

# **BANKRUPTCY AND DILIGENCE ETC. (SCOTLAND) ACT 2007**

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## **EXPLANATORY NOTES**

### **THE ACT**

#### *Commentary*

#### **Part 5 – Inhibition**

#### **Creation**

#### ***Section 146 – Certain decrees and documents of debt to authorise inhibition without need for letters of inhibition***

412. This section replaces the existing common law on when it is competent to inhibit in execution (for inhibition on the dependence, see Part 6 of this Act).
413. Subsection (1) provides that inhibition in execution is competent to enforce payment of a debt constituted by a decree or document of debt or to enforce an obligation to perform a particular act (sometimes referred to as an obligation *ad factum praestandum*). Inhibition is competent only to enforce that kind of obligation where it is contained in a decree (so it is not competent to inhibit in execution of an obligation contained in a document of debt) and the action in which the decree is obtained either contained an alternative conclusion or crave for payment of money (for example, payment of damages if the obligation was not adhered to) or was an action demanding the conveyance of or granting of a real right in heritable property (subsection (2)).
414. Subsections (3) to (5) insert provisions relating to an inhibition for ordinary debt into the Writs Execution (Scotland) Act 1877, Sheriff Courts (Scotland) Extracts Act 1892 and the 1987 Act which provide that extract decrees or documents for payment automatically carry a warrant for inhibition (including extracts of decrees granted in the sheriff court). Previously, the sheriff could not grant warrant for inhibition in execution and a creditor wishing to inhibit in execution of a sheriff court decree had to apply by letters of inhibition to the Court of Session. The amendments made by these subsections mean that there is now no need to apply for such letters of inhibition and subsection (6) abolishes this procedure.
415. Subsection (7) provides that the sections 165 and 166 (dealing with expenses and allocation of sums paid to account) do not apply to inhibitions executed to enforce the performance of an obligation. This is because there is no principal sum along with which expenses could be recovered under section 166 and no sum can be paid to account when there is no principal sum being recovered. This section also modifies the references to “debtor” and “creditor” in sections 158 to 160 and 163 to make it clear that, in the case of inhibition to enforce performance of an obligation, those references make sense even though no money debt is involved.

*These notes relate to the Bankruptcy and Diligence etc. (Scotland)  
Act 2007 (asp 3) which received Royal Assent on 15 January 2007*

416. Subsection (8) defines “decree” and “document of debt” by reference to section 221 of the Act. Subsection (9) provides for those definitions to be modified by the Scottish Ministers by regulations. Those regulations will be subject to negative resolution procedure (see section 224(3)).