



The prerequisites for THE IMPLEMENTATION OF A COMPULSORY EXECUTION MEASURE

• What conditions must be met before implementing an enforcement order against a debtor?

Enforcement procedures (*diligences* is the term in Scots law) are available for enforcing decrees and documents of debt.

A *decree* is a civil court judgment; included in the category are, for example, summary warrants, granted for the recovery of taxes, and civil judgments granted by courts outside Scotland.

A *document of debt* usually means a document which is registered for execution in the Books of Council and Session or the sheriff court books. (Agreements in which the parties consent to enforcement being executed upon default in an undertaking, without the need for any court action to establish the sum recoverable, are documents of debt. Leases of commercial premises are usually registered for this purpose. Some loan agreements can also be registered. Bills of exchange, duly protested for non-payment, are also classed as documents of debt, although the system of enforcing them has fallen into disuse.)

A debtor receives notification of the granting of a decree, or the intention of a creditor in a document of debt to use the warrant for execution, by the service of a charge for payment. Generally this is a document, served by the hand of a messenger-at-arms or sheriff officer, which calls on the debtor to make payment within fourteen days.

No attachment of corporeal moveable property or the arrestment of earnings can take place until the fourteen days have expired. However, only if the debt is recoverable by virtue of a summary warrant is it correct to say that enforcement in Scotland proceeds only after the notification of details of the warrant have been given by the service of a charge. In fact, arrestment (but not earnings arrestment) of money and other moveable property of the debtor, in the hands of a third party, can be executed without the need to give a prior charge, under any other decree or document of debt other than a summary warrant for unpaid tax. Furthermore, inhibition (which prevents the sale of the debtor's heritable property) can also be executed on any decree or document of debt but a summary warrant, without any charge having been given.

If decree has been granted as the court's judgment in an action and the defender (debtor), having failed to state a defence, wishes to recall or repon the decree, it is his responsibility to intimate this to the pursuer (creditor) or the pursuer's agent (i.e. solicitor). The creditor is thereby bound to ensure that no enforcement takes place after that intimation and before the assigned court hearing has taken place. An officer (i.e. a messenger-at-arms or sheriff officer) can thus assume that the decree he has been given to enforce is not subject to the procedures for recall or other appeal, unless he becomes aware that, in fact, it is.





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1. POSSESSING AN ENFORCEABLE RIGHT ESTABLISHING A CLAIM FOR A DEBT THAT IS FIXED AND DUE AND CERTIFIED ENFORCEABLE

WHAT IS AN ENFORCEABLE RIGHT?

Section 221 of the Bankruptcy and Diligence etc. (Scotland) Act 2007, in its interpretation of the meanings of “decree” and “document of debt”, may be said to provide a complete list of enforceable rights:

“decree” means-

- (a) a decree of the Court of Session, of the High Court of Justiciary, or of the sheriff;
- (b) a decree of the Court of Teinds;
- (c) a summary warrant;
- (d) a civil judgement granted outside Scotland by a court, tribunal or arbiter which, by virtue of any enactment or rule of law, is enforceable in Scotland;
- (e) an order or determination which, by virtue of any enactment, is enforceable as if it were an extract registered decree arbitral bearing a warrant for execution granted by the sheriff;
- (f) a warrant granted in criminal proceedings for enforcement by civil diligence;
- (g) an order under section 114 of the Companies Clauses Consolidation (Scotland) Act 1845 (c.17);
- (h) a determination under section 46 of the Harbours, Docks and Piers Clauses Act 1847 (c.27); or
- (i) a liability order within the meaning of section 33(2) of the Child Support Act 1991 (c.48);

“document of debt” means-

- (a) a document registered for execution in the Books of Council and Session or in the sheriff court books;
- (b) a bill protested for non-payment by a notary public; or
- (c) a document or settlement which, by virtue of an Order in Council made under section 13 of the Civil Jurisdiction and Judgments Act 1982 (c.27), is enforceable in Scotland.

WHAT IS AN ORDER FOR ENFORCEMENT?

All decrees granted as court judgments and all extract registered deeds bear a short form of “warrant for lawful execution hereon”. The following three extracts from statutes state precisely which diligences are authorized once such a warrant for lawful execution has been granted.





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► Section 87 of the Debtors (Scotland) Act 1987 (effect of warrants for diligence in extract decrees and other documents)

(1) Every extract of a decree for the payment of money, or among other things for the payment of money, which is pronounced by—

- (a) the Court of Session;
- (b) the High Court of Justiciary; or
- (c) the Court of Teinds,

shall contain a warrant in the form prescribed by Act of Sederunt or, as the case may be, by Act of Adjournal.

(2) The warrant referred to in subsection (1) above shall have the effect of authorising—

- (a) in relation to an ordinary debt, the charging of the debtor to pay to the creditor within the period specified in the charge the sum specified in the extract and any interest accrued on the sum and, in the event of failure to make such payment within that period, the execution of an earnings arrestment and the attachment of articles belonging to the debtor and, if necessary for the purpose of executing the attachment, the opening of shut and lockfast places;
- (b) in relation to an ordinary debt, an arrestment other than an arrestment of the debtor's earnings in the hands of his employer; and
 - (ba) in relation to an ordinary debt, inhibition against the debtor;
- (c) if the decree consists of or includes a maintenance order, a current maintenance arrestment in accordance with Part III of this Act.

► Section 7(1) of the Sheriff Courts (Scotland) Extracts Act 1892 (import of the warrant for execution)

(1) the said warrant shall have the effect of authorising—

- (a) in relation to an ordinary debt within the meaning of the Debtors (Scotland) Act 1987, the charging of the debtor to pay to the creditor within the period specified in the charge the sum specified in the extract and any interest accrued on the sum and, in the event of failure to make such payment within that period, the execution of an earnings arrestment and the pouding [*attachment*] of articles belonging to the debtor and, if necessary for the purpose of executing the pouding, the opening of shut and lockfast places;
- (b) in relation to an ordinary debt within the meaning of the Debtors (Scotland) Act 1987, an arrestment other than an arrestment of the debtor's earnings in the hands of his employer; and
- (ba) in relation to an ordinary debt within the meaning of the Debtors (Scotland) Act 1987, inhibition against the debtor;
- (c) if the decree consists of or includes a maintenance order within the meaning of the Debtors (Scotland) Act 1987, a current maintenance arrestment in accordance with Part III of that Act.





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► Section 3 of the Writs Execution (Scotland) Act 1877 (c.40) (warrant in extract writ to authorise diligence)

The warrant inserted in an extract of a document registered in the Books of Council and Session or in sheriff court books which contains an obligation to pay a sum of money shall have the effect of authorising—

- (a) in relation to an ordinary debt within the meaning of the Debtors (Scotland) Act 1987, the charging of the debtor to pay to the creditor within the period specified in the charge the sum specified in the extract and any interest accrued on the sum and, in the event of failure to make such payment within that period, the execution of an earnings arrestment and the poinding [*attachment*] of articles belonging to the debtor and, if necessary for the purpose of executing the poinding, the opening of shut and lockfast places;
- (b) in relation to an ordinary debt within the meaning of the Debtors (Scotland) Act 1987, an arrestment other than an arrestment of the debtor's earnings in the hands of his employer; and
 - (ba) in relation to an ordinary debt within the meaning of the Debtors (Scotland) Act 1987, inhibition against the debtor;
- (c) if the document is a maintenance order within the meaning of the Debtors (Scotland) Act 1987, a current maintenance arrestment in accordance with Part III of that Act.

2. ADDITIONAL CONDITIONS TO BE FULFILLED WHEN THE ENFORCEABLE RIGHT IS A JUDGMENT

It has been explained above that the pursuer is responsible, when instructing enforcement, for ensuring that the decree is not subject to an attempt to repone or appeal.

It has also been explained that no prior notification of the granting of the decree - by the procedure of serving a charge for payment - is necessary before either an arrestment or an inhibition is executed, except when the “decree” is a summary warrant.

Mention has already been made, however, of the requirement to serve a charge for payment and wait for the “days of charge” (usually 14) to “expire” before any attachment of moveable property or arrestment of earnings can take place on any type of decree or document of debt.

3. IMPLEMENTING ENFORCEMENT WITHIN A CERTAIN TIME

The quinquennial prescription in Scots Law, whereby an obligation is extinguished if it has subsisted for a continuous period of five years without any relevant claim having been made, does not apply to any obligation to recognise or obtemper a decree of court, an arbitration award or an order of a tribunal, or to any obligation constituted or evidenced by a probative writ. This means that all obligations under “decrees” and “documents of debt” (i.e. the enforceable rights, as defined by section 221 of the 2007 Act) are believed to remain enforceable throughout the common law prescriptive period of twenty years.





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A charge for payment of money remains valid for a period of two years. However, an attachment (where moveable property is inventoried by a messenger-at-arms or sheriff officer, as a preliminary to removal to a public saleroom for auction) executed following upon the service of such a charge, has a duration which is limited to six months (although this period may be extended, by application to the sheriff).

• What can I do while waiting to obtain an enforceable right? Are there protective measures?

Diligence is carried out either *on the dependence* of an action or *in execution* of a decree (or document of debt). Until the very point at which the decree of the court is extracted (i.e. when the clerk of court issues to the document which records the judgment and bears the short warrant for lawful execution) the creditor may consider applying to the court for warrant to do diligence on the dependence (i.e. to seek protective measures).

1. CONDITIONS REQUIRED TO HAVE A PROTECTIVE MEASURE CARRIED OUT

Diligence on the dependence is regulated by Part 6 of the Bankruptcy and Diligence etc. (Scotland) Act 2007, in respect of arrestment and inhibition, and by Part 7 in respect of the new (and possibly never used) procedure of interim attachment. The creditor (or his solicitor) must apply to the court for warrant to do any diligence on the dependence. If the warrant is granted in the Court of Session, only a messenger-at-arms can execute the warrant for the protective measure that has been authorized. If the warrant is granted at a sheriff court, a sheriff officer will be the executor.

Warrant for diligence on the dependence is competent only where the action contains a conclusion for payment of a sum other than by way of expenses. It is available in the Court of Session (the supreme civil court) and in all the sheriff courts, in all values of claims.

A special application to the court for the warrant is required. This may be granted and executed, without prior intimation to the debtor, if (a) the creditor has a prima facie case; (b) there is a real and substantial risk enforcement of any decree in the action in favour of the creditor would be defeated or prejudiced by (i) the debtor being insolvent or verging on insolvency; or (ii) the likelihood of the debtor removing, disposing of, burdening, concealing or otherwise dealing with all or some of his assets. The onus is on the creditor to satisfy the court that the order granting warrant should be made. If the court does grant the warrant without there first being a hearing on the application, a hearing for recall or restriction of the arrestment on the dependence will be held thereafter, the creditor being ordered to intimate the date to the debtor and any other person appearing to the court to have an interest.

- ▶ The principle that judicial authorization is required for all protective measures is now firmly established in Scots law.





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2. THE DIFFERENT TYPES OF PROTECTIVE MEASURES

ARRESTMENT

Arrestment is the diligence by which moveables which are not in the possession of the debtor himself are attached, either in security of an alleged or constituted debt, or in execution of the decree judicially establishing the debt. The diligence is used against all categories of moveable property belonging to the debtor in the hands of a third party, with the exception of earnings in the hands of the debtor's employer, for which the special processes of earnings arrestment and current maintenance arrestment apply. Used as a protective measure, the diligence is termed arrestment on the dependence of an action.

The schedule of arrestment on the dependence is in a prescribed form. It must be served by a judicial officer: either a messenger-at-arms, if the warrant proceeds from the Court of Session, or a sheriff officer, in a sheriff court action. The form describes the warrant and gives precise instructions to the arrestee. It states the total amount arrestable, according to the formula: "arrest in your hands (i) the sum of (amount), in excess of the Protected Minimum Balance, where applicable, more or less, due by you to (debtor's name) or to any other person on his [or her or its or their] behalf; and (ii) all moveable things in your hands belonging or pertaining to the said (debtor), to remain in your hands under arrestment until they are made forthcoming to (creditor) or until further order of the court."

The arrestee is further informed, "you must also, within the period of 3 weeks beginning on the day on which the arrestment is executed, disclose to the creditor the nature and value of the funds and/or moveable property which have been attached. This disclosure must be in the form set out Failure to comply may lead to a financial penalty under section 73G of the Debtors (Scotland) Act 1987 and may also be dealt with as a contempt of court."

If the arresting creditor then succeeds in obtaining a final decree in his favour, the creditor must, as soon as reasonably practicable, serve a copy of that final decree on the arrestee. This form (which is signed by the creditor or the solicitor for the creditor, rather than the officer) gives an important instruction to the bank - being part of the important reforms of arrestment which came into force in 2009: "You are now required to release to the creditor, on the expiry of the period of 14 weeks beginning with this date (or earlier where a mandate [granted by the debtor] authorises you to do so) the lowest of - (a) the sum attached by the arrestment; (b) the sum due by you to the debtor; or (c) the sum ... calculated in accordance with section 73K(c) of the Debtors (Scotland) Act 1987." This sum, (b), is the aggregate of (i) the principal sum; (ii) any judicial expenses chargeable against the debtor; (iii) the expenses of executing the arrestment; and (iv) interest on the principal sum. It may also be competent in some circumstances to recover interest on the expenses of executing the arrestment.





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INHIBITION

Inhibition is a personal prohibition against the debtor from “selling, disposing of, burdening or otherwise affecting all land and heritable property in which you have an interest [or this may be limited to specific land and heritable property, which requires to be sufficiently identified], to the prejudice of” the creditor. The schedule of inhibition will be served on the debtor by a messenger-at-arms, if the action is in the Court of Session, or by a sheriff officer, if the action is on the dependence in a sheriff court. The inhibition takes effect upon registration at the Registers of Scotland of a certified copy of the schedule of inhibition and an execution (i.e. certificate of service) of the inhibition on the dependence.

- ▶ **The assets that can be subject to protective measures are therefore the debtor’s heritable property and the money or moveable property owed by third parties to the debtor. Although moveable property in the debtor’s own possession could be attached by the new measure of interim attachment, but this is seldom used by creditors.**

- ▶ **Assets that can be subject to a judgment**

It has been mentioned above how, following an arrestment on the dependence, the subsequent obtaining of a decree gives effect to the arrestment as though it had been an arrestment in execution, by requiring the arrestee (i.e. the third party) to pay the arrested sum to the creditor.

All of a debtor’s heritable property could be said to be subject to a judgment, following registration of an inhibition. However there is no law in force which allows a creditor to force the sale of the debtor’s heritable property through diligence.

Following service of a charge, the non-exempt corporeal moveable property of a debtor could be attached and auctioned. Special procedures apply if the property is kept in a dwelling house, and an exceptional attachment order would be required from the court. The Debt Arrangement and Attachment (Scotland) Act 2002 regulates the whole procedure for attachment.

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For further information, please contact eje@europe-eje.eu

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