



Bankruptcy (Scotland) Act 1985

1985 CHAPTER 66

Safeguarding of interests of creditors of insolvent persons

34 Gratuitous alienations

- (1) Where this subsection applies, an alienation by a debtor shall be challengeable by—
 - (a) any creditor who is a creditor by virtue of a debt incurred on or before the date of sequestration, or before the granting of the trust deed or the debtor's death, as the case may be; or
 - (b) the permanent trustee, the trustee acting under the trust deed or the judicial factor, as the case may be.
- (2) Subsection (1) above applies where—
 - (a) by the alienation, whether before or after the coming into force of this section, any of the debtor's property has been transferred or any claim or right of the debtor has been discharged or renounced; and
 - (b) any of the following has occurred—
 - (i) his estate has been sequestrated (other than, in the case of a natural person, after his death); or
 - (ii) he has granted a trust deed which has become a protected trust deed; or
 - (iii) he has died and within 12 months after his death, his estate has been sequestrated; or
 - (iv) he has died and within the said 12 months, a judicial factor has been appointed under section 11A of the Judicial Factors (Scotland) Act 1889 to administer his estate and the estate was absolutely insolvent at the date of death; and
 - (c) the alienation took place on a relevant day.
- (3) For the purposes of paragraph (c) of subsection (2) above, the day on which an alienation took place shall be the day on which the alienation became completely effectual; and in that paragraph "relevant day" means, if the alienation has the effect of favouring—

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- (a) a person who is an associate of the debtor, a day not earlier than 5 years before the date of sequestration, the granting of the trust deed or the debtor's death, as the case may be; or
 - (b) any other person, a day not earlier than 2 years before the said date.
- (4) On a challenge being brought under subsection (1) above, the court shall grant decree of reduction or for such restoration of property to the debtor's estate or other redress as may be appropriate, but the court shall not grant such a decree if the person seeking to uphold the alienation establishes—
- (a) that immediately, or at any other time, after the alienation the debtor's assets were greater than his liabilities; or
 - (b) that the alienation was made for adequate consideration ; or
 - (c) that the alienation—
 - (i) was a birthday, Christmas or other conventional gift; or
 - (ii) was a gift made, for a charitable purpose, to a person who is not an associate of the debtor, which having regard to all the circumstances, it was reasonable for the debtor to make:

Provided that this subsection shall be without prejudice to any right or interest acquired in good faith and for value from or through the transferee in the alienation.

- (5) In subsection (4) above, " charitable purpose " means any charitable, benevolent or philanthropic purpose whether or not it is charitable within the meaning of any rule of law.
- (6) For the purposes of the foregoing provisions of this section, an alienation in implementation of a prior obligation shall be deemed to be one for which there was no consideration or no adequate consideration to the extent that the prior obligation was undertaken for no consideration or no adequate consideration.
- (7) This section is without prejudice to the operation of section 2 of the Married Women's Policies of Assurance (Scotland) Act 1880 (policy of assurance may be effected in trust for spouse, future spouse and children).
- (8) A permanent trustee, the trustee acting under a protected trust deed and a judicial factor appointed under section 11A of the Judicial Factors (Scotland) Act 1889 shall have the same right as a creditor has under any rule of law to challenge an alienation of a debtor made for no consideration or for no adequate consideration.
- (9) The permanent trustee shall insert in the sederunt book a copy of any decree under this section affecting the sequestrated estate.

35 Recalling of order for payment of capital sum on divorce

- (1) This section applies where—
 - (a) a court has made an order, whether before or after the coming into force of this section, under section 5 of the Divorce (Scotland) Act 1976 or section 8(2) of the Family Law (Scotland) Act 1985, for the payment by a debtor of a capital sum or under the said section 8(2) for the transfer of property by him ;
 - (b) on the date of the making of the order the debtor was absolutely insolvent or was rendered so by implementation of the order ; and
 - (c) within 5 years after the making of the order—
 - (i) the debtor's estate has been sequestrated other than after his death ; or

- (ii) he has granted a trust deed which has (whether or not within the 5 years) become a protected trust deed; or
 - (iii) he has died and, within 12 months after his death, his estate has been sequestrated ; or
 - (iv) he has died and, within the said 12 months, a judicial factor has been appointed under section 11A of the Judicial Factors (Scotland) Act 1889 to administer his estate.
- (2) Where this section applies, the court, on an application brought by the permanent trustee, the trustee acting under the trust deed or the judicial factor, may make an order for recall of the order made under the said section 5 or 8(2) and for the repayment to the applicant of the whole or part of any sum already paid, or as the case may be for the return to the applicant of all or part of any property already transferred, under that order, or, where such property has been sold, for payment to the applicant of all or part of the proceeds of sale:
- Provided that before making an order under this subsection the court shall have regard to all the circumstances including, without prejudice to the generality of this proviso, the financial, and other, circumstances (in so far as made known to the court) of the person against whom the order would be made.
- (3) Where an application is brought under this section in a case where the debtor's estate has been sequestrated, the permanent trustee shall insert a copy of the decree of recall in the sederunt book.

36 Unfair preferences

- (1) Subject to subsection (2) below, subsection (4) below applies to a transaction entered into by a debtor, whether before or after the coming into force of this section, which has the effect of creating a preference in favour of a creditor to the prejudice of the general body of creditors, being a preference created not earlier than 6 months before—
- (a) the date of sequestration of the debtor's estate (if, in the case of a natural person, a date within his lifetime) ; or
 - (b) the granting by him of a trust deed which has become a protected trust deed ; or
 - (c) his death where, within 12 months after his death—
 - (i) his estate has been sequestrated, or
 - (ii) a judicial factor has been appointed under section 11A of the Judicial Factors (Scotland) Act 1889 to administer his estate and his estate was absolutely insolvent at the date of death.
- (2) Subsection (4) below shall not apply to any of the following transactions—
- (a) a transaction in the ordinary course of trade or business ;
 - (b) a payment in cash for a debt which when it was paid had become payable unless the transaction was collusive with the purpose of prejudicing the general body of creditors;
 - (c) a transaction whereby the parties thereto undertake reciprocal obligations (whether the performance by the parties of their respective obligations occurs at the same time or at different times) unless the transaction was collusive as aforesaid ;
 - (d) the granting of a mandate by a debtor authorising an arrestee to pay over the arrested funds or part thereof to the arrester where—

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- (i) there has been a decree for payment or a warrant for summary diligence ; and
 - (ii) the decree or warrant has been preceded by an arrestment on the dependence of the action or followed by an arrestment in execution.
- (3) For the purposes of subsection (1) above, the day on which a preference was created shall be the day on which the preference became completely effectual.
- (4) A transaction to which this subsection applies shall be challengeable by—
 - (a) any creditor who is a creditor by virtue of a debt incurred on or before the date of sequestration, the granting of the protected trust deed or the debtor's death, as the case may be ; or
 - (b) the permanent trustee, the trustee acting under the protected trust deed, or the judicial factor, as the case may be.
- (5) On a challenge being brought under subsection (4) above, the court, if satisfied that the transaction challenged is a transaction to which this section applies, shall grant decree of reduction or for such restoration of property to the debtor's estate or other redress as may be appropriate:

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