date of death.

Amounts payable by way of remuneration

- 15 6 (1) For the purposes of paragraph 2, a sum is payable by the debtor to a person by way of remuneration in respect of any period if—
- (a) it is paid as wages or salary (whether payable for time or for piece work or earned wholly or partly by way of commission) in respect of services rendered to the debtor in that period, or
 - (b) it is an amount falling within sub-paragraph (2) and is payable by the debtor in respect of that period.
- 20 (2) An amount falls within this sub-paragraph if it is—
- (a) a guarantee payment under section 28(1) to (3) of the Employment Rights Act 1996 (c.18) (entitlement to payment for workless day),
 - 25 (b) a payment for time off under section 53(1) (looking for new employment or making arrangements for training for future employment) or 56(1) (antenatal care) of that Act,
 - (c) remuneration on suspension on medical grounds under section 64 of that Act,
 - (d) a payment for time off under section 169(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (c.52) (trade union duties), or
 - 30 (e) remuneration under a protective award made by an employment tribunal under section 189 of that Act (redundancy dismissal with compensation).
- 35 (3) For the purposes of paragraph 2(2), holiday remuneration is deemed, in the case of a person (“P”) whose employment has been terminated by or in consequence of the award of sequestration of P’s employer’s estate, to have accrued to P in respect of a period of employment if, by virtue of P’s contract of employment or of any enactment, that remuneration would have accrued in respect of that period if P’s employment had continued until P became entitled to be allowed the holiday.
- (4) In sub-paragraph (3), “enactment” includes an order made or direction given under an enactment.

- (5) Without prejudice to the preceding provisions of this paragraph—
- (a) any remuneration payable by the debtor to a person in respect of—
 - (i) a period of holiday, or
 - (ii) of absence from work through sickness or other good cause,
- 5 is deemed to be wages, or as the case may be salary, in respect of services rendered to the debtor in that period, and
- (b) references in this paragraph to remuneration in respect of a period of holiday include references to any sums which, if they had been paid, would have been treated for the purposes of the enactments relating to social services as earnings in respect of that period.
- 10

Transitional provisions

- 7 Regulations under paragraph 2 or 3 may contain such transitional provisions as may appear to the Scottish Ministers necessary or expedient.

SCHEDULE 3 (introduced by section 101)

DISCHARGE ON COMPOSITION[J126S.DOC]

- 15
- 1 (1) At any time after the sheriff or, as the case may be, the Accountant in Bankruptcy (“AiB”) appoints the trustee in the sequestration (“T”), an offer of composition may be made to T, by or on behalf of the debtor (“D”), in respect of D’s debts.
- 20 (2) Any offer of composition must specify caution or other security to be provided for its implementation.
- 2 T, where T is not AiB, is to submit the offer of composition along with a report on it to the commissioners or, if there are no commissioners, to AiB.
- 3 The commissioners or, if there are no commissioners, AiB—
- 25 (a) if they consider (or AiB considers) that the offer of composition will be timeously implemented and that, were the rules set out in section 90 of, and schedule 1 to, this Act applicable, its implementation would secure payment of a dividend of at least 25p in the £ in respect of the ordinary debts, and
- (b) if satisfied with the caution or other security specified in the offer,
- 30 are (or is) to recommend that the offer be placed before the creditors.
- 4 Where a recommendation is made that the offer of composition be placed before the creditors, T is—
- (a) to intimate the recommendation to D and record it in the sederunt book,
 - (b) to publish in the Edinburgh Gazette a notice stating that an offer of composition has been made and where its terms may be inspected, and
- 35

(c) not later than 1 week after the date of publication of the notice, to send to every creditor known to T—

- (i) a copy of the terms of offer, and
- (ii) such other information as may be prescribed.

5 5 The notice mentioned in paragraph 4(b) is to be in the prescribed form and to contain such information as may be prescribed.

6 Where, within the period of 5 weeks beginning with the date of publication of that notice, T does not receive notification in writing from—

(a) a majority in number, or

10 (b) not less than one third in value,

of the creditors that they reject the offer of composition, the offer is to be approved by T.

7 Where T receives such notification—

(a) within the period, and

15 (b) to the extent,

mentioned in paragraph 6, the offer of composition is to be rejected by T.

8 Where a creditor—

(a) has, under paragraph 4(c)(i), been sent a copy of the terms of offer, and

20 (b) has not notified T, as mentioned in paragraph 6, that the creditor objects to the offer,

the creditor is to be treated for all purposes as if the creditor had accepted the offer.

9 (1) The Scottish Ministers may by regulations amend paragraphs 4 to 8 by—

(a) replacing them,

(b) varying them, or

25 (c) adding to, or deleting anything from, them.

(2) Regulations under sub-paragraph (1) may contain such amendments of this Act as appear to the Scottish Ministers to be necessary in consequence of the amendments to paragraphs 4 to 8.

10 (1) Where an offer of composition is approved, a creditor—

30 (a) who has not, under paragraph 4(c)(i), been sent a copy of the terms of offer, or

(b) who has notified T, as mentioned in paragraph 6, that the creditor rejects the offer,

may, not more than 28 days after the expiry of the period mentioned in paragraph 6, appeal to AiB against the approval.

(2) In determining an appeal under sub-paragraph (1), AiB may—

35 (a) approve or reject the offer of composition, and

(b) make such other determination in consequence of that approval or rejection as AB thinks fit.

- 11 (1) Where an offer of composition is approved, T, where T is not AiB—
- (a) is to submit to the commissioners or, if there are no commissioners, to AiB—
 - (i) T's accounts of T's intromissions with D's estate for audit, and
 - (ii) a claim for the outlays reasonably incurred by T and for T's remuneration,
 - 5 (b) where those documents are so submitted, is to send a copy of them to AiB, and
 - (c) is to take all reasonable steps to ensure that the interim trustee (where a different person) has submitted, or submits, to AiB the interim trustee's—
 - (i) accounts, and
 - (ii) claim for outlays and remuneration.
- 10 (2) Where the offer of composition is approved and T is AiB, T is to prepare accounts of T's intromissions with D's estate and to make a determination of T's fees and outlays calculated in accordance with regulations made under section 124.
- (3) Subsections (1) and (2) of section 93, (1) to (3) of section 95 and (4) of section 96 apply, subject to any necessary modifications, in respect of the accounts and claim submitted
- 15 under sub-paragraph (1)(a) as they apply in respect of the accounts and claim submitted under subsection (1) of section 93.
- (4) Subsections (2) to (4), (6), (9) and (12) of section 97 apply, subject to any necessary modifications, in respect of the accounts prepared and determination made under sub-
- 20 paragraph (2) as they apply in respect of the accounts prepared and determination made under subsection (1) of that section.
- 12 As soon as the procedure under paragraph 11 has been completed, there is to be sent to AiB—
- (a) by T (where T is not AiB), a declaration that all necessary charges in connection with the sequestration have been paid or that satisfactory provision has been made
 - 25 (b) by or on behalf of D, the bond of caution or other security for payment of the composition.
- 13 (1) Where the documents have been sent to AiB under paragraph 12 and either—
- (a) the 28 days mentioned in paragraph 10(1) have expired, or
 - 30 (b) AiB, in determining an appeal under paragraph 10(1), has approved the offer of composition,
- AiB is to grant the certificates of discharge referred to in sub-paragraph (2).
- (2) Those certificates are—
- (a) a certificate discharging the debtor, and
 - 35 (b) a certificate discharging T.
- (3) A certificate granted under sub-paragraph (1) is to be in the prescribed form.

(4) AiB is—

(a) to send a certified copy of the certificate discharging D to the keeper of the register of inhibitions for recording in that register, and

(b) either—

5 (i) to send a copy of that certificate to T, who is to insert it in the sederunt book, or

(ii) where AiB is T, to insert a copy of that certificate in the sederunt book.

14 A certificate granted under paragraph 13(1) discharging T has the effect of discharging
10 T from all liability (other than any liability arising from fraud) to the creditors or to D in respect of any act or omission of T in exercising the functions conferred on T by this Act.

15 Even though an offer of composition has been made the sequestration is, until the discharge of D becomes effective, to proceed as if no such offer has been made.

16 On the discharge of D becoming effective the sequestration ceases.

15 17 A creditor who has not submitted a claim under section 84 before an offer of composition is approved is not entitled to make any demand against—

(a) a person offering the composition on behalf of D, or

(b) a cautioner in the offer.

18 20 But paragraph 17 is without prejudice to any right of such a creditor to a dividend out of D's estate equal to the dividend which creditors of the same class are entitled to receive under the composition.

19 D may make 2, but no more than 2, offers of composition in the course of a sequestration.

20 (1) On the granting of a certificate under paragraph 13(1) discharging D—

25 (a) D is re-invested in D's estate as existing at the date the certificate is granted,

(b) D is discharged of all debts for which D was liable at the date of sequestration (other than any debts mentioned in section 100(3)), and

(c) the claims of creditors in the sequestration are converted into claims for their respective shares in the composition.

30 (2) But sub-paragraph (1)(b) is subject to paragraphs 17 and 18.

(3) The discharge of D by virtue of the granting of a certificate under paragraph 13(1) does not affect any right of a secured creditor—

35 (a) for a debt in respect of which D has been discharged to enforce the security for payment of the debt and any interest due and payable on the debt until the debt is paid in full,

(b) for an obligation in respect of which D has been discharged to enforce the security in respect of the obligation.

- 21 (1) The Court of Session, on the application of any creditor, may recall the approval of the offer of composition and the granting of certificates discharging D and T where it is satisfied—
- 5 (a) that there has been, or is likely to be, default in payment of the composition or of any instalment of the composition, or
- (b) that for any reason the composition—
- (i) cannot be proceeded with, or
- (ii) cannot be proceeded with without undue delay or without injustice to the creditors.
- 10 (2) The effect of a decree of recall under this paragraph where D has already been discharged is to revive the sequestration.
- (3) But the revival of the sequestration does not affect the validity of any transaction entered into by D, after D's discharge, with a person who has given value and has acted in good faith.
- 15 (4) Where T has been discharged, the Court may, on pronouncing decree of recall under this paragraph—
- (a) appoint a judicial factor to administer D's estate, and
- (b) give the judicial factor such order as it thinks fit as to that administration.
- (5) The clerk of court is to send a copy of any decree of recall under this paragraph to T, or to the judicial factor, for insertion in the sederunt book.
- 20 22 (1) The Court of Session, on the application of any creditor, may reduce a certificate granted under paragraph 13(1) discharging D where it is satisfied that—
- (a) a payment was made,
- (b) a preference was granted, or
- 25 (c) a payment or preference was promised,
- for the purpose of facilitating the obtaining of D's discharge.
- (2) The Court may, whether or not it pronounces a decree of reduction under this paragraph, order a creditor who has received a payment or preference in connection with D's discharge to surrender the payment or the value of the preference to D's estate.
- 30 (3) Where T has been discharged the Court may, on pronouncing a decree of reduction under this paragraph—
- (a) appoint a judicial factor to administer D's estate, and
- (b) give the judicial factor such order as it thinks fit as to that administration.
- (4) The clerk of court is to send a copy of any decree of reduction under this paragraph to T, or to the judicial factor, for insertion in the sederunt book.
- 35

SCHEDULE 4
(introduced by section 115)

VOLUNTARY TRUST DEEDS FOR CREDITORS[J127S.DOC]

Remuneration of trustee

- 5 1 Whether or not—
- (a) provision is made in the trust deed for auditing the accounts of the trustee in the sequestration (“T”) and for determining the method of fixing T’s remuneration, or
 - (b) T and the creditors have agreed on such auditing and the method of fixing that remuneration,
- 10 the debtor (“D”), T or any creditor may, at any time before the final distribution of D’s estate among the creditors, have T’s accounts audited by, and T’s remuneration fixed by, the Accountant in Bankruptcy.

Accountant in Bankruptcy’s power to carry out audit

- 15 2 The Accountant in Bankruptcy may, at any time, audit T’s accounts and fix T’s remuneration.

Registration of notice of inhibition

- 3 (1) T, from time to time after the trust deed is delivered to T, may cause a notice in such form as is prescribed by act of sederunt to be recorded in the register of inhibitions.
- 20 (2) Such recording has the same effect as the recording in that register of letters of inhibition against D.
- (3) T, after—
- (a) D’s estate has been distributed finally among D’s creditors, or
 - (b) the trust deed has otherwise ceased to be operative,
- 25 is to cause a notice in such form as is so prescribed to be recorded in that register recalling the notice recorded under sub-paragraph (1).

Lodging of claim to bar effect of limitation of actions

- 4 The submission to T, acting under a trust deed, of a claim by a creditor bars the effect of any enactment or rule of law relating to limitation of actions.

Valuation of claims

- 30 5 (1) Unless the trust deed otherwise provides, schedule 1 applies in relation to a trust deed as it applies to a sequestration but subject to the following modifications.
- (2) In paragraphs 1, 2 and 5, for the word “sequestration”, wherever it occurs, there is substituted “granting of the trust deed”.
 - (3) In paragraph 3(3), for heads (a) and (b) and the words “the trustee or sheriff” which immediately follow head (b) there is substituted “the trustee”.
 - (4) Paragraph 4 is to be disregarded.
- 35

Protected trust deeds

- 6 (1) The Scottish Ministers may by regulations make provision as to—
- (a) the conditions which require to be fulfilled in order for a trust deed to be granted the status of a protected trust deed,
 - 5 (b) the consequences of a trust deed being granted that status,
 - (c) the rights of any creditor who does not accede to a trust deed which is granted protected status,
 - (d) the extent to which D may be discharged, by virtue of a protected trust deed, from D's liabilities or from such liabilities or class of liabilities as may be prescribed in the regulations,
 - 10 (e) the circumstances in which D may bring to an end the operation of a trust deed in respect of which the conditions provided for under head (a) are not fulfilled,
 - (f) the administration of the trust under a protected trust deed (including provisions about the remuneration payable to T).
- 15 (2) Regulations under this paragraph may—
- (a) make provision enabling applications to be made to the court, and
 - (b) contain such amendments of this Act as appear to the Scottish Ministers to be necessary in consequence of any other provision of the regulations.

SCHEDULE 5

(introduced by section 133)

MEETINGS OF CREDITORS AND COMMISSIONERS[J128S.DOC]

PART 1

MEETINGS OF CREDITORS OTHER THAN THE STATUTORY MEETING

Calling of meeting

- 25 1 The trustee in the sequestration ("T") is to call a meeting of creditors if required to do so—
- (a) by order of the sheriff,
 - (b) by one-tenth in number or one-third in value of the creditors,
 - (c) by a commissioner, or
 - 30 (d) by the Accountant in Bankruptcy ("AiB").
- 2 A meeting called under paragraph 1 is to be held not later than 28 days after—
- (a) the issuing of the order under head (a), or
 - (b) the receipt by T of the requirement under head (b), (c) or (d),
- of that paragraph.
- 35 3 T, or a commissioner who has given notice to T, may at any time call a meeting of creditors.

4 T, calling a meeting under paragraph 1 or 3, or a commissioner calling a meeting under paragraph 3, is no fewer than 7 days before the date fixed for the meeting to notify—

- (a) every creditor known to T or, as the case may be, to the commissioner, and
- (b) AiB,

5 of the date, time and place fixed for the holding of the meeting and of the meeting's purpose.

5 Where—

- (a) a requirement has been made under paragraph 1, but
- (b) no meeting has been called by T,

10 AiB may, of AiB's own accord or on the application of any creditor, call a meeting of creditors.

6 AiB, calling a meeting under paragraph 5, is no fewer than 7 days before the date fixed for the meeting to take reasonable steps to notify the creditors of the date, time and place fixed for the holding of the meeting and of the meeting's purpose.

15 7 It is not necessary to notify under paragraph 4 or 6 any creditor whose accepted claim is less than £50 or such sum as may be prescribed, unless the creditor has in writing requested such notification.

Role of trustee at meeting

8 At the commencement of a meeting T is to be the person chairing the meeting and as such is, after carrying out T's duties under section 88(1)—

- (a) to invite the creditors to elect 1 of their number to chair the meeting in T's place, and
- (b) to preside over the election.

9 If no person is elected in pursuance of paragraph 8, T is to chair the meeting throughout.

25 10 T is to arrange for a record to be made of the proceedings at the meeting and is to insert the minutes of the meeting in the sederunt book.

Appeals

30 11 T, a creditor or any other person having an interest may, within 14 days after the date of a meeting called under paragraph 4 or 6, appeal to the sheriff against a resolution of the creditors at the meeting.

PART 2

ALL MEETINGS OF CREDITORS

Validity of proceedings

35 12 No proceedings at a meeting are invalidated by reason only that a notice or other document relating to the calling of the meeting, being a notice required to be sent or given under a provision of this Act, has not been received by, or come to the attention of, any creditor before the meeting.

Locus of meeting

13 Every meeting is to be held in such place (whether or not in the sheriffdom) as is, in the opinion of the person calling the meeting, the most convenient for the majority of the creditors.

Mandatories

14 A creditor may authorise in writing a person to represent the creditor at a meeting.

15 A creditor is to lodge with T, before the commencement of the meeting, any authorisation given under paragraph 14.

10 16 Any reference in paragraph 8, or in the following provisions of this Part, to a creditor includes a reference to a person authorised under paragraph 14 by a creditor.

Quorum

17 The quorum at any meeting is 1 creditor.

Voting at meeting

15 18 Any question at a meeting is to be determined by a majority in value of the creditors who vote on that question.

Objections by creditors

19 At any meeting the person chairing it (“Ch”) may allow or disallow any objection by a creditor, other than (if Ch is not T) an objection relating to a creditor’s claim.

20 20 A person aggrieved by the determination of Ch in respect of an objection may appeal to the sheriff against the determination.

21 If Ch is in doubt as to whether to allow or disallow an objection, the meeting is to proceed as if no objection had been made, except that for the purposes of appeal the objection is to be deemed to have been disallowed.

Adjournment of meeting

25 22 If no creditor has appeared at a meeting by half an hour after the time appointed for its commencement, Ch may adjourn it such other day as Ch may appoint, being a day no fewer than 7, nor more than 21, days after that on which the meeting is adjourned.

23 Ch may, with the consent of a majority in value of the creditors who vote on a resolution to adjourn a meeting, adjourn the meeting.

30 24 Any adjourned meeting is to be held at the same time and place as the original meeting, unless in the resolution another time or place is specified.

Minutes of meeting

25 The minutes of every meeting are to be signed by Ch and within 14 days after the meeting are to be sent to AiB.

PART 3

MEETINGS OF COMMISSIONERS

5
26 T—

(a) may call a meeting of commissioners at any time, and

(b) is to call such a meeting—

(i) on being required to do so by order of the sheriff, or

10 (ii) on being requested to do so by AiB or by any commissioner.

27 If T fails to call a meeting of commissioners within 14 days after being required or requested to do so under paragraph 26, a commissioner may call a meeting of commissioners.

28 T is to give the commissioners at least 7 days notice of a meeting called by T unless the
15 commissioners decide that they do not require such notice.

29 T is to act as clerk at a meeting of commissioners and is to insert a record of the deliberations of the commissioners in the sederunt book.

30 If the commissioners are considering the performance of the functions of T under any provision of this Act, T is to withdraw from the meeting if requested to do so by the
20 commissioners and in such a case a commissioner is to—

(a) act as clerk,

(b) transmit a record of the deliberations of the commissioners to T for insertion in the sederunt book, and

(c) authenticate the insertion when made.

25 31 The quorum at a meeting of commissioners is 1 commissioner and the commissioners may act by a majority of the commissioners present at the meeting.

32 Any matter may be agreed by the commissioners without a meeting if such agreement—

(a) is unanimous, and

(b) is subsequently recorded in a minute signed by the commissioners.

30 33 Any minute signed under paragraph 32(b) is to be inserted by T in the sederunt book.

SCHEDULE 6
(introduced by section 147)

RE-ENACTMENT OF SECTIONS 10 AND 189 OF THE BANKRUPTCY (SCOTLAND) ACT 1913[J151S.DOC]

Arrestments and attachments

- 5 1 (1) Subject to sub-paragraph (2), all arrestments and attachments which have been executed within 60 days prior to the constitution of the apparent insolvency of the debtor, or within 4 months after its constitution, rank *pari passu* as if they had all been executed on the same date.
- 10 (2) Any such arrestment which is executed on the dependence of an action is to be followed up without undue delay.
- (3) A creditor judicially producing, in a process relative to the subject of such arrestment or attachment, liquid grounds of debt or decree of payment within the 60 days or 4 months referred to in sub-paragraph (1) is entitled to rank as if the creditor had executed an arrestment or an attachment.
- 15 (4) If, in the meantime—
- (a) the first or any subsequent arrester obtains a decree of furthcoming and recovers payment, or
- (b) an attachment creditor carries through an auction,
- 20 the person in question is accountable for the sum recovered to those who, by virtue of this Act, may eventually be found to have a ranking *pari passu* on the sum; and that person is liable in an action at their instance for payment to them proportionately, after allowing out of the fund the expense of such recovery.
- (5) Arrestments executed for attaching the same effects of the debtor after the period of 4 months subsequent to the constitution of the debtor's apparent insolvency do not compete with those within the 60 days or 4 months referred to in sub-paragraph (1) but may rank with each other on any reversion of the fund attached in accordance with any enactment or rule of law relating to such ranking.
- 25 (6) Any reference in sub-paragraphs (1) to (5) to a debtor is to be construed as including a reference to an entity whose apparent insolvency may, by virtue of subsection (7) of section 15, be constituted under subsection (1) of that section.
- 30 (7) This paragraph applies in respect of arrestments and attachments executed whether before or after the coming into force of this Act.
- (8) Nothing in this paragraph applies to an earnings arrestment, a current maintenance arrestment or a conjoined arrestment order.

35 *Exemptions from stamp or other duties for conveyances, deeds etc. relating to sequestrated estates*

2 Any—

- 40 (a) conveyance, assignation, instrument, discharge, writing or deed relating solely to the estate of a debtor ("D") which has been or may be sequestrated, under either this or any former Act, being estate which after the execution of the document in question is and remains the property of D, for the benefit of D's creditors, or of the trustee in the sequestration,

- (b) discharge to D,
- (c) deed, assignation, instrument, or writing for reinvesting D in the estate,
- (d) article of roup or sale, or submission,
- (e) other instrument or writing whatsoever relating solely to the estate of D, and
- 5 (f) other deed or writing forming part of the proceedings ordered under such sequestration,

is exempt from all stamp duties or other Government duty.

SCHEDULE 7
(introduced by section 148(1))

10 MODIFICATION OF ENACTMENTS[J150S.DOC]

Judicial Factors (Scotland) Act 1889 (c.39)

- 1 In section 11A(2) of the Judicial Factors (Scotland) Act 1889 (application for judicial factor on estate of person deceased), for the words “73(2) of the Bankruptcy (Scotland) Act 1985, section 51” there is substituted “143(5) of the Bankruptcy (Scotland) Act 2011, section 90”.
- 15

Conveyancing (Scotland) Act 1924 (c.27)

- 2 In section 44(4)(c) (limitation of effect of entries in the register of inhibitions)—
- (a) after the words “1985”, where they first occur, there is inserted “or the Bankruptcy (Scotland) Act 2011, and
 - 20 (b) in paragraph (b)—
 - (i) after the words “1985” there is inserted “or (1)(a) of section 22 of the Bankruptcy (Scotland) Act 2011, and
 - 25 (ii) for the words “that section” there is substituted “the said section 14 or (4) of the said section 22”.

Administration of Justice Act 1956 (c.46)

- 3 In section 47G of the Administration of Justice Act 1956 (ranking of arresting creditor of demise charterer in sequestration or winding up of owner), for subsection (3) there is substituted—
- 30 “(3) Subsections (6) to (8) of section 21 of the Bankruptcy (Scotland) Act 2011 (as amended) (further provision as regards the effect of sequestration on diligence) and, in so far as applying and modifying those subsections, section 185(1)(a) and (2) of the Insolvency Act 1986 (c.45) (application of sequestration provisions relating to diligence on winding up) shall apply to such an arrestment as they
- 35 apply to any other arrestment.”.

Sheriff Courts (Scotland) Act 1971 (c.58)

4 In section 32(1)(m) of the Sheriff Courts (Scotland) Act 1971 (power of Court of
Session to regulate civil procedure in sheriff court), for the words “12 of the Bankruptcy
5 (Scotland) Act 1985 (c.66)” there is substituted “19 of the Bankruptcy (Scotland) Act
2011 (asp 00)”.

Prescription and Limitation (Scotland) Act 1973 (c.52)

5 (1) The Prescription and Limitation (Scotland) Act 1973 is amended as follows.

(2) In section 9(1) (definition of “relevant claim” for purposes of sections 6, 7 and 8 of the
Act)—

10 (a) in paragraph (b), for the words “22 or 48 of the Bankruptcy (Scotland) Act 1985”
there is substituted “32 or 84 of the Bankruptcy (Scotland) Act 2011”, and

(b) in paragraph (c), for the words “5(2)(c) of the Bankruptcy (Scotland) Act 1985”
there is substituted “143(1) of the Bankruptcy (Scotland) Act 2011”.

15 (3) In section 22A(3) (10 years’ prescription of obligations), in paragraph (b) of the
definition of “relevant claim”, for the words “22 or 48 of the Bankruptcy (Scotland) Act
1985” there is substituted “32 or 84 of the Bankruptcy (Scotland) Act 2011”.

Local Government (Scotland) Act 1973 (c.65)

6 In section 31 of the Local Government (Scotland) Act 1973 (disqualification for
nomination, election and holding office as member of local authority)—

20 (a) in subsection (2)(b), for the words “1985” there is substituted “2011”, and

(b) in subsection (3B)—

(i) in paragraph (a), for the words “56A of the Bankruptcy (Scotland) Act
1985” there is substituted “105 of the Bankruptcy (Scotland) Act 2011”,
and

25 (ii) in paragraph (b), for the words “56G” there is substituted “111”.

Land Registration (Scotland) Act 1979 (c.33)

7 In section 12(3)(b) of the Land Registration (Scotland) Act 1979 (indemnity in respect
of loss), after the word “respectively” there is inserted “or subsection (5) of section 62,
or subsection (6) of section 63, of the Bankruptcy (Scotland) Act 2011”.

Education (Scotland) Act 1980 (c.44)

8 In section 73B(12) of the Education (Scotland) Act 1980 (regulations relating to student
loans), for the words “54 of the Bankruptcy (Scotland) Act 1985 or on an order being
made under paragraph 11 of Schedule 4” there is substituted “98 of the Bankruptcy
30 (Scotland) Act 2011 or on certificates being granted under paragraph 13 of schedule 3”.

Family Law (Scotland) Act 1985 (c.37)

- 9 (1) The Family Law (Scotland) Act 1985 is amended as follows.
- (2) In section 14(5)(b) (incidental orders), for the words “41 of the Bankruptcy (Scotland) Act 1985” there is substituted “77 of the Bankruptcy (Scotland) Act 2011”.
- 5 (3) In section 16(3)(b) (agreements on financial provision), for the words “10(5) of the Bankruptcy (Scotland) Act 1985” there is substituted “16(6) of the Bankruptcy (Scotland) Act 2011”.

Legal Aid (Scotland) Act 1986 (c.47)

- 10 In Part 2 of Schedule 2 to the Legal Aid (Scotland) Act 1986 (civil legal aid: excepted proceedings), in paragraph 3(d), for the words “5(2)(a) of the Bankruptcy (Scotland) Act 1985” there is substituted “2(1)(a) of the Bankruptcy (Scotland) Act 2011”.

Debtors (Scotland) Act 1987 (c.18)

- 11 (1) The Debtors (Scotland) Act 1987 is amended as follows.
- 15 (2) In section 9(10)(b) (effect of time to pay order on diligence), for the words “7 of the Bankruptcy (Scotland) Act 1985” there is substituted “15 of the Bankruptcy (Scotland) Act 2011”.
- (3) In section 13(2) (saving of creditor’s rights and remedies), for the words “24 of Schedule 7 to the Bankruptcy (Scotland) Act 1985” there is substituted “1 of schedule 6 to the Bankruptcy (Scotland) Act 2011”.
- 20 (4) In section 66 (recall and variation of conjoined arrestment order)—
- (a) in subsection (2)(e), for the words “13 of the Bankruptcy (Scotland) Act 1985 or the permanent” there is substituted “38 of the Bankruptcy (Scotland) Act 2011 or the”, and
- 25 (b) in subsection (7), the words “the permanent” are repealed.
- (5) In section 67 (equalisation of diligences not to apply), for the words “24 of Schedule 7 to the Bankruptcy (Scotland) Act 1985” there is substituted “1 of schedule 6 to the Bankruptcy (Scotland) Act 2011”.
- (6) In section 72(5) (effect of sequestration on diligence against earnings), for the words “12(4) of the Bankruptcy (Scotland) Act 1985” there is substituted “19(8) of the Bankruptcy (Scotland) Act 2011”.
- 30 (7) In section 93(4) (recovery from debtor of expenses of certain diligences)—
- (a) in paragraph (b), for the words “1985” there is substituted “2011”, and
- (b) in paragraph (f), for the words “Schedule 5 to the Bankruptcy (Scotland) Act 1985” there is substituted “schedule 4 to the Bankruptcy (Scotland) Act 2011”.
- 35

Agricultural Holdings (Scotland) Act 1991 (c.55)

- 12 (1) The Agricultural Holdings (Scotland) Act 1991 is amended as follows.
- (2) In section 21(6) (notice to quit and notice of intention to quit), after the words “under the” there is inserted “Bankruptcy (Scotland) Act 2011, the”.

- (3) In section 22(2)(f) (restriction on operation of notices to quit), for the words “7 of the Bankruptcy (Scotland) Act 1985” there is substituted “15 of the Bankruptcy (Scotland) Act 2011”.
- (4) In section 41(3)(b) (direction by Land Court that holding be treated as market garden), for the words “7 of the Bankruptcy (Scotland) Act 1985” there is substituted “15 of the Bankruptcy (Scotland) Act 2011”.
- (5) In section 85(1) (interpretation), in the definition of—
- (a) “landlord”, for the words from “, tutor” to the end there is substituted “or tutor of a landlord or the trustee or interim trustee in the sequestration of a landlord’s estate;”, and
- (b) “tenant”, for the words from “, curator” to the end there is substituted “or curator bonis of a tenant or the trustee or interim trustee in the sequestration of a tenant’s estate;”.

Further and Higher Education (Scotland) Act 1992 (c.37)

- 13 In paragraph 7 of Schedule 2 to the Further and Higher Education (Scotland) Act 1992 (constitution and proceedings of boards of management), in sub-paragraph (2)(b), for the words “1985” there is substituted “2011”.

Crofters (Scotland) Act 1993 (c.44)

- 14 In paragraph 10 of Schedule 2 to the Crofters (Scotland) Act 1993 (the statutory conditions), for the words “1985” there is substituted “2011”.

Proceeds of Crime (Scotland) Act 1995 (c.43)

- 15 (1) The Proceeds of Crime (Scotland) Act 1995 is amended as follows.
- (2) In Schedule 1 (administrators), in paragraph 2(1)(j), for the words “74 of the Bankruptcy (Scotland) Act 1985” there is substituted “144 of the Bankruptcy (Scotland) Act 2011”.
- (3) In Schedule 2 (sequestration etc. of persons holding realisable or forfeitable property)—
- (a) in paragraph 1(1)(a), for the words “12(4) of the 1985” there is substituted “19(8) of the 2011”,
- (b) in paragraph 1(2)—
- (i) in head (a), for the words “31(8) of the 1985” there is substituted “51 of the 2011”,
- (ii) for head (b) there is substituted—
- “(b) any income of the debtor which has been ordered, under subsection (4) of section 57 of that Act, to be paid to the trustee in the sequestration or any estate which, under subsection (4) of section 51, or subsection (4) of section 59, of that Act vests in the trustee;”, and
- (iii) for the words “permanent trustee in accordance with section 48” there is substituted “trustee in the sequestration in accordance with section 84”,
- (c) in paragraph 1(3), for the words “1985” there is substituted “2011”,

- (d) in paragraph 1(4), for the words “2(5) of the 1985” there is substituted “37(8) of the 2011”,
- (e) in paragraph 1(5)—
- 5 (i) in head (a), for the words “34 or 36 of the 1985” there is substituted “62 or 63 of the 2011”, and
- (ii) in head (b), for the words “34 and 36” there is substituted “62 and 63”,
- (f) in paragraph 5—
- (i) in sub-paragraph (1), for the words “1985” there is substituted “2011”, and
- 10 (ii) in sub-paragraph (3), the words from “the reference” to “sequestration and” are repealed,
- (g) in paragraph 6(1), for the words “1985”, in both places where they appear, there is substituted “2011”, and
- (h) in paragraph 6(3), for the words “or permanent” there is substituted “trustee or”.

Education (Scotland) Act 1996 (c.43)

- 15 16 In paragraph 4 of Schedule 1 to the Education (Scotland) Act 1996 (the Scottish Qualifications Authority), in sub-paragraph (2)(b), for the words “1985” there is substituted “2011”.

Adults with Incapacity (Scotland) Act 2000 (asp 4)

- 20 17 In section 87(4) of the Adults with Incapacity (Scotland) Act 2000 (interpretation), for the words “5 to the Bankruptcy (Scotland) Act 1985 (c.66)” there is substituted “4 to the Bankruptcy (Scotland) Act 2011 (asp 00)”.

Regulation of Care (Scotland) Act 2001 (asp 8)

- 25 18 In section 29(3)(d) of the Regulation of Care (Scotland) Act 2001 (regulations relating to care services), for the words from “permanent” to “respect” there is substituted “trustee or interim trustee in the sequestration, under the Bankruptcy (Scotland) Act 2011 (asp 00),”.

Housing (Scotland) Act 2001 (asp 10)

- 30 19 In paragraph 4 of Schedule 7 to the Housing (Scotland) Act 2001 (regulation of registered social landlords), in sub-paragraph (2)(a), for the words “1985 (c.66)” there is substituted “2011 (asp 00)”.

International Criminal Court (Scotland) Act 2001 (asp 13)

- 20 (1) Schedule 6 to the International Criminal Court (Scotland) Act 2001 (freezing orders in respect of property liable to forfeiture) is amended as follows.

(2) In paragraph 8 (sequestration)—

(a) in sub-paragraph (1)(a), for the words “12(4) of the 1985” there is substituted “19(8) of the 2011”, and

(b) in sub-paragraph (2)—

(i) in head (a), for the words “31(8) of the 1985” there is substituted “51(1) of the 2011”,

(ii) in head (b), for the words “32(2) of that Act to be paid to the permanent trustee” there is substituted “57(4) of that Act to be paid to the trustee in the sequestration”,

(iii) in head (c), for the words “31(10) or 32(6) of that Act vests in the permanent trustee” there is substituted “51(4) or 59(4) of that Act vests in the trustee in the sequestration”, and

(iv) for the words “22 of that Act or the permanent trustee in accordance with section 48” there is substituted “32 of that Act or the trustee in the sequestration in accordance with section 84”,

(c) in sub-paragraph (3), for the words “1985” there is substituted “2011”,

(d) in sub-paragraph (4), for the words “2(5) of the 1985” there is substituted “37(8) of the 2011”, and

(e) sub-paragraph (5) is repealed.

(3) In paragraph 12 (interpretation)—

(a) the definition of “the 1985 Act” is repealed, and

(b) after the definition of “the 1986 Act” there is inserted—

““the 2011 Act” means the Bankruptcy (Scotland) Act 2011 (asp 00);”.

Debt Arrangement and Attachment (Scotland) Act 2002 (asp 17)

21 (1) The Debt Arrangement and Attachment (Scotland) Act 2002 is amended as follows.

(2) In section 9Q(3) (recovery of expenses of interim attachment)—

(a) in paragraph (b), for the words “1985 (c.66)” there is substituted “2011 (asp 00)”, and

(b) in paragraph (f), for the words “5 to the 1985” there is substituted “4 to the 2010”.

(3) In section 31(1) (disposal of proceeds of auction), for the words “37 (effect of sequestration on diligence) of the Bankruptcy (Scotland) Act 1985 (c.66)” there is substituted “21 (further provision as regards the effect of sequestration on diligence) of the Bankruptcy (Scotland) Act 2011 (asp 00)”.

(4) In section 40(3) (recovery from debtor of expenses of attachment)—

(a) in paragraph (b), for the words “1985 (c.66)” there is substituted “2011 (asp 00)”, and

(b) in paragraph (f), for the words “5 to the Bankruptcy (Scotland) Act 1985 (c.66)” there is substituted “4 to the Bankruptcy (Scotland) Act 2011 (asp 00)”.

Agricultural Holdings (Scotland) Act 2003 (asp 11)

22 In section 93 of the Agricultural Holdings (Scotland) Act 2003 (interpretation), in the definition of—

(a) “landlord”—

5 (i) after the word “guardian” there is inserted “or”, and

(ii) for the words from “or permanent” to the end there is substituted “of a landlord or the trustee or interim trustee in the sequestration, under the Bankruptcy (Scotland) Act 2011, of a landlord’s estate;”.

(b) “tenant”—

10 (i) after the word “guardian” there is inserted “or”, and

(ii) for the words from “or permanent” to the end there is substituted “of a tenant or the trustee or interim trustee in the sequestration, under the Bankruptcy (Scotland) Act 2011, of a tenant’s estate;”.

Charities and Trustee Investment (Scotland) Act 2005 (asp 10)

15 23 In section 70(3)(b) of the Charities and Trustee Investment (Scotland) Act 2005 (disqualification: supplementary)—

(a) in sub-paragraph (i), for the words “54 or 75(4) of the Bankruptcy (Scotland) Act 1985 (c.66)” there is substituted “98 (or 98 and 99) of the Bankruptcy (Scotland) Act 2011 (asp 00)”, and

20 (b) in sub-paragraph (ii), for the words “an order under paragraph 11 of Schedule 4” there is substituted “the granting of certificates under paragraph 13 of schedule 3”.

Licensing (Scotland) Act 2005 (asp 16)

24 In section 28(8) of the Licensing (Scotland) Act 2005 (period of effect of premises licence), for the words “1985 (c.66)” there is substituted “2011 (asp 00)”.

Bankruptcy and Diligence etc. (Scotland) Act 2007 (asp 3)

25 In section 195(4) of the Bankruptcy and Diligence etc. (Scotland) Act 2007 (recovery from debtor of expenses of money attachment)—

(a) in paragraph (a), for the words “1985 Act” there is substituted “Bankruptcy (Scotland) Act 2011 (asp 00)”, and

30 (b) in paragraph (e), for the words “the 1985 Act” there is substituted “that Act of 2011”.

Criminal Proceedings etc. (Scotland) Act 2007 (asp 6)

26 In section 73(2)(b) of the Criminal Proceedings etc. (Scotland) Act 2007 (disqualification where sequestration or bankruptcy), for the words “1985 (c.66)” there is substituted “2011 (asp 00)”.
35

SCHEDULE 8
(introduced by section 148(2))

REPEALS AND REVOCATIONS[J131S.DOC]

5

PART 1

REPEALS

<i>Enactment</i>	<i>Extent of repeal</i>
Bankruptcy (Scotland) Act 1985 (c.66)	The whole Act.
Debtors (Scotland) Act 1987 (c.18)	In Schedule 6, paragraphs 27 and 28.
5 Bankruptcy (Scotland) Act 1993 (c.6)	The whole Act.
Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (c.40)	In Schedule 3, paragraph 15(4). In Schedule 4, paragraph 58.
Housing (Scotland) Act 2001 (asp 10)	In schedule 10, paragraph 10.
10 Water Industry (Scotland) Act 2002 (asp 3)	In schedule 7, paragraph 16.
Debt Arrangement and Attachment (Scotland) Act 2002 (asp 17)	In schedule 3, paragraph 15.
Bankruptcy and Diligence etc. (Scotland) Act 2007 (asp 3)	Sections 1 and 2. Sections 5 to 32. Sections 35 and 36. Schedule 1. In schedule 5, paragraph 13.
15 Home Owner and Debtor Protection (Scotland) Act 2010 (asp 00)	Part 2.

5

PART 2
REVOCATIONS

<i>Enactment</i>	<i>Extent of revocation</i>
10 Debt Arrangement Scheme (Scotland) Regulations 2004 (S.S.I. 2004 No. 468)	In schedule 3, paragraphs 1 and 2.
15 Bankruptcy (Scotland) Act 1985 (Low Income, Low Asset Debtors etc.) Regulations 2008 (S.S.I. 2008 No. 81)	Regulation 4.
Bankruptcy (Scotland) Regulations 2008 (S.S.I. 2008 No. 82)	Regulation 8.
20 Debt Arrangement Scheme (Scotland) Regulations 2011 (S.S.I. 2011 No. 141)	Regulation 45. In schedule 2, paragraphs 1 and 2.