

BANKRUPTCY & DILIGENCE ETC (SCOTLAND) ACT 2007

-- A SIMPLE GUIDE --

The Bankruptcy & Diligence Etc (Scotland) Act 2007 contains 17 Parts and Six Schedules. One of the most succinct, but relevant sections of the B.A.D. Act can be found at Part 17 Section 227 (3) which states that sections of the Act **“come into force on such day as the Scottish Ministers may, by order, appoint.”**

In view of the complexity and the far-reaching effect that each section of the Act has on the execution of diligence, it was essential that this paragraph was inserted.

The overarching principal of the B.A.D. Act is “universal attachability.” It envisaged the introduction of **four completely new diligences, the formation of a “Scottish Civil Enforcement Commission” (SCEC) additional “Debtor Protection” procedures including the introduction of a Debt Advice and Information Package. (DAIP), reform of some existing diligences and the complete abolition of others, including the abolition of personnel such as Messengers-at-Arms and Sheriff Officers who were to be re-named “Judicial Officers”.**

The Four new diligences are - **Land Attachment, Residual Attachment, Interim Attachment and Money Attachment. Interim Attachment was introduced on 1st April, 2008, see below.**

Money Attachment was intended to be introduced during the month of July, 2009 - but was delayed until 23rd November, 2009 and both Land and Residual Attachment have also been delayed somewhat, either due to the complexity of both of these proposed new diligences or perhaps due to a lack of political will !! The whole concept of SCEC appears to have been abandoned, as has the Abolition of Messengers-at-Arms and Sheriff Officers. -See the “Public Services Reform (Scotland) Bill [AS INTRODUCED]”

The B.A.D. Act rivals the Debtors Scotland Act 1987 in its importance to Practitioners and Creditors, but, whereas the 1987 Act took around 17 years to come onto the statute books, sections of this former “Bill” and now “Act” have become law in only five years.

The first section of the B.A.D. Act which really affected practitioners in the performance of their duties was brought into force by **SI 2007/82 on 31st March, 2007** and can be found in **Part 13 - Amendments of the DAA (Scotland) Act 2002** where the following was inserted at **Section 31- Disposal of proceeds of auction** (1A) “Where an article is sold at auction at a price below the value of the article (appraised value by the Officer who carried out the attachment) the difference

between that price and that value shall, prior to the proceeds of the auction being disposed of, be credited against the sum recoverable." In layman's terms, this means that the debtor will be credited with whichever sum, between the appraised value and the amount obtained at the Sale, is the higher !!

Note - This was the case under the Debtors (Scotland) Act 1987 but when the 2002 Act was introduced this section was overlooked and accordingly for approx. 6/7 years the value of the goods sold at auction was the sum credited against the sum recoverable - which the majority of practitioners thought was the correct solution !!!

The next major tranche of B.A.D. Act Legislation which came into force on **1st April, 2008** related to **Part 6 - Diligence on the Dependence - Part 7 - Interim Attachment, - Part 9 - Diligence against Earnings, - Part 11 - Maills and Duties, Sequestration for Rent and Landlord's Hypothec and finally: Part 12 - Summary Warrants, Time to Pay and Charges to Pay.**

Part 6 - Diligence on the Dependence.

Inhibition on the Dependence.

The main feature under this heading was to extend Inhibition on the Dependence, which was exclusively a Court of Session practice, to the Sheriff Court. This extension effectively reduced the expense of IODs considerably for Creditors and had the general effect of streamlining the process.

It should be noted, however, that Letters of Inhibition were still available until 22nd April, 2009, over one year later and Inhibition in Execution was not extended to the Sheriff Court until that same date.

Somewhat surprisingly, the introduction of Inhibition on the Dependence into the Sheriff Court appeared not to be utilised as extensively as might have been anticipated.

It was generally thought that a number of Court users were unaware of its availability in the Sheriff Court. There were also "teething troubles" when the "diligence" was first introduced with no two warrants granted, being the same. Thankfully, over three years later, it appears that these anomalies have, to a large extent, been overcome.

Arrestment on the Dependence.

Once again Practitioners believe that this very effective diligence is under utilised by creditors.

Section 15H was introduced into the Debtors (Scotland) Act 1987 to allow the Court,

when granting warrant for Arrestment on the Dependence to "limit the sum" which may be attached, to funds not exceeding such amount as the court may specify.

This formula was made up as follows:-

The principal sum concluded for, a sum equal to 20 per cent of that sum, a sum equal to 1 year's interest on the principal sum at the judicial rate and any additional sum prescribed by Scottish Ministers. - In a minority of cases the court has stipulated an amount to be arrested but in the majority of cases, Officers utilise the formula as detailed above.

It is important for Practitioners to note that if the arrestment on the dependence is served prior to service of the summons, the summons or Writ must be served within 21 days from the date the AOD was executed failing which, the arrestment "shall cease to have effect." In practical terms this, in effect, reduces the period for service to 20 days.

The creditor will be entitled to expenses incurred in both obtaining a warrant on the dependence and effecting service providing he has acted "reasonably!!!"

Section 95A - DSA 87 - Prescription of Arrestment

An Arrestment on the Dependence will prescribe at the end of 3 years from the date final interlocutor (decree) is granted.

Where a 3rd party Arrestment is executed on a decree or other extract registered document it will expire at the end of the period of 3 years, beginning with the day on which the arrestment was executed.

Part 7 - Interim Attachment

Up until 23rd November, 2009, when Money Attachment was introduced, Interim Attachment was the only one of the four, completely new diligences to actually have been introduced.

Instructions during the period from its introduction (1st April, 2008) have been few and far between as basically the process from start to finish is fatally flawed. It is too expensive and cumbersome, with the prospect of a successful recovery for the creditor - almost negligible.

Practitioners, however, have to be aware of the procedure as the process exists in statute and is part of the principal of "Universal Attachability."

The process is best described as "Attachment on the Dependence." The warrant grants authority for officers to Attach articles belonging to a debtor (not in a dwelling house).

The attachment imposes a restriction on the debtor from selling the attached items and the summons may be served either prior to Interim Attachment, at the same time, or after the execution of the Interim Attachment- if served after, within 21 days,

beginning with the day on which the Interim Attachment was executed. Articles exempt from Interim Attachment include amongst others, a mobile home which is the only or principal residence of a person other than the debtor and perhaps more importantly, where the debtor is engaged in trade, any article acquired by the debtor - (i) to be sold by the debtor (whether or not after adaptation) or (ii) as a material for a process of manufacturing for sale by the debtor, in the ordinary course of that trade.

The Interim Attachment has to be reported to Court (similar to an Attachment in execution) but the defender may not redeem the attached articles.

Once Decree is granted, unlike Sequestration for Rent (now abolished) the Officer then has to Charge the Debtor for Payment, await the expiry of the days of Charge, and thereafter return to the debtor's property and Attach the same article(s) in execution - report the Attachment in execution and thereafter arrange a public auction. If the new appraised value of the articles which were previously "Interim Attached" are insufficient to cover the debt, the Officer would be entitled to Attach additional items found within the premises up to the value of the debt and expenses.

Duration of Interim Attachment.

An Interim Attachment will last from the date it is executed until the date of decree and thereafter for a period of six months or such longer period as the court may specify after decree is granted in favour of the creditor.

There is provision for the officer to remove the Interim Attached Articles to a place of safe

keeping and hold them there until the auction is arranged but on the negative side, should the Pursuer or his Agent decide to utilise this course of action, all removal and storage costs have to be borne by the Pursuer. In view of the possible time scale involved, these costs could be prohibitive!!

Part 9 - Diligence against Earnings.

The introduction of this part of the Act on 1st April, 2008 imposed duties to provide information, on Employers, Creditors and Debtors to differing degrees.

In all cases, prior to an Earnings Arrestment being lodged, a Charge for Payment requires to have been served and the days of Charge expired.

This section amended the situation concerning employees in receipt of "holiday pay" when an Earnings Arrestment is in force and most importantly introduced the rules governing the provision of a debt advice and information package (daip) to debtors within a 12 week period prior to the Earnings Arrestment being served.

On receipt of an Earnings Arrestment **the Employer** has to "take all reasonable

practical steps to" intimate a copy of it to the debtor (his employee) and notify him of the date on which the first deduction is to be made and the sum to be deducted.

The Employer has to "as soon as is reasonably practical" send to the creditor, or the sheriff clerk in respect of a conjoined arrestment, information on how the debtor is paid (weekly, monthly or otherwise,) the date of the debtor's next pay day and the sum to be deducted .

The employer also has to intimate to the creditor or the sheriff clerk, where a debtor gives notice of the termination of his employment or if he ceases employment and moves to a new employer, the name and address of the new employer, if known.

The Creditor who is receiving payment from a debtor by virtue of an Earnings Arrestment, current maintenance arrestment or conjoined arrestment order has to provide information to the employer or in the case of a conjoined arrestment order, the sheriff clerk, relating to the sum owed by the debtor to the creditor, the amounts received by the creditor by virtue of the arrestment or order and the dates of payment of those amounts. This information has to be provided on the day falling six months after the service of the arrestment schedule and each 6th April, thereafter.

The Debtor has a duty to provide information to the creditor or, in respect of a conjoined arrestment order, to the Sheriff Clerk, of any notice or change of employment and where appropriate the name and address of any new employer. Should he fail to do so, there is no sanction that can be taken against him.

There is a sanction, however, available against an employer who fails to intimate that the debtor has terminated his employment or has terminated and moved to a new employer whose name is known. The sum payable is an amount not exceeding twice the sum which the employer would have been required to deduct on the debtor's next pay day had he still employed the debtor - if this section is invoked the employer will not be entitled to recover that sum from the debtor but if he feels aggrieved he may appeal to the Sheriff principal within 14 days from the date the order is made, on a point of law. - **Section 70B (1)(2)&(3)**

Section 204 - Conjoined arrestment orders:- jurisdiction - This section clarifies the jurisdiction where an application for a conjoined arrestment is made. (ie) - (i) the place where the debtor is principally employed (ii) where that place is outside Scotland, any other place where the defender is employed; or (iii) where neither of the above applies, the place where the debtor is domiciled.

Section 205 - Arrestment of Seaman's wages - Repeals the exemption of seaman's wages from earnings arrestment under Section 73 of the Debtors (Scotland) Act 1987.

Part 11 - Maills and Duties, Sequestration for Rent and Landlord's Hypothec - It appears that the intention was to Abolish Maills and Duties on 1st April, 2008 but this didn't happen. The procedure is seldom used and has fallen into disuse. It is understood that the diligence of Maills and Duties will be abolished at some future date.

Sequestration for Rent was abolished on **1st April, 2008** and is no longer competent in any of the Courts.

Landlord's Hypothec - Has been severely restricted but continues, as a right in security over corporeal moveable property (with numerous exceptions) kept in or on the subjects let.

It would appear to still rank in any Sequestration, (Bankruptcy) - insolvency proceedings or other process in which there is ranking in respect of a particular property.

See Section 208 - Sub-sections 1-13

Part 12 - Section 209 - Summary Warrants, Time to Pay and Charges to Pay

In many respects although just containing two Sections - 209 and 210 - this was probably the most far-reaching Part of the B.A.D. Act to be introduced on 1st April, 2008.

In layman's terms it introduced the formal service of a "Charge for Payment" into all Summary Warrant Procedures, including HMRC and Local Authority debts, prior to any further diligence, including 3rd party Arrestments (which, at present, is not necessary in Court of Session or Sheriff Court decrees) being executed.

It also introduced the rule that a D.A.I.P. had to be served on a debtor (**where he is an individual**) within twelve weeks, prior to the execution of an attachment, an earnings arrestment, 3rd party arrestment, etc. In practice the majority of Officers of Court serve a D.A.I.P. on the defender along with the Charge for Payment and add an execution to that effect into their execution of charge.

Extreme caution must be exercised to ensure the D.A.I.P. is still effective before proceeding with any further diligence in all cases.

Section 210 - Time to pay directions and time to pay orders.

On 1st April, 2008, Time to pay orders were extended to Summary Warrant Actions, **but only in respect of Local Authority Taxation - NOT TAXATION OR DEBTS DUE TO HMRC.**

This allowed local authority debtors, following the service of a Charge for Payment, to apply to the court for a **Time to Pay Order (TTPO)**

In practice, I understand that this is a "debtor protection" area, which is not being overly utilised by debtors.

Time to pay directions (TTPD) have been extended to include Local Authority taxation actions where those action are raised in the Court of Session or in Ordinary or Summary Cause Actions in the Sheriff Court. These circumstances normally apply, only when the Local Authority has abandoned the Summary Warrant procedure.

Abandoning a Summary Warrant is normally done to facilitate the obtaining of an Inhibition, which is not available on a Summary Warrant.

SECTIONS OF THE B.A.D. ACT INTRODUCED ON 22ND APRIL, 2009

THE BANKRUPTCY & DILIGENCE ETC. (SCOTLAND) ACT 2007

(COMMENCEMENT No 4 SAVINGS & TRANSITIONALS) ORDER 2009 (SSI 2009/67)

Part 5 - Inhibition. - As of 22nd April, 2009, Letters of Inhibition were abolished.

The new rules basically allow an Inhibition to be utilised on any decree, which "grants warrant for all lawful execution." A warrant to inhibit in execution will also be inherent in certain decrees and documents of debt, such as Extract Registered Leases, Bonds and Agreements.

It is anticipated that the "Register of Inhibitions and Adjudications" will be re-named as simply, the "Register of Inhibitions", but as Adjudication is largely tied in with the proposed new diligence of Land Attachment, this may not happen for some considerable time.

If the debtor is an individual, the schedule of Inhibition served must be accompanied by a D.A.I.P.

The modes of service for Court of Session cases remain the same **including Edictal Service -with a Post copy sent by Recorded delivery 1st class mail to the last known address**, but the modes of service for Sheriff Court Inhibitions follow similar patterns as to the Sheriff Court Rules including service in the hands of a named official in the Sheriff Court - where the debtor has absconded and his present address is not known. **(Post copies for depositing, affixing and Sheriff Court Services - are sent by Ordinary First Class Post.)**

Postal Service is also acceptable where the defender has a known residence furth of Scotland. - See OCR 1993 -rule 5.5

Registration and Service:-

There are two distinct ways of registering the inhibition and dependent on which course is followed, the date on which it takes effect is determined.

Examples:-

1. A decree authorising Inhibition is sent to a firm of Sheriff Officers with a letter of instruction requesting urgent or immediate service.

Service is effected, an execution prepared and registered with the Keeper of the Register of Inhibitions and Adjudications.

The Effective date, in these circumstances, is the date the execution is registered.

2. A "Notice of Inhibition" in the "prescribed form." (ie) Schedule 4 - Form of Notice of Inhibition - is lodged with the Keeper of the Register, prior to service.

Once the notice is registered, service of the inhibition is effected.

Following service, an execution of Inhibition is prepared and registered with the Keeper of the Register of Inhibitions and Adjudications.

The Effective date, in these circumstances, is the date the Schedule of Inhibition was served.

An Inhibition served on the dependence of an action which was limited to specific property will, once decree is granted, automatically convert to a general inhibition, provided an Extract of the Decree and a Form of Notice of Decree in the prescribed form under section 152(b) of the B.A.D. Act and contained in the Bankruptcy & Diligence Act 2007 (Inhibition) Order 2009, is sent to the Keeper of the Registers of Scotland.

Service of an inhibition will not confer any preference in any sequestration or insolvency proceedings, in which there is a ranking.

An Inhibition will terminate or cease to have effect on the lapse of five years from the date on which it took effect. - [See 1 & 2 Above.] It is, however, possible to continue to protect the Creditor's position by serving a fresh Inhibition.

Expenses of inhibition.

The inhibition expenses are chargeable against the debtor [section 165 (1)] but it would appear, recoverable only, by the diligence of Land Attachment or Residual Attachment executed for the purpose of enforcing payment of the debt to which the inhibition relates, but not by any other legal process.[section 165 (2)] - somewhat contradictory !!!! but see Section 166 (2) - Ascription:- Sums must be ascribed to the following, in the order in which they are mentioned -

(a) the expenses which are chargeable against the debtor incurred in respect of any diligence (other than the inhibition) authorised by the decree or document of debt;

(b) the inhibition expenses;

- (c) any interest which has accrued, at the date on which the inhibition takes effect, on the debt constituted by the decree or document of debt;
- (d) the debt constituted by the decree or document of debt together with such interest as has accrued after the date on which the inhibition takes effect.

Where an Execution of Inhibition (including inhibition on the dependence) is prepared, the execution must be accompanied by a “true copy of the original schedule of inhibition” served, signed and certified by the serving Messenger or Sheriff Officer.

Section 168

Inhibition effective against judicial factor.

This section indicates that an inhibition has effect, notwithstanding the appointment of a judicial factor, however, this would not apply where (a) a judicial factor is appointed under section 11A of the Judicial Factors (Scotland) Act 1889 (c39)(application for judicial factor on deceased person’s estate); and (b) the inhibition was effective against the debtor prior to the debtor’s death.

PART 10 - ARRESTMENT AND ACTION OF FURTHCOMING.

SECTION 206 - inserts, after section 73 of the 1987 Act - Part 3A

Effective as from 22nd April, 2009.

Confirmation is made that a 3rd party arrestment and action of furthcoming or sale in execution of a **Summary Warrant** is only competent if the debtor has been charged to pay the debt, the days of charge have expired and a D.A.I.P. issued (where the debtor is an individual) within a period of 12 weeks prior to the Arrestment.

It is worth noting that an Action of Furthcoming can only now be raised against the Arrestee and the Common Debtor, if goods rather than money, have been arrested.

A new “prescribed form - Schedule 7 - Form of Schedule of arrestment in execution” was introduced by the Scottish Ministers under SSI 2009 No 68- Enforcement Debt Diligence - The Diligence (Scotland) Regulations 2009 on 22nd April, 2009.

Part 10 introduced a protected sum in respect of individual debtors who have funds in financial institutions. Prior to 6th April, 2010 this protected amount was the same amount as the monthly protected sum relating to an earnings arrestment. (ie) £ 370.00 but both these amounts were increased to the sum of £415.00 on 6th April, 2010.

The protected amount relates to one personal account held in any single bank or other financial institution.

The Diligence (Scotland) Regulations 2009 also came into force on 22nd April, 2009.-Schedule 8 - Form of disclosure by arrestee:-.

A "duty of disclosure" on Arrestees was introduced. Arrestees are now required, within 3 weeks beginning on the day on which the arrestment is executed, to send to the creditor, a note of the funds and any property other than funds which have been arrested. -

One anomaly which has arisen in practice, and is causing difficulty, is that where no funds have been arrested, [(i.e) - the Arrestee is under no obligation to account to the debtor] it would appear that the Arrestee is not required to disclose this information.

Where funds have been arrested the Arrestee will, thereafter, require to automatically release the sums arrested on the date, 14 weeks from either the intimation of final decree (Arrestment on the Dependence) or the date of service of the arrestment schedule, (Arrestment in Execution) unless an objection is lodged by either the debtor, the arrestee or any other person to whom the funds are due solely, or in common, with the debtor. This process, however, can be speeded up by the debtor signing a mandate.

A Form of debtor mandate in "prescribed form" has been prepared and must be utilised - See Schedule 9 - Form of debtor mandate - (The Diligence (Scotland) Regulations 2009) - to speed up the process of obtaining the funds from the Arrestee.

It is worth re-iterating that Actions of Furthcoming can only be raised where "goods" not "funds" have been arrested in the hands of a third party.

**SECTIONS OF THE B.A.D. ACT INTRODUCED ON 23RD NOVEMBER, 2009
THE BANKRUPTCY & DILIGENCE ETC. (SCOTLAND) ACT 2007
(COMMENCEMENT No 5 and TRANSITIONAL) ORDER 2009**

Part 8. -Attachment of Money.

After "Land Attachment" this was probably the most contentious of the four new diligences introduced, or scheduled to be introduced under the B.A.D. Act. Although there was considerable debate as to the benefits of this new diligence and how it would work in practice. In the correct circumstances it has proven to be an effective diligence.

The original rationale behind this new diligence, was that the officer and witness would travel to the defender's business premises (Money Attachment is not valid in the debtor's dwelling house) in possession of a valid decree, an execution of charge (days of charge expired) and two Schedules of Attachment - a straightforward "Attachment Schedule" in Form 3 of the DAA - Act 2002 and if the defender is an

individual a valid D.A.I.P. execution, (issued no earlier than 12 weeks before executing the attachment) together with a "Money Attachment Schedule" (Form 1) If the Officer discovered any cash, meaning coins and banknotes in any currency, cheques, promissory notes, other negotiable instruments, money and postal orders, then he would execute a "Money Attachment." (The meaning of "Money" is defined in section 175 of the Act.) If there was insufficient money to cover the whole of the debt, interest and expenses, then an Attachment would also be executed in respect of the outstanding balance.

This concept has been modified somewhat and it is now current practice for certain Creditors to instruct a "Money Attachment" pretty much on its own merits within commercial properties such as shops, offices, warehouses, and the likes. Restrictions on when a Money Attachment is not competent are similar to that of a normal Attachment (i.e) Not competent on a Sunday, a public holiday in the area in which the attachment is to be executed or such other day as may be prescribed by Act of Sederunt.

The execution of a Money Attachment must not begin before 8 a.m. or after 8 p.m. or be continued after 8 p.m. unless the Officer has obtained prior authority from the Sheriff for such commencement or continuation. In the main, where money is attached at any place, it is not competent to attach other money kept at that place, to enforce the same debt, unless that money is brought to that place after execution of the first Money Attachment. There does not appear to be a restriction on the number of occasions a Money Attachment may be executed and no specific " Money Attachment Warrant" is required - the process comes under the umbrella of the wording "grants warrant for all lawful execution hereon" inherent in Court Decrees.

The Officer must Attach and Remove the money from the place in which it is found and must not exceed the sum for payment of which the Charge was served, together with any interest accruing after service and all expenses which are chargeable against the debtor by virtue of the Money Attachment. Thereafter the Officer must deposit any proceeds attached into a bank account or a secure place and a report of the Money Attachment must be made to the Court within a period of 14 days, beginning with the day on which the money attachment is executed. On making the report the Officer must send a copy of it to the debtor, the creditor and to any person who has asserted that any money attached is not owned by the debtor (or is owned in common by the debtor and a third party

Where money has been attached by an Officer, the Creditor may apply to the Sheriff for a "payment order," authorising payment to the creditor out of the money attached and this application must be made before the expiry of the period of 14 days beginning with the day on which the report of the money attachment is made. If there

is an objection to this application the Sheriff may not make a payment order without holding a hearing and allowing all parties an opportunity to make representation. Where the Sheriff is satisfied that the money attachment is valid he will issue a payment order authorising the Officer to realise the value of the money attached and dispose of the proceeds of the money attachment by retaining such amount as necessary to meet the fees and outlays of the Officer, paying to the creditor the remainder of the proceeds to meet the sum recoverable by the money attachment and paying to the debtor any surplus remaining. It is worth noting that the payment order authorises the Officer to act as the irrevocable agent of the debtor in relation to any banking instrument attached.

Initial concerns within the Sheriff Officer profession, such as Officer safety, Professional Indemnity Insurance, Bond of Caution, Opening and Shutting Lockfast places, Money laundering, Police Assistance, enforcement costs etc., whilst still requiring to be seriously considered before Officers proceed to enforce this diligence, have pretty much faded into the background due to careful case selection and proper planning.

**THE BANKRUPTCY AND DILIGENCE ETC (SCOTLAND)ACT 2007
(commencement No 6. and Savings) Order 2010. - 1st July, 2010.**

Part 14 of and Schedule 4 - (Admiralty Actions and Arrestment of ships) of the Bankruptcy and Diligence etc (Scotland) Act 2007 came into force on 1st July, 2010.

Section 6 of Schedule 4 introduces a new section "47A" into the "Administration of Justice Act 1956" by extending the warrant for arrestment "in rem" of a ship, cargo or other maritime property from within the sheriffdom in which the warrant was granted to the whole of Scotland, where the ship, cargo, or other maritime property was situated within that Sheriffdom when the warrant was granted.

Under sub-section (2) the following is added "For the avoidance of doubt, where a warrant for arrestment in rem granted by the sheriff has been executed, an order for the sale of the arrested ship, cargo or other maritime property may be made notwithstanding that it is not situated with the sheriffdom when the order is made."

It also brings into force rule "47D"- "where cargo is arrested (on board a ship) the ship is treated as if arrested until the cargo is unloaded."

It also confirms that "cargo" will be inserted into Section 11- of the 2002 Act - (articles exempt from Attachment) - under a new section 11 (3)

Under section 47B the pursuer shall be entitled to expenses incurred in obtaining the warrant and in executing the arrestment.

Where section 47E of the Administration of Justice Act 1956 applies, the pursuer may apply for an order for the sale of the ship by public auction or private bargain.

There is also a subtle change to Section 16.14 of the Court of Session Rules - Arrestment of Cargo. - Prior to the introduction of this part, the Messenger served the Schedule on:-

- (a) the custodian for the time being of such cargo
- (b) where the cargo has been landed on the quay or into a shed of any port or harbour authority, to the harbour master.

The new proposals, now introduced, make the undernoted changes:-

- (a) the master of the ship
- (b) any other person in charge of the ship or cargo; or
- (c) other proper arrestee

Sections 16.13(4) & (5) remain unaltered.

In addition, under sub-section (3) "A person who has an interest in a ship or cargo which is the subject of an arrestment under this rule may apply by motion for a warrant authorising the movement of the ship or cargo and rule 13.11 shall apply to such motion."

Part 15 - Actions for removing from heritable property

The Removing from Heritable property (Form of Charge) (Scotland) Regulations 2011

AS 2011 No 158 - 4th April, 2011

Introduced the form of Charge for Removing.

The Bankruptcy and Diligence etc (Scotland) Act 2007 (Commencement) No 8 and Transitional) Order 2011

AS 2011 No 179 - 4th April, 2011

Brings into force Part 15 of the B.A.D. Act. Actions for Removing from heritable property.

Although not a new diligence, this section endeavours to standardise ejection procedure and seeks to introduce a further element of debtor protection into the process by the introduction of a standard "Charge for Ejection" in all actions (including Summary Cause - where, previously, it was not necessary to serve a Charge.) The "days of Charge" will be increased from the present 48 hours to 14 days but at Section 216 (4) it states that "where the decree for removing from heritable property is granted by a court, the court, may, on cause shown, dispense with or vary the period of Charge." This will allow Agents acting on behalf of Pursuers, in certain urgent cases, to apply to the court to dispense with the requirement to serve a Charge for Ejection.

It also curtails the dates and time when it is competent to execute a decree of removing by bringing the process into line with the diligence of "Attachment."

The decree may not be executed on a Sunday or a day which is a public holiday in the area in which the decree is to be executed and must not begin before 8 a.m. or after 8 p.m. or be continued after 8 p.m. unless the Officer of Court has obtained prior authority from the Sheriff for the district in which the premises are situated.

Authority is also being given to the court to direct that the pursuer takes such steps as the court considers appropriate for the preservation of any effects removed from the subjects or premises and the officer must make an inventory of effects removed.

Act of Sederunt (Actions for removing from heritable property) 2012

SI 2012 No 136 - Made 9th May, 2012-Coming into force 18th June, 2012.

The intention of this Act of Sederunt was to prescribe the practice and procedure to be followed in the execution of any decree for removing from heritable property. Unfortunately, as a result of the drafting of this S.I., the procedure to be adopted is anything but clear and transparent, so much so that representatives of SMASO have contacted the Assistant Secretary to the Sheriff Court Rules Council, seeking clarification on certain steps, now introduced.

Regarding the Charge for Ejection mentioned above and detailed in section 3(7)(a) of the Act it would appear that a further copy of the Charge for Removing has to be placed in a sealed envelope addressed to the "occupiers" and affixed to the main door or other conspicuous part of the premises.

I believe that the intention of this section was only meant to come into play where the address of the defender is not known and cannot reasonably be ascertained by the Sheriff Officer, but the way the section is worded, it implies that this procedure must be followed in all cases, irrespective of the mode of service. As a consequence this leads to the nonsensical situation where a Charge for Ejection is served personally on the defender, the Officer then has to ask the defender to close the door and a further copy of the Charge is placed in a sealed envelope and "affixed to the door" Hopefully common sense will prevail and a coherent procedure will be eventually agreed.

A further change in the process is detailed **under Section 4 -of the Act of Sederunt - Notice of date of Removal. (Form 4)** Previous legislation allowed Officers to use their discretion as to how and when to intimate the Notice of Ejection. It could be served by the Officer, contemporaneously with service of the Charge for Ejection, or at a later date, prior to the Ejection.(normally at least 48 hours before the ejection date.)

In certain circumstances the Notice could also be posted. With the introduction of this section it would appear that "Postal Intimation" is no longer an option and in addition, a certificate of service of the Notice requires to be provided. (It would appear that it does not require to be witnessed.)

When goods and effects are removed from the premises an "Inventory of effects Removed" in Form 6, has to be provided and the inventory shall be witnessed. In modern day practice Officers rarely have to ensure that the effects are removed from the premises - they are often removed at a later date - but there is no mention that the Officer should prepare an Inventory of effects left within the premises at the time of the ejection. As a result of this new step, it may mean that the Officer has to return to the premises once the instructing Agent acting on behalf of the Pursuer makes arrangements to remove the goods. Only time will tell !!

Section 7 is the final section of this Act and entails the Officer completing a certificate of Execution of Decree, in Form 7, signed by the Officer and Witness and affixed to the main door or other conspicuous part of the heritable property in a sealed envelope or in the case of land only, attached in a sealed envelope, to stakes in the ground at conspicuous parts of the land. As the Act does not state to whom the envelope should be addressed, uncertainty raises it's head as to who might open the "sealed envelope!!!"

This procedure is intended to replace the previous procedure of the Officer "chalking" the door with the Royal initials EIR, the date of the ejection and his name.

Regrettably it is generally accepted that, all in all the introduction of this Act of Sederunt has raised more questions than it has provided answers !!!

LEGISLATION STILL TO BE ENACTED AS AT 1st SEPTEMBER, 2012

Part 4 - Land Attachment and Residual Attachment.

Chapter 1 - Abolition of Adjudication for Debt -

Inhibition is an "inchoate" diligence. It is a preventative measure which prevents a debtor from realising funds from the sale of his heritable property or using his property as collateral for obtaining additional funds from a third party.

Under existing legislation, following upon service of an Inhibition and in order to realise the debtor's heritable asset, a creditor has to raise an action of Adjudication, which can take up to ten years to finalise.

Under this Part of the 2007 Act, the abolition of "Adjudication for debt" was proposed, as it was deemed unnecessary due to the imminent introduction of the new diligence of "Land Attachment." It was anticipated that to all extent and purposes "Land Attachment" would come onto the Statute Books and supercede the process of Adjudication.

It now appears that until "Land Attachment" is introduced it is extremely doubtful if the process of "Adjudication for Debt" will be abolished.

Chapter 2 - Attachment of Land.

There appears to be considerable political pressure against the introduction of the proposed new diligence of "Land Attachment.."

The Scottish "First Minister" Alex Salmond, at a C.A.B. Conference on 15th August, 2007 made a commitment that if the "Land" in question was the debtor's main or sole dwelling house, it would be exempt from the proposed diligence.

As a result of this lack of political commitment, the timescale as to the introduction of this diligence is, to say the least, uncertain.

Chapter 3 - Residual Attachment.

This is, by far, the most difficult of the four proposed new diligences to comprehend. The clear intention is to provide a creditor with a mechanism for securing or "attaching" items belonging to a debtor, which at present are not subject to, or are exempt from, any of the existing diligences such as Attachment and Arrestment. Examples of the type of asset which may be included in this category are, for instance - Intellectual Property rights (copyright,) certain timeshare rights, liferents, Interests in Trusts, Premium Bonds, Private Number Plates, Fishing Rights, Taxi Plates etc. etc. The proposed rules governing the procedure are extremely complicated and as there is absolutely no precedent for the diligence it is anticipated that it will take a considerable amount of time and effort to prepare the necessary legislation. There is no doubt that, in this case - "the devil will be in the detail" and it has been suggested that Residual Attachment may well not be introduced, until late 2012 or 2013.

Part 16 -

Disclosure of Information.

The clear intention of this section of the Act is to provide Sheriffs with the authority to obtain information about debtors in order to facilitate diligence to enforce payments of debts constituted by virtue of decrees and documents of debt, but there is little sign of it coming onto the Statute Book in the near future.