

BANKRUPTCY AND DILIGENCE ETC. (SCOTLAND) ACT 2007

EXPLANATORY NOTES

THE ACT

Commentary

Part 4 – Land Attachment and Residual Attachment

Chapter 2 – Attachment of land

Land attachment

Section 81 – Land attachment

240. **Section 81** creates a new diligence over land to be known as land attachment.
241. Subsection (2) provides that land attachment is competent only if the debt is established by a decree or document of debt, the debtor has been charged to pay the debt and the period for payment has expired without payment being made. It also provides that, where the debtor is an individual, the creditor must provide the debtor with the debt advice and information package within the 12 weeks before registering the notice of land attachment. “Decree” and “document of debt” are defined in section 128. The debt advice and information package is the same package required, in the case of attachment of moveables, by section 10 of the 2002 Act (see subsection (8)).
242. Subsection (3) provides that a land attachment is created over land at the beginning of the day which falls 28 days after the last day on which a notice of land attachment is registered. The reference to the “last day” is necessary because the notice must be registered in both the property register and the personal register and may therefore be registered in one before being registered in the other. The period between registration of the notice and creation of the land attachment gives third parties notice that the attachment, which may affect a deed granted by the debtor, is pending. It covers a “registration gap”, similar to that discussed in respect of sequestration in paragraph 70 above, when a notice of land attachment has been sent for registration but a person dealing with the debtor will not be aware of it because it has yet to appear on any register.
243. Subsection (3) should be read together with the provision in sections 83(6) and 121(1). Under section 83(6), the notice of land attachment is void and no land attachment will be created if the creditor does not register a certificate of service of the notice within the 28-day period. Section 121(1) provides that the notice of land attachment ceases to have effect and, accordingly, no land attachment will be created if the debt is paid, or tendered to, the creditor or others on the creditor’s behalf within that period.
244. Subsection (4) provides for the effect of a notice of land attachment during the period after it is registered and before the land attachment is created. The notice has effect as

if it were an inhibition registered against the debtor in the Register of Inhibitions but restricted to the land described in the notice.

245. Subsection (5) provides for the effect of a land attachment. It gives the creditor a subordinate real right over the land described in the notice of land attachment as security for the “sum recoverable by the land attachment”. That sum is the sum (principal and accrued interest) for payment of which the charge was served together with any interest which may be accrued before the debt is paid plus all expenses of the land attachment which are chargeable against the debtor.
246. Subsection (7) gives the Scottish Ministers power, by regulations, to change the 28-day period. This power extends to amending any Act in which that period is mentioned (see, for instance, new section 13A being inserted into the Conveyancing and Feudal Reform (Scotland) Act 1970 by section 85). Any such regulations will be subject to negative resolution procedure (see section 224(3)).

Section 82 – Attachable land

247. Section 82(1) defines what is meant by “land” in this Chapter and, therefore, the property of the debtor which may be attached by land attachment. This is land which is either owned by the debtor or is the right of long lease of land in relation to which the debtor is the tenant.
248. Subsection (2) provides that such land or long lease is attachable only if the debtor has a recorded or registered title to the land or lease. That subsection also excludes proper liferents.
249. In addition, by virtue of subsections (2) and (3), long leases which are not assignable cannot be attached by land attachment. A long lease which is assignable but only with the consent of the landlord is not to be regarded as unassignable and can be attached. Only leases which are not assignable under any circumstances may not be attached by land attachment.
250. “Land” is used throughout this Chapter of this Act (rather than “land or, as the case may be, long lease” but that needs to be read with section 128(2), which modifies such references (including references to ownership, purchase, sale, conveyance and disposition) so that they include references to, for instance, the right of long lease and to assignation.

Section 83 – Notice of land attachment

251. Section 83(1) provides that a notice of land attachment must be in the form prescribed in rules of court and provide a description of the attached land. The description needed will depend on the requirements of the property register within which the notice is to be registered. To be effective, the notice must also be registered in both the relevant property register (either the Register of Sasines or the Land Register – see section 128) and in the Register of Inhibitions.
252. Subsections (2) and (3) provide that a creditor can register a notice of land attachment only where the sum which the creditor has charged the debtor to pay is more than £3,000, or any other sum which the Scottish Ministers prescribe. The power to change this sum is exercisable by regulations subject to affirmative resolution procedure (see section 224(4)(b)(i)).
253. Subsection (4) provides that it is competent to register a single notice of land attachment in relation to two or more sums which the debtor has been charged to pay.
254. Subsection (5) specifies that the notice of land attachment must be served by a judicial officer on the debtor, any person (other than the debtor) who owns the land and any tenant under a long lease of the land, as soon as is practicable after the notice is registered.

255. Subsection (6) provides that if the certificate of service on the debtor is not registered before the 28-day period expires, the notice will be, and will be deemed always to have been, void. Accordingly, no land attachment will be created. Subsection (7) provides for the certificate of service to be in a form prescribed in rules of court and to contain a description of the land to be attached and to be registered in the same way as the notice of land attachment.

Consequences of land attachment

Section 84 – Debts secured by land attachment not rendered heritable

256. Section 84 specifies that the creation of a land attachment will not make a moveable debt heritable, which avoids (for example) any affect on rights of succession. This is particularly relevant, if the creditor dies while the land attachment still has effect, in succession to the creditor's estate.

Section 85 – Restriction on priority of ranking of certain securities

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

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

258. Section 13(1) of the 1970 Act covers the preference in ranking of standard securities. Where a creditor has registered a standard security over land, and another creditor subsequently registers a standard security over the same land, the first creditor's preference in ranking is restricted to security for present advances and those future advances which that creditor is obliged to make.
259. Section 13A applies this rule where, instead of a subsequent standard security being registered, a land attachment is created over the same land. That subsequent land attachment, being a real right in security over the land, will have effect on the existing security in the same way as a subsequent standard security. Section 13A provides that it has this effect from the day on which the land attachment is created, provided notice is given to the existing secured creditor of the registration of the notice of land attachment before the expiry of the 28-day period.

Section 86 – Lease granted after registration of notice of land attachment

260. This section applies where a notice of land attachment is registered and where, during the 28-day period mentioned in section 81(3), the debtor or a tenant of the debtor grants a lease (or sublease) of land specified in the notice. Where a land attachment is created at the end of that period, any such lease which would be reducible were it granted in breach of an inhibition (for which see section 163) is reducible by the creditor.

Section 87 – Assignment of title deeds etc.

261. Section 87(1) provides that a land attachment has the effect of assigning the title deeds, searches and all unregistered conveyances affecting the attached land to the creditor. Subsection (2) entitles the creditor, where the land is sold by virtue of the land attachment, to deliver those title deeds and other documents to the purchaser and to assign to that purchaser any right the creditor has to have any title deeds not in the creditor's possession delivered to the creditor. This mirrors the effect of section 10(4) of the 1970 Act (which operates in a similar way when a creditor registers a standard security).

Section 88 – Acquisition of right to execute land attachment

262. Section 88 of the 1987 Act provides for how diligence may be done where a decree or document of debt is assigned to (or otherwise acquired by) a person who is not the original creditor (for ease of reference, called here the “assignee”). The assignee must apply to the court for warrant authorising the assignee to do any diligence authorised by the original decree or other document.
263. **Section 88** of this Act provides for how such assignation or other acquisition affects land attachment. The assignee may take, or continue to take, steps towards enforcing the debt by land attachment provided that (a) before the assignation or other acquisition, a notice of land attachment has been registered; and (b) before taking those steps, the assignee registers a notice in the relevant property register and the Register of Inhibitions. If the assignee so registers notice, the assignee is treated as having been granted a warrant under section 88(4) of the 1987 Act. The notice must be in the form prescribed in rules of court.

Section 89 – Effect of debtor’s death before land attachment created

264. **Section 89(1)** applies where a debtor dies after a creditor has taken steps to begin or carry out a land attachment but before a land attachment has been created. Section 90 covers the case where a debtor dies after a land attachment is created.
265. The basic position, as set out in subsection (2), is that any steps taken cease to have effect and the charge served on the debtor becomes void.
266. Subsection (3) provides that nothing in subsection (2) stops the creditor from proceeding to raise, against any executor of the debtor, an action to constitute the debt against the debtor’s estate.
267. Subsection (4) provides that any warrant for diligence in such an action authorises land attachment.

Section 90 – Effect of debtor’s death after land attachment created

268. **Section 90(1)** clarifies and applies the existing law on the effect of the death of a debtor on subordinate real rights over his or her land. Where a debtor dies after a land attachment has been created, the land attachment will continue to have effect.
269. Subsection (2) gives the Court of Session power, by rules of court, to modify the procedures under this Chapter to reflect that the debtor is dead and that the land attachment is proceeding. Provisions about the service of notices of applications for warrant for sale and for foreclosure which require the creditor to serve or intimate such applications to the debtor will require to be modified, as will other procedures.

Section 91 – Caveat by purchaser under missives

270. A person who has entered into a contract to purchase land from a debtor, but to whom ownership of that land has not yet been transferred, may be concerned that a creditor of the debtor will execute a land attachment affecting that land. Section 91 provides a mechanism under which that person will be informed, if such a land attachment is created, of any attempt by the attaching creditor to sell that land.
271. Subsection (2) provides that such a person may register a notice in the Register of Inhibitions, in the form prescribed in rules of court, for the purpose of receiving intimation of an application under section 92(1) for a warrant for sale of the land. Under section 92(4)(c)(ii), the attaching creditor must carry out a search in that register and must intimate the application to any person who has registered a notice under this section (see section 92(5)(b)). The person who registered the notice may then lodge objections to the application (see section 92(6)) and, subject to sections 99 and 100, may be able to complete title to the land.

Preparations for sale of attached land

Section 92 – Application for warrant to sell attached land

272. **Section 92** provides for the form and method of applying for a warrant to sell attached land.
273. A creditor may apply for warrant to sell attached land only where a land attachment is in effect, 6 months have elapsed since the notice of land attachment was registered, the sum recoverable by the land attachment at that time exceeds £3,000 (or another sum prescribed by the Scottish Ministers) and that sum has not been paid off. The power to change this sum is exercisable by regulations subject to affirmative resolution procedure (see section 224(4)(b)(i)).
274. Under subsection (2), the Scottish Ministers have power to restrict the creditor's right to apply under subsection (1) for a warrant for sale. They can do this by excluding either all dwellinghouses or dwellinghouses of a specified kind from land in relation to which such an application may be made. Such dwellinghouses could still be attached by land attachment but the attaching creditor could not apply to have them sold. This power is exercisable by regulations subject to affirmative resolution procedure (see section 224(4)(b)(i)).
275. The application must, among other things, name a solicitor who is willing to act as the "appointed person" (see sections 97(2)(b) and 108) and to sell the land if warrant is granted. Subsection (4) covers the form and content of the application and the documents which are to accompany it, including reports on the searches in the property register and the Register of Inhibitions. Subsection (5) provides for the persons to whom the application must be intimated.
276. Under subsection (6), any person who receives intimation of the application is entitled to object to it but must lodge objections within 14 days of receiving the application.
277. Under subsection (7), the Scottish Ministers may by regulations make further provision about the reports on searches that accompany an application for a warrant to sell attached land. Such regulations are subject to negative resolution procedure (see section 224(3)).
278. Subsection (8) provides for the use of electronic communications. In particular, the application must be accompanied by a declaration signed by the solicitor who the creditor proposes as the appointed person. Where that declaration is an electronic communication, the signature must be a certified electronic signature (as defined in section 221).

Section 93 – Notice to local authority of application for warrant for sale

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

Section 94 – Preliminary hearing on application for warrant to sell

280. **Section 94** requires the sheriff to hold a preliminary hearing which the creditor must attend and at which the persons to whom intimation of the application was given under section 92(5) are to be given the opportunity of making representations.
281. If satisfied that the application is in order, the sheriff must fix a date for a full hearing on the application. In addition, the sheriff must, among other things, appoint a surveyor or other suitably qualified person to report on the open market value of the land and, where the creditor has been unable to ascertain the amount outstanding under any security

or other diligence affecting the land, require any such security or diligence holder to disclose those amounts.

Section 95 – Valuation report

282. **Section 95(1)** authorises the valuer, appointed under section 94(3)(c), to take all necessary steps to produce a valuation report which must be sent to the creditor and the persons to whom the application for the warrant for sale was intimated.
283. Subsection (2) provides that the debtor and any other person occupying the land must allow the valuer to inspect the land and carry out all necessary steps to produce the valuation report.
284. Subsections (3) and (4) provide that the creditor is liable to the valuer for the costs associated with the production of the report. These will be expenses of the land attachment and (under section 120) will be chargeable against (and therefore recoverable by the creditor from) the debtor.

Section 96 – Creditor’s duties prior to full hearing on application for warrant for sale

285. **Section 96(1)** requires the creditor, at least 7 days before the date of the full hearing under section 97, to lodge the valuation report, a continuation of the reports on the searches in the property register (lodged with the initial application for warrant for sale) and in the Register of Inhibitions, and a note of any amounts outstanding under any securities or diligences affecting the land.
286. Subsection (2) provides for further intimation of the application and the date of the full hearing where a search in the property registers reveals a deed or a search in the Register of Inhibitions reveals a notice registered since the date of application. The sheriff, if it appears necessary, may postpone the date of the hearing and the creditor will be required to inform the debtor and other relevant persons of the later date. A person who receives intimation of the full hearing under this section may lodge objections (see subsection (4)).
287. A sheriff who postpones a full hearing following an application can make whatever ancillary orders he or she thinks appropriate (see subsection (3)). This can include ordering fresh continuations of the reports on searches in the property registers and in the Register of Inhibitions.
288. Subsection (5) provides that the Scottish Ministers may by regulations make further provision about the continuations of the reports on searches in property registers and in the Register of Inhibitions that an attaching creditor must lodge with the court. Such regulations are subject to negative resolution procedure (see section 224(3)).

Section 97 – Full hearing on application for warrant for sale

289. **Section 97(1)** provides that, at the hearing on an application for warrant to sell attached land, the sheriff must not make any order without first giving any person who has lodged objections under section 92(6) an opportunity to be heard.
290. Under subsection (2), the sheriff may grant the application provided he or she is satisfied that the application is in order. This discretion is subject, however, to a number of other provisions in the Act, namely subsections (3) and (5) of this section and sections 98 (warrant for sale of dwellinghouses), 99 (protections for purchasers under missives) and 102 (land owned in common).
291. Where the sheriff grants the application, the sheriff must grant warrant for sale of the attached land and must appoint a solicitor (either the solicitor specified in the application or another of the sheriff’s choosing) as the appointed person.

292. Subsection (3) provides that the sheriff may, if satisfied that granting the warrant for sale is unduly harsh to the debtor or any other interested person, either refuse the application or grant it and suspend the warrant for a period up to one year.
293. Subsection (4) provides that, where the sheriff grants warrant for sale, the sheriff must specify a time within which the land must be sold, may limit the warrant to part only of the attached land, and may authorise the sale of the attached land by lots.
294. Under subsection (5), the sheriff must refuse the application if satisfied that any of the grounds specified in subsection (6) apply. Those grounds include the ground that, if the attached land were sold, the “net likely proceeds” would not exceed the aggregate of the expenses of the land attachment and either £1,000 or 10 per cent of the outstanding debt (whichever is the lesser). The Scottish Ministers are given power by subsection (7) to alter the figure of £1,000 and the percentage of 10 per cent. That power is exercisable by regulations subject to affirmative resolution procedure (see section 224(4)(b)(i)). Subsection (8) defines “net likely proceeds” as the proceeds of sale less any sums due to other creditors who rank before or equally with the attaching creditor.

Section 98 – Application for warrant for sale of sole or main residence

295. **Section 98(1)** applies where the creditor applies for a warrant for sale of attached land which is or includes a dwellinghouse which is the sole or main residence of the debtor, of the owner (if that person is not the debtor) or of any of the persons specified in subsection (2).
296. Those persons are a non-entitled spouse of the debtor or owner, a cohabitee of the debtor or owner, a civil partner of the debtor or owner, a same sex cohabitee of the debtor or owner, and a former partner of the debtor or owner who resides with a child, provided that the child is also a child of the debtor or owner, and that former partner lived with the debtor or owner as husband and wife (or with the characteristics of that relationship) throughout a period of 6 months ending on the day on which the debtor or owner ceased to reside in the dwellinghouse.
297. The sheriff is not prohibited from granting a warrant for sale of a dwellinghouse where this section applies but, before making a decision, the sheriff is obliged by subsection (4) to consider the matters in subsection (5). Those matters are the nature and reasons for the debt secured by the land attachment, the debtor’s ability to pay, any action taken by the creditor to help the debtor in paying the debt and the ability of those living in the property to obtain reasonable alternative accommodation.
298. Subsection (6) allows the Scottish Ministers to modify the matters listed in subsection (5) which the sheriff has to consider. That power is exercisable by regulations subject to affirmative resolution procedure (see section 224(4)(b)(i)).
299. Subsection (7) provides that, where the sheriff grants warrant for sale, the sheriff can suspend the operation of the warrant for a period not exceeding 1 year.
300. Subsection (8) provides that a dwellinghouse may be a sole or main residence even if it is also used by the debtor or other relevant person for the purposes of any profession, trade or business. Subsection (9) defines what is meant by “child”, “dwellinghouse” and “non-entitled spouse”.

Section 99 – Protection of purchaser under contract where creditor applies for warrant for sale

301. **Sections 99 to 101** deal with the situation where the debtor has concluded a contract to transfer attached land to a third party (called in those sections the “prospective purchaser”).

302. **Section 99** applies where a creditor applies for a warrant to sell attached land and a person who has registered a caveat under section 91 has lodged objections to the application.
303. Subsections (2) and (3) provide that the sheriff may, if satisfied the prospective purchaser did not seek to defeat the rights of creditors of the debtor in entering into the contract and that both the purchaser and debtor will proceed quickly with the purchase, make an order suspending the application (i.e. without making a decision on whether or not to grant warrant for sale) and requiring the prospective purchaser to pay the price due under the contract to the creditor.
304. Subsection (4) provides that section 116 applies to the proceeds of sale paid to the creditor under this section as if the sale had taken place under a warrant for sale and those proceeds were the proceeds of that sale.

Section 100 – Protection of purchaser under contract where warrant for sale granted

305. This section applies where a prospective purchaser had (before notice of land attachment was registered) entered into a contract to buy attached land from the debtor and a warrant for sale is subsequently granted.
306. Subsection (2) operates in a similar way to section 99(2) and (3) and provides that the sheriff may make an order suspending the warrant for a period of up to 1 year and requiring the prospective purchaser to pay the price under the contract to the appointed person.
307. Subsection (3) operates in a similar way to section 99(4).

Section 101 – Provision supplementary to sections 99 and 100

308. This section applies where an order is made under section 99(2) or 100(2) and gives the sheriff power, on an application by the creditor or the appointed person, to revoke the order. The sheriff may do so if satisfied that the prospective purchaser and the debtor entered into the contract to defeat the rights of creditors of the debtor or if there has been undue delay in completing the sale.

Section 102 – Warrant for sale of attached land owned in common

309. **Section 102** applies where the land specified in an application for warrant to sell attached land is owned in common by the debtor and another person or persons. Land owned in common may be capable of being separated into part owned by the debtor and part owned by the co-owner. Where this is possible, the debtor's part may be sold. Where this is not possible, the whole land would have to be sold and the proceeds of sale divided, with the debtor's share going to pay the sum recoverable by the land attachment and the co-owner's share being paid to that co-owner.
310. Subsection (2) provides that, subject to subsection (3), the sheriff may make an order under section 97(2) granting warrant for sale of the land owned in common.
311. Subsection (3) provides that the sheriff must specify in the order whether the warrant authorises the division of the land owned in common and the sale only of the part belonging to the debtor or sale of all the land owned in common and, subject to subsection (5), division of the proceeds.
312. Subsection (4) provides that, where the warrant authorises division of the land, from the day on which the order granting the warrant is made the debtor's part will be subject to the land attachment and the remaining land will be released from it. The warrant will apply as if the land specified in it were the debtor's part and the warrant for sale granted were warrant for sale of that part.

313. Subsection (5) provides that, where the warrant authorises the sale of the land owned in common and a division of the proceeds, the appointed person must pay the other owner of the land the share of the proceeds of sale due to that owner and deal, as specified in section 116, with the share of proceeds that would be due to the debtor. The appointed person's duty to pay to the common owner the common owner's share of the proceeds is subject to the rights of any creditor with a security over the third party's interest in the land.
314. Subsections (6) and (7) make further provision providing that a common owner of common property may buy out the attached property and sets out the amount payable to the appointed person by such an owner if the whole land is bought by that owner and the proceeds fall to be divided.

Section 103 – Intimation of sheriff's decision at full hearing

315. Section 103(1) provides that, where a warrant for sale is granted under section 97(2), the creditor must send a copy of the warrant to the debtor and the appointed person.
316. Subsection (2) provides that, where a warrant is refused under section 97(3)(b) or (5), the sheriff clerk must send a copy of the order to the debtor and to any other person the sheriff clerk considers to have an interest.

Section 104 – Supplementary orders as respects sale

317. Section 104(1) gives the sheriff power, when either granting an application for warrant for sale or subsequently, to make any order in connection with the sale that appears to the sheriff to be appropriate. Subsection (2) provides that, in particular, on application by the appointed person, the sheriff may extend the period within which the land is to be sold or may remove that appointed person and appoint another solicitor as appointed person instead. The debtor, a creditor or any other interested party may make an application for the removal of the appointed person and the appointment of a replacement one.
318. Subsection (3) provides for the intimation, by the creditor, of orders made under subsection (1) after the granting of warrant for sale.

Section 105 – Effect of certain refusals of application for warrant for sale under section 97(5)

319. This section provides that, where an application for sale is refused on a ground specified in paragraph (d), (e), (f) or (g) of section 97(6), the land attachment will not, because of that refusal, cease to have effect and it will be competent for the creditor to make a further application for a warrant to sell the attached land.

Section 106 – Termination of debtor's right to occupy land

320. Section 106 provides the creditor with power to terminate the right of the debtor or other person having a right derived from the debtor to occupy land in respect of which warrant for sale has been granted.
321. This is achieved by the creditor serving a notice (which complies with subsection (2)) on the debtor or that other person. The right of the debtor or other person to occupy the land is terminated with effect from the day specified in the notice, which must be a minimum of 7 days after the date of service. A certificate of service of the notice in the form prescribed in rules of court may be registered.
322. Subsection (3) provides that where a person (other than the debtor) has a right to occupy the land which, leaving out of account the registration of the notice of land attachment, would have been good against a singular successor of the debtor, that person's right cannot be terminated by notice under this section.

Section 107 – Consequences of giving notice under section 106(1)

323. **Section 107** governs the consequences of serving notice under section 106.
324. Subsection (1) provides that, from the date the creditor serves notice under section 106, the creditor has the rights and obligations of a heritable creditor in lawful possession of the land. This is similar to section 20(5) of the Conveyancing and Feudal Reform (Scotland) Act 1970, which applies where a creditor under a standard security has obtained lawful possession of the security subjects on the default of the debtor. Subsection (2) provides that the rights and obligations in subsection (1) include any right the debtor, or other person whose right to occupy has been terminated under section 106, has to receive rent from a tenant. The creditor has that right only in relation to rent due on or after the date on which the creditor notifies the tenant of the termination of the debtor's (or other person's) rights, either in writing or by electronic means (see subsections (3) and (6)). The creditor also has right to any lease, and any permission or right of occupancy. The creditor does not, however, have power to grant a lease.
325. Subsection (4) gives the creditor power to apply to the sheriff for an order authorising reconstruction, alteration or improvement works if they are required to maintain the market value of the land. The creditor may also bring an action of ejection against the debtor and will have title to bring any action of removing, intrusion or ejection which the debtor might have brought in respect of the land. The costs of works needed to maintain the market value of the land and of any action brought under subsection (4) will be expenses of the land attachment recoverable from the debtor (see subsection (5))

The sale

Section 108 – Appointed person

326. **Section 108** makes provision about the appointed person and that person's functions (the main function being to carry out the sale of the attached land under the warrant).
327. Subsection (1) provides that the appointed person is an officer of the court and must act independently of the creditor, debtor and any other interested person. Subsection (2) requires the appointed person to lodge a bond of caution before exercising any functions under this Chapter.
328. Subsection (3) provides that the appointed person may apply to the sheriff who granted the warrant for sale for directions as to how to perform any of the appointed person's functions.
329. Subsection (5) provides that the appointed person is liable to the creditor, debtor, any person who owns the attached land in common with the debtor and any secured creditor for patrimonial loss as a result of negligence on the part of the appointed person in executing the warrant for sale. Subsections (6) and (7) provide that the creditor is liable for the appointed person's expenses and outlays incurred in exercising that person's functions, but that those expenses are expenses of the land attachment and the creditor can recover them from the debtor.
330. Subsection (8) gives the Scottish Ministers power to make further provision about the functions of the appointed person. This power is exercisable by regulations subject to negative resolution procedure (see section 224(3)).

Section 109 – Method of sale

331. **Section 109** provides for the appointed person's main function – selling the attached land. Subsection (3) requires the appointed person to consult the creditor about the method of sale (private bargain or public auction) which is to be used. Subsection (4) requires the appointed person to advertise the land for sale and ensure the best price is obtained.

Section 110 – Legal incapacity or disability of debtor not to affect title of purchaser

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

Section 111 – Title of purchaser not to be affected by certain irregularities

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

Section 112 – Effect of registration of disposition on securities

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

Section 113 – Report of sale

335. **Section 113(1)** imposes a duty on the appointed person to lodge a report of the sale with the sheriff clerk for the court which granted the warrant. That report must be lodged within 28 days of the date on which the sale price is paid. Subsection (2) provides for the form to be as prescribed in rules of court and for the content of the report.
336. Subsection (3) provides that, if the appointed person submits a report after the specified period has expired, or refuses to submit or delays submitting a report, the sheriff may make an order providing that the appointed person will not be entitled to payment of some or all of the expenses incurred in executing the warrant for sale.

Section 114 – Audit of report of sale

337. This section deals with auditing the report on sale lodged under section 113(1). The sheriff must forward it to the auditor of court. Subsection (2) provides that the auditor must tax the expenses chargeable against the debtor, confirm the balance due to or by the debtor following the sale and give a report to the sheriff. The auditor will not be entitled to charge a fee for the report (see subsection (3)).
338. Subsection (4) provides that the report of sale and the auditor's report will be held by the sheriff clerk, and be available for inspection, for a time prescribed by rules of court. A fee for inspection may be prescribed in an order under section 2 of the Courts of Law Fees (Scotland) Act 1895.

Section 115 – Sheriff's consideration of report

339. This section provides for the sheriff's powers on receiving the auditor's report. Under subsection (1), the sheriff may, after considering that report and the report of sale lodged under section 113(1), make an order approving the report of sale subject to any amendments made following a hearing with all interested parties or by the auditor. Alternatively, the sheriff may, if satisfied that there has been a substantial irregularity in the land attachment, make an order declaring the land attachment void and making any consequential order which the sheriff considers necessary in the circumstances.
340. Subsection (3) deals with intimation of the sheriff's order by the sheriff clerk. Subsection (4) provides that any order declaring the land attachment void does not affect the title of any person who purchased the attached land under the warrant for sale.

Section 116 – Proceeds of sale

341. **Section 116(1)** provides for the distribution of the proceeds of the sale where land is sold in execution of a warrant for sale. The appointed person must disburse the proceeds in the following order—
- any expenses due to the creditor under section 114(2)(a);
 - any sums due to any creditor holding a security or diligence over the land which ranks before the land attachment;
 - any sums due to—
 - the creditor who executed the land attachment; and
 - any creditor under a security or diligence which ranks equally with the land attachment;
 - any sums due to any other creditor under any security or diligence which ranks after the land attachment; and
 - any balance due to the debtor (subject, however, to section 37(8C)(b) of the 1985 Act, which requires the appointed person, where the debtor’s estate has been sequestrated, to pay over any balance due to the debtor to the trustee in sequestration).
342. The appointed person is entitled to fees and expenses for dealing with the land attachment (unless the sheriff has limited them under section 113(3)). These shall be met by the creditor. The appointed person may deduct his or her fees and expenses from the sum paid to the creditor (see subsection (2)).
343. Subsection (3) provides that, if there is a balance of the proceeds due to the debtor, the appointed person must pay that balance to the debtor or other person authorised to give a receipt for it.
344. Subsection (4) obliges a creditor who receives the sums due under a security or diligence to grant a discharge of that security or diligence.
345. Subsections (5) and (6) provide that, if the appointed person is unable to obtain a receipt or discharge relating to the distribution of the proceeds of sale from the debtor or any creditor, the appointed person may consign the amount due to the person in the sheriff court. That consignment will discharge the duty to pay the amount due and a certificate of the sheriff clerk will be evidence of the discharge.

Foreclosure

Section 117 – Foreclosure

346. **Section 117** provides for what happens where the appointed person has exposed the land to sale but has failed to find a buyer or has succeeded in selling only part of the land at a price which is less than the amount secured by the land attachment and any other security or diligence ranking before or equally with the land attachment. This section provides that the court may, among other things, grant decree of foreclosure, which transfers the land to the creditor.
347. Subsections (2) to (4) provide for the procedure to be followed by the appointed person when applying for a decree of foreclosure. The application must be accompanied by a statement setting out the whole amount secured by the land attachment and secured by any other security or diligence ranking before or equally with the land attachment. Where part of the land has been sold, a report on that sale under section 113(1) must accompany the application. A copy of the application must be served by a judicial officer on the debtor, any occupier of the land specified in the warrant for sale, the

creditor in any heritable security affecting the land and any other person with a land attachment or other diligence over the land. The application, statement and report can be sent electronically (see subsection (9)).

348. Subsection (5) provides that the sheriff, after allowing any person served with a copy of the application an opportunity to make representations, may grant the decree of foreclosure straightaway, may suspend the application for no more than 3 months to allow the debtor to pay the sum recoverable by the land attachment or may, instead, appoint a valuer to fix a reserve price at which the land must be auctioned or advertised for sale and, if unsold, auctioned.
349. Subsection (6) provides the debtor may bid and purchase at any auction or purchase at the price advertised for sale. Subsection (7) provides that the sheriff may, where the appointed person produces an auctioneer's certificate that the land remains unsold at the reserve price or that the land did not achieve a sale at the advertised price, grant decree of foreclosure.
350. Subsection (8) provides a decree of foreclosure must be in the form prescribed by rules of court, provide a description of the land and contain a declaration of the price the creditor is deemed to have paid for the land (which is relevant for the purposes of section 118(2)).

Section 118 – Registration of decree of foreclosure

351. **Section 118** provides for the effects of registration of the decree of foreclosure in the appropriate property register. Subsection (1) provides that the debtor's right to bring the land attachment to an end by paying the debt is removed and the land will vest in the creditor. At the same time, the land will no longer be subject to the land attachment, securities or any diligence ranking after the land attachment and the creditor will have the right to redeem any security or diligence ranking prior to or equally with, the land attachment. Effectively, the creditor will now own the land (or, in the case of a long lease, will become the tenant in place of the debtor).
352. Subsection (2) provides that, despite the decree of foreclosure, the debtor will remain liable for any balance due to the creditor which is not extinguished by the price at which the creditor is (under section 117(8)(c)) deemed to have acquired the land and for any sums due to any creditor under a postponed security. Subsections (3) and (4) provide that the creditor's title will not be challengeable on the ground of any irregularity in the diligence or foreclosure proceedings although the debtor will retain a right to claim damages for wrongful diligence.

Payments to account and expenses

Section 119 – Ascription

353. This section provides that, where any sums are recovered by land attachment or are paid by the debtor while the attachment is in force, those sums will be ascribed to the following heads of claim in the following order—
- the expenses of the land attachment chargeable against the debtor;
 - interest on the debt due as at the date the notice of land attachment was registered;
 - the debt due and any interest on it which has accrued since the registration of the notice.

Section 120 – Expenses of land attachment

354. **Section 120** provides that the expenses incurred by the creditor in carrying out the land attachment will be chargeable against the debtor and can be recovered only by the land

attachment itself and not by any other legal process. Any expenses not recovered by the time the land attachment is completed will cease to be chargeable against the debtor.

355. Subsection (5) gives the sheriff power, if satisfied that the debtor has objected on frivolous grounds to an application for a warrant for sale or for decree of foreclosure, to award expenses against the debtor not exceeding an amount prescribed by the Scottish Ministers by regulations (such regulations are subject to negative resolution procedure (see section 224(3)). Expenses awarded under subsection (5) do not cease to be chargeable against the debtor if not recovered by the time the land attachment is completed.

Termination, discharge etc. of land attachment

Section 121 – Termination by payment etc.

356. **Section 121(1)** covers the situation where the debt owed is paid or tendered after a notice of land attachment is registered but before the land attachment is created. It provides that, if the full sum owed is paid or tendered to the creditor, a judicial officer or any other person authorised to receive payment on behalf of the creditor before the expiry of 28 days from the date the notice of land attachment is registered, no land attachment is created and the notice ceases to have effect.
357. Subsections (2) and (3) cover the situation where such payment is made or tendered after a land attachment is created. The land attachment will cease to have effect if the debtor pays or tenders the sum owed to the creditor, judicial officer or other person authorised to receive it provided the debtor does so before either a contract of sale is concluded or a decree of foreclosure is registered.

Section 122 – Discharge

358. **Section 122** applies where the debtor complies with section 121 and either the notice of land attachment or the land attachment ceases to have effect. The creditor must discharge the notice of land attachment or the land attachment if the expenses of discharge are also paid or tendered to the persons specified in section 121(1). It is competent to register the discharge (which must be in the form prescribed in rules of court) in the property registers.

Section 123 – Recall and restriction of land attachment

359. **Section 123** provides for the sheriff's powers to recall or restrict a land attachment.
360. Subsections (1) and (2) provide that the debtor or any other interested person may apply to the sheriff for an order recalling or restricting a land attachment. The application must be in the form prescribed by rules of court and be notified to the creditor.
361. Subsection (3) provides that the sheriff must make an order for recall if satisfied that the land attachment is invalid, has been carried out incompetently or irregularly, has ceased to have effect or the creditor is obliged to discharge it under section 122(2) (b) (because the debtor has paid or tendered payment of the sum due). Subsection (4) provides that the sheriff may make an order restricting the land attachment if satisfied that significantly more land is attached than need be and it is reasonable to restrict the attachment.
362. Subsections (5) and (6) provide that an order for recall or restriction must be in the form prescribed by rules of court and that it is competent for a person who obtains such an order to register it in the property registers.

Section 124 – Duration of land attachment

363. Section 124(1) provides that a land attachment will cease to have effect 5 years after the date on which the notice of land attachment was registered, if not terminated earlier by payment, by discharge or by recall under section 123 (order of the sheriff).
364. Subsections (2) to (4) give the creditor power to extend that period for a further 5 years. To extend the period the creditor must register a notice of extension in the form prescribed by rules of court within 2 months before the current 5-year period expires. The creditor may extend the period on more than one occasion.

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

Section 125 – Land attachment subsequent to reduction of deed granted in breach of inhibition

365. Section 125 provides for the situation where a debtor has been inhibited, breaches the inhibition by disposing of the property affected and the inhibiting creditor reduces the transaction which breached the inhibition. Taking the example of the sale of inhibited land, the reduction of the disposition granted by the debtor is *ex capite inhibitionis*. This means that, in any question between the creditor and the debtor, the debtor is regarded as still having title to the land. However, the person who purchased the land from the debtor, in a question with anyone other than the creditor, has that title.
366. Land attachment is normally competent only against land in respect of which the debtor has a recorded or registered title (see section 82(2)). Where the disposition granted in breach of inhibition is reduced, the debtor does not have recorded or registered title. Section 125 provides that, notwithstanding section 82(2) and this rule from the law of inhibition, the inhibiting creditor who has reduced the disposition may proceed to register a notice of land attachment over the land. A land attachment may subsequently be created and this section makes the necessary modifications to other sections in this Chapter to take account of the fact that the purchaser from the debtor (the “third party”) needs to be involved in the land attachment process.
367. In addition, subsection (2) provides that the land attachment registered in the circumstances mentioned in subsection (1) enjoys preference in ranking in any competition with a security granted in favour of, and a land attachment executed by, a creditor of the third party.

General and miscellaneous

Section 126 – Land attachment as heritable security

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

Section 127 – Statement on impact of land attachment

369. This section requires the Scottish Ministers to publish and to lay before the Scottish Parliament a statement of the impact that land attachment has had on debt recovery and homelessness.
370. Subsection (1) provides that this must be done within 15 months of the commencement of this Chapter of the Act. Subsection (2) sets out the information which the statement is required to include. Subsection (3) defines “homelessness” for the purposes of this section (by attracting the definition in the Housing (Scotland) Act 1987) to mean, effectively, lack of accommodation or lack of accommodation which it would be reasonable for the person involved to continue to occupy.

Section 128 – Interpretation

371. This section defines what is meant by expressions used in this Chapter. In particular, subsection (2) modifies the terminology used in relation to ownership and transfer of land so that it can be read as covering the equivalent terminology appropriate to attached land which is a long lease. Subsection (3) also provides the Scottish Ministers with power to modify the definitions of “decree” and “document of debt”. That power is exercisable by order subject to negative resolution procedure (see section 224(3)).