

# Mortgage Rights (Scotland) Act 2001

2001 asp 11

---

© Crown Copyright 2001

Acts of the Scottish Parliament printed from this website are printed under the superintendence and authority of the Queen's Printer for Scotland.

The legislation contained on this web site is subject to Crown Copyright protection. It may be reproduced free of charge provided that it is reproduced accurately and that the source and copyright status of the material is made evident to users.

It should be noted that the right to reproduce the text of Acts does not extend to the Queen's Printer for Scotland imprints which should be removed from any copies of Act which are issued or made available to the public. This includes reproduction of the Act on the Internet and on intranet sites. The Royal Arms may be reproduced only where they are an integral part of the original document.

The text of this Internet version of the Act is published by the Queen's Printer for Scotland has been prepared to reflect the text as it received Royal Assent. A print version is also available and is published by The Stationery Office Limited as the **Mortgage Rights (Scotland) Act 2001**, ISBN 0 10 590021 4. The print version may be purchased by clicking [here](#). Braille copies of this Act can also be purchased at the same price as the print edition by contacting TSO Customer Services on 0870 600 5522 or e-mail:[customer.services@tso.co.uk](mailto:customer.services@tso.co.uk).

Further information about the publication of legislation on this website can be found by referring to the [Frequently Asked Questions](#).

To ensure fast access over slow connections, large documents have been segmented into "chunks". Where you see a "continue" button at the bottom of the page of text, this indicates that there is another chunk of text available.

---

## Mortgage Rights (Scotland) Act 2001

2001 asp 11

### CONTENTS

	Section
<a href="#">Application to suspend enforcement of standard security</a>	<u>1</u>
	<u>2</u>

<u>Disposal of application</u>	<u>3</u>
<u>Registration of order under section 2</u>	<u>4</u>
<u>Notices to debtors, proprietors and occupiers</u>	<u>5</u>
<u>Crown application</u>	<u>6</u>
<u>Interpretation</u>	<u>7</u>
<u>Commencement and short title</u>	
<u>Schedule</u>	
<u>Notices to debtors, proprietors and occupiers</u>	<u>Part 1</u>
-	
<u>Amendments to Schedule 6 to the 1970 Act</u>	<u>Part 2</u>
-	
<u>Forms relating to proceedings under section 5 of the 1894 Act</u>	

**The Bill for this Act of the Scottish Parliament was passed by the Parliament on 20th June 2001 and received Royal Assent on 25th July 2001**

An Act of the Scottish Parliament to provide for the suspension in certain circumstances of enforcement rights of a creditor in a standard security over property used for residential purposes and the continuation of proceedings relating to those rights; to make provision for notifying tenants and other occupiers of enforcement action by a creditor in a standard security; and for connected purposes.

## **1 Application to suspend enforcement of standard security**

(1)

This section applies where a creditor in a standard security over an interest in land used to any extent for residential purposes has-

(a) served-

(i) a calling-up notice under section 19 (calling-up of standard security), or

(ii) a notice of default under section 21 (notice of default),

(b) made an application to the court under section 24 (application to court for remedies on default) of that Act, or

(c) commenced proceedings under section 5 (power to eject proprietor in personal occupancy) of the Heritable Securities (Scotland) Act 1894 (c.44) (in this Act referred to as "the 1894 Act").

(2)

The following persons may apply to the court for an order under section 2 of this Act-

(a) the debtor in the standard security or the proprietor of the security subjects (where the proprietor is not the debtor), if the security subjects (in whole or in part) are that person's sole or main residence,

(b) the non-entitled spouse of the debtor or the proprietor, where the security subjects (in whole or in part) are a matrimonial home and the sole or main residence of the non-entitled spouse,

(c) a person living together with the debtor or the proprietor as husband or wife or in a relationship which has the characteristics of the relationship between husband and wife except that the persons are of the same sex, if the security subjects (in whole or in part) are that person's sole or main residence,

(d) a person who has lived together with the debtor or the proprietor as mentioned in paragraph (c), if-

(i) the security subjects (in whole or in part) are the sole or main residence of that person but not of the debtor or, as the case may be, the proprietor,

(ii) that person lived together with the debtor or the proprietor as mentioned in that paragraph throughout the period of 6 months ending with the date on which the security subjects ceased to be the sole or main residence of the debtor or the proprietor, and

(iii) the security subjects (in whole or in part) are the sole or main residence of a child under the age of 16 years who is a child of that person and of the debtor or the proprietor.

(3)

In paragraph (d)(iii) of subsection (2), "child" includes a stepchild and any person brought up or treated by the person mentioned in that paragraph and the debtor or the proprietor as their child.

(4)

An application under subsection (2) must be made-

(a) in the case mentioned in subsection (1)(a)(i), before the expiry of the period of notice in relation to the calling-up notice,

(b) in the case mentioned in subsection (1)(a)(ii), not later than one month after the expiry of the period of notice specified in the notice of default,

(c) in a case mentioned in subsection (1)(b) or (c), before the conclusion of the proceedings.

(5)

The period of one month mentioned in subsection (4)(b) may be dispensed with or shortened by the person on whom the notice of default has been served, but only with the consent in writing of-

(a) any other person on whom the notice of default has been served,

(b) if the standard security is over a matrimonial home, the spouse of each person on whom the notice of default has been served, and

(c) any person entitled to make an application under subsection (2) by virtue of paragraph (c) or (d) of that subsection.

(6)

An application under subsection (2) in a case mentioned in subsection (1)(a) must be made by summary application.

(7)

Any rights which the creditor has, or acquires, by virtue of the enactments mentioned in subsection (1)(a) to (c) may not be exercised-

(a) at any time when an application under subsection (2) is competent,

(b) at any time when such an application has been made but has not been determined.

(8)

In a case mentioned in subsection (1)(a)-

(a) section 19 (calling-up of standard security) of the 1970 Act has effect as if-

(i) in subsection (10), the words "effectively dispensed with or" and "dispense with or" were omitted,

(ii) after subsection (10) there were inserted-

"(10A) Subsection (10) above does not permit the period of notice mentioned in the calling-up notice to be shortened to a period of less than one month.

(10B) The period of notice mentioned in the calling-up notice may be shortened under subsection (10) above only with the consent in writing (in addition to any consent required by that subsection) of-

(a) any person entitled to make an application under subsection (2) of section 1 (application to suspend enforcement of standard security) of the Mortgage Rights (Scotland) Act 2001 (asp 11) by virtue of paragraph (c) or (d) of that subsection, and

(b) where the debtor in the standard security is not the proprietor-

(i) the debtor, and

(ii) if the standard security is over a matrimonial home (within the definition referred to in that subsection), the debtor's spouse.",

(b) section 21 (notice of default) of that Act has effect as if subsection (3) of that section were omitted, and

(c) Form C in Schedule 6 (procedures as to calling up and default) to that Act has effect as if the words "dispensed with (or" were omitted.

## **2 Disposal of application**

(1)

On an application under section 1(2) the court may-

(a) suspend the exercise of the rights which the creditor has, or may acquire, by virtue of the enactments mentioned in subsection (1)(a) to (c) of that section-

(i) to such extent,

(ii) for such period, and

(iii) subject to such conditions,

as the court thinks fit,

(b) if the application is made in proceedings under section 24 of the 1970 Act or section 5 of the 1894 Act, continue those proceedings to such date as the court thinks fit.

(2)

The court may make an order under this section only where it considers it reasonable in all the circumstances to do so; and the court, in considering whether to make such an order and what its terms should be, is to have regard in particular to-

(a) the nature of and reasons for the default,

(b) the applicant's ability to fulfil within a reasonable period the obligations under the standard security in respect of which the debtor is in default,

(c) any action taken by the creditor to assist the debtor to fulfil those obligations, and

(d) the ability of the applicant and any other person residing at the security subjects to secure reasonable alternative accommodation.

(3)

If, while an order under this section is in force, the obligations under the standard security in respect of which the debtor is in default are fulfilled, the standard security has effect as if the default had not occurred.

(4)

In relation to an application under section 1(2) in the case mentioned in subsection (1)(a)(i) of that section, the preceding provisions of this section have effect with the following modifications-

(a) the power to specify a period in pursuance of subsection (1)(a) includes, without prejudice to the generality of that provision, power to specify the period which expires on the calling-up notice ceasing to have effect by virtue of section 19(11) of the 1970 Act,

(b) subsection (2)(a) is to be read as referring to the circumstances giving rise to the service of the calling-up notice,

(c) subsection (2)(b) is to be read as referring to the ability of the applicant to comply with the notice within a reasonable period,

(d) subsection (2)(c) is to be read as referring to any action taken by the creditor to assist the debtor to fulfil the debtor's obligations under the standard security, and

(e) subsection (3) does not apply.

(5)

The court may, if requested to do so by the creditor or the applicant-

(a) vary or revoke an order made under subsection (1)(a),

(b) further continue proceedings continued under subsection (1)(b).

(6)

Section 1 and this section are without prejudice to any rights which a debtor, proprietor or non-entitled spouse may have under any other enactment or rule of law.

(7)

In section 1 and this section-

"applicant" means the person who makes an application under section 1(2),

"court" means the sheriff court,

"matrimonial home" and "non-entitled spouse" are to be construed in accordance with the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (c.59).

### **3 Registration of order under section 2**

(1)

Where the court makes an order under section 2 the clerk of court must, as soon as possible, send to the Keeper of the Register of Inhibitions and Adjudications, for recording in that Register-

(a) a certified copy of the order, and

(b) a notice complying with subsection (2).

(2)

A notice referred to in subsection (1)(b)-

(a) must be in such form, and

(b) must contain such particulars of the order, the proceedings in which it was made and the standard security,

as may be prescribed by the Scottish Ministers by order made by statutory instrument.

(3)

A statutory instrument containing an order under subsection (2) is subject to annulment in pursuance of a resolution of the Scottish Parliament.

### **4 Notices to debtors, proprietors and occupiers**

(1)

After section 19 of the 1970 Act there is inserted-

**"19A Notice to occupier of calling-up**

(1) Where a creditor in a standard security over an interest in land used to any extent for residential purposes serves a calling-up notice, he shall serve a notice in conformity with Form BB (notice to occupier) of Schedule 6 to this Act together with a copy of the calling-up notice.

(2) Notices under subsection (1) above shall be sent by recorded delivery letter addressed to "The Occupier" at the security subjects.

(3) If a creditor fails to comply with subsections (1) and (2) above, the calling-up notice shall be of no effect."

(2)

In section 21 (notice of default) of that Act, after subsection (2) there is inserted-

"(2A) Section 19A of this Act applies where the creditor serves a notice of default as it applies where he serves a calling-up notice."

(3)

In section 24 (application by creditor to court for remedies on default) of that Act, after subsection (2) there is inserted-

"(3) Where the creditor applies to the court under subsection (1) above, he shall, if the standard security is over an interest in land used to any extent for residential purposes-

(a) serve on the debtor and (where the proprietor is not the debtor) on the proprietor a notice in conformity with Form E of Schedule 6 to this Act, and

(b) serve on the occupier of the security subjects a notice in conformity with Form F of that Schedule.

(4) Notices under subsection (3) above shall be sent by recorded delivery letter addressed-

(a) in the case of a notice under subsection (3)(a), to the debtor or, as the case may be, the proprietor at his last known address,

(b) in the case of a notice under subsection (3)(b), to "The Occupier" at the security subjects."

(4)

Where a creditor in a standard security over an interest in land used to any extent for residential purposes commences proceedings under section 5 (power to eject proprietor in personal occupancy) of the 1894 Act, the creditor must-

(a) serve on the proprietor a notice in conformity with Form 1 in Part 2 of the schedule to this Act, and

(b) serve on the occupier of the security subjects a notice in conformity with Form 2 in that Part of that schedule.

(5)

Notices under subsection (4) must be sent by recorded delivery letter addressed-

(a) in the case of a notice under subsection (4)(a), to the proprietor at the proprietor's last known address,

(b) in the case of a notice under subsection (4)(b), to "The Occupier" at the security subjects.

(6)

The schedule to this Act, Part 1 of which amends Schedule 6 to the 1970 Act (forms to be used in relation to calling-up and default) and Part 2 of which sets out the Forms referred to in subsection (4), has effect.

(7)

The Scottish Ministers may, by order made by statutory instrument, amend-

(a) the Notes inserted in Forms A and B in Schedule 6 to the 1970 Act by Part 1 of the schedule to this Act,

(b) Forms BB, E and F in Schedule 6 to the 1970 Act,

(c) the Forms set out in Part 2 of the schedule to this Act.

(8)

A statutory instrument containing an order under subsection (7) is subject to annulment in pursuance of a resolution of the Scottish Parliament.

## **5 Crown application**

This Act binds the Crown.

## **6 Interpretation**

Except so far as the context otherwise requires, expressions used in this Act and in Part II of the 1970 Act have the same meanings in this Act as they have in that Part.

## **7 Commencement and short title**

(1)

The preceding provisions of this Act come into force on such day as the Scottish Ministers may by order made by statutory instrument appoint.

(2)

An order under subsection (1) may include such transitional and transitory provisions and savings as the Scottish Ministers think expedient.

(3)

This Act may be cited as the Mortgage Rights (Scotland) Act 2001.

### SCHEDULE

(introduced by section 4)

#### NOTICES TO DEBTORS, PROPRIETORS AND OCCUPIERS

##### **PART 1**

##### AMENDMENTS TO SCHEDULE 6 TO THE 1970 ACT

1 Schedule 6 to the 1970 Act (forms to be used in connection with calling-up of, or default under, standard security) is amended as follows.

2 In Form A (notice of calling-up of standard security) there is inserted, at the end of the notice-

"NOTE: The Mortgage Rights (Scotland) Act 2001 gives you the right in certain circumstances to apply to the court to suspend the rights of C.D. You have two months (which may be shortened only with your consent) to make an application. The court will have regard in particular to the circumstances giving rise to the service of this notice, your ability to comply with this notice, any action taken by C.D. to assist the debtor in the standard security to fulfil the obligations under it and the ability of you and anyone else residing at the property to find reasonable alternative accommodation. If you wish to make such an application, you should consult a solicitor. You may be eligible for legal aid depending on your circumstances, and you can get information about legal aid from a solicitor. You may also be able to get advice, including advice about how to manage debt, from any Citizens Advice Bureau or from other advice agencies."

3  
standard security) there is inserted, at the end of the notice-

In Form B (notice of default under

"NOTE: The Mortgage Rights (Scotland) Act 2001 gives you the right in certain circumstances to apply to the court to suspend the rights of C.D. You have two months (which may be shortened only with your consent) to make an application. The court will have regard in particular to the nature of and reasons for the default, your ability to fulfil the obligations under the standard security, any action taken by C.D. to assist the debtor in the standard security to fulfil those obligations and the ability of you and anyone else residing at the property to find reasonable alternative accommodation. If you wish to make such an application, you should consult a solicitor. You may be eligible for legal aid depending on your circumstances, and you can get information about legal aid from a solicitor. You may also be able to get advice, including advice about how to manage debt, from any Citizens Advice Bureau or from other advice agencies."

4

After Form B there is inserted-

"FORM BB

## NOTICE TO OCCUPIER

To the Occupier (*address*)

A Notice of Calling-up of a standard security/ Default under a standard security (*delete as appropriate*) has been served by C.D. on A.B. in relation to (*address of subjects*). A copy of the notice is attached.

If you are a tenant of A.B., in certain circumstances C.D. cannot take possession of the property without a court order. You should obtain legal advice about your rights as a tenant. You may be eligible for legal aid depending on your circumstances, and you can get information about legal aid from a solicitor. You may also be able to get advice from any Citizens Advice Bureau or from other advice agencies.

If you are the spouse or partner of A.B., the Mortgage Rights (Scotland) Act 2001 gives you the right in certain circumstances to apply to the court to suspend the rights of C.D. You have two months (which may be shortened only with your consent) to make an application. The court will have regard in particular to-

(*for a Notice of Calling-up*) the circumstances giving rise to the service of the Notice of Calling-up, your ability to comply with the notice, any action taken by C.D. to assist the debtor in

the standard security to fulfil the obligations under it and the ability of you and anyone else residing at the property to find reasonable alternative accommodation.

*(for a Notice of Default)* the nature of and reasons for the default, your ability to fulfil the obligations under the standard security, any action taken by C.D. to assist the debtor in the standard security to fulfil those obligations and the ability of you and anyone else residing at the property to find reasonable alternative accommodation.

*(delete as appropriate)*

If you wish to make such an application, you should consult a solicitor. You may be eligible for legal aid depending on your circumstances, and you can get information about legal aid from a solicitor. You may also be able to get advice, including advice about how to manage debt, from any Citizens Advice Bureau or from other advice agencies.

Dated

*(Signature of C.D., or signature and designation of C.D.'s agent followed by the words Agent of C.D.)"*

5

After Form D there is inserted-

"FORM E

To A.B. *(address)*

C.D. *(designation)*, the creditor in a standard security by you (or by E.F.) in favour of C.D. *(or of G.H. to which C.D. now has right)* recorded in the Register for *(or, as the case may be, registered in the Land Register for Scotland)* on *(date)* has applied to the court under section 24 of the Conveyancing and Feudal Reform (Scotland) Act 1970 for warrant to exercise in relation to *(address of security subjects)* remedies to which he is entitled on the following default-

*(specify in detail the default in respect of which the application is made)*

A copy of the application is attached.

Dated

*(Signature of C.D., or signature and designation of C.D.'s agent followed by the words Agent of C.D.)*

NOTE: The Mortgage Rights (Scotland) Act 2001 gives you the right in certain circumstances to apply to the court for suspension of the rights of C.D. The court will have regard in particular to the nature of and reasons for the default, your ability to fulfil the obligations under the standard security, any action taken by C.D. to assist the debtor in the standard security to fulfil those obligations and the ability of you and anyone else residing at the property to find reasonable alternative accommodation. If you wish to make such an application, you should consult a solicitor. You may be eligible for legal aid depending on your circumstances, and you can get information about legal aid from a solicitor.

You may also be able to get advice, including advice about how to manage debt, from any Citizens Advice Bureau or from other advice agencies.

## FORM F

To the Occupier (*address*)

C.D. (*designation*) has applied to the court under section 24 of the Conveyancing and Feudal Reform (Scotland) Act 1970 for warrant to exercise in relation to (*address of security subjects*) remedies to which he is entitled on the default of A.B. (*designation*) in the performance of his obligations under a standard security over (*address of subjects*). A copy of the application is attached.

If you are a tenant of A.B. (or, if A.B. is not the proprietor of the subjects, of E.F. (being the proprietor)), in certain circumstances C.D. cannot take possession of the property without a court order. You should obtain legal advice about your rights as a tenant. You may be eligible for legal aid depending on your circumstances, and you can get information about legal aid from a solicitor. You may also be able to get advice from any Citizens Advice Bureau or from other advice agencies. If you are the spouse or partner of A.B., the Mortgage Rights (Scotland) Act 2001 gives you the right in certain circumstances to apply to the court to suspend the rights of C.D. The court will have regard in particular to the nature of and reasons for the default, your ability to fulfil the obligations under the standard security, any action taken by C.D. to assist the debtor in the standard security to fulfil those obligations and the ability of you and anyone else residing at the property to find reasonable alternative accommodation. If you wish to make such an application, you should consult a solicitor. You may be eligible for legal aid depending on your circumstances, and you can get information about legal aid from a solicitor. You may also be able to get advice, including advice about how to manage debt, from any Citizens Advice Bureau or from other advice agencies.

Dated

(*Signature of C.D., or signature and designation of C.D.'s agent followed by the words Agent of C.D.*)"

## PART 2

### FORMS RELATING TO PROCEEDINGS UNDER SECTION 5 OF THE 1894 ACT

#### FORM 1

To A.B. (*address*)

C.D. (*designation*), the creditor in a standard security by you (*or* by E.F.) in favour of C.D. (*or* of G.H. to which C.D. now has right) recorded in the Register for (*or*, as the case may be, registered in the Land Register for Scotland) on (*date*) has commenced proceedings against you under section 5 of the Heritable Securities (Scotland) Act 1894 to eject you from (*address of security subjects*). A copy of the initial writ is attached.

Dated

(*Signature of C.D., or signature and designation of C.D.'s agent followed by the words Agent of C.D.*)

**NOTE:** The Mortgage Rights (Scotland) Act 2001 gives you the right in certain circumstances to apply to the court for suspension of the rights of C.D. The court will have regard in particular to the nature of and reasons for the default, your ability to fulfil the obligations under the standard security,

any action taken by C.D. to assist the debtor in the standard security to fulfil those obligations and the ability of you and anyone else residing at the property to find reasonable alternative accommodation. If you wish to make such an application, you should consult a solicitor. You may be eligible for legal aid depending on your circumstances, and you can get information about legal aid from a solicitor. You may also be able to get advice, including advice about how to manage debt, from any Citizens Advice Bureau or from other advice agencies.

## FORM 2

To the Occupier (*address*)

C.D. (*designation*) has commenced proceedings under section 5 of the Heritable Securities (Scotland) Act 1894 to eject A.B. from (*address of security subjects*). A copy of the initial writ is attached.

If you are a tenant of A.B., in certain circumstances C.D. cannot take possession of the property without a court order. You should obtain legal advice about your rights as a tenant. You may be eligible for legal aid depending on your circumstances, and you can get information about legal aid from a solicitor. You may also be able to get advice from any Citizens Advice Bureau or from other advice agencies.

If you are the spouse or partner of A.B., the Mortgage Rights (Scotland) Act 2001 gives you the right in certain circumstances to apply to the court to suspend the rights of C.D. The court will have regard in particular to the nature of and reasons for the default, your ability to fulfil the obligations under the standard security, any action taken by C.D. to assist the debtor in the standard security to fulfil those obligations and the ability of you and anyone else residing at the property to find reasonable alternative accommodation. If you wish to make such an application, you should consult a solicitor. You may be eligible for legal aid depending on your circumstances, and you can get information about legal aid from a solicitor. You may also be able to get advice, including advice about how to manage debt, from any Citizens Advice Bureau or from other advice agencies.

Dated

(*Signature of C.D., or signature and designation of C.D.'s agent followed by the words Agent of C.D.*)

## EXPLANATORY NOTES

### INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Executive (with the approval of Cathie Craigie MSP, who was the member in charge of the Bill for this Act), in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by the Parliament.

2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

3. To assist the reader, a glossary of the terms used throughout the Explanatory Notes is provided at the end of the Notes.

## **THE ACT**

### **Background**

4. Part II of the Conveyancing and Feudal Reform (Scotland) Act 1970 created the standard security (commonly known as a mortgage) as the only means of securing a debt over land and buildings. The 1970 Act sets out twelve standard conditions that the parties to a standard security are required to adhere to (either as set out in the Act or as varied by agreement between the parties). The first seven of these conditions concern the maintenance of the value of the secured property and place certain obligations upon the debtor which the creditor can carry out if the debtor fails to do so. The remaining conditions deal with the creditor's rights to enforce the security (e.g. to pursue payment of arrears from the debtor) and allow the creditor to recover from the debtor any expenses incurred in exercising those rights.

5. Where the debtor defaults on mortgage repayments or otherwise fails to carry out obligations under the standard security, the bank or building society or other creditor can take action to (among other things) sell or enter into possession of the property. The 1970 Act provides for three distinct processes which can be used by creditors when they seek to enforce their rights - a calling-up notice, a notice of default and a warrant under section 24 of the 1970 Act. Where a debtor is in arrears, the creditor may also apply under section 5 of the Heritable Securities (Scotland) Act 1894 to eject the debtor from the property. These processes are outlined briefly in the glossary at the end of these Notes.

### **Outline of the Act**

6. Where a creditor has taken enforcement action (as described above) over property used for residential purposes, the Act makes provision for the sheriff court, on the application of the debtor or certain other persons, to suspend the enforcement process in appropriate cases. In deciding whether to do so, the court is required to consider whether—

- the applicant might be able to repay the debt or arrears, or fulfil the obligations under the standard security, within a reasonable time so as to keep their home, or
- the enforcement process should be delayed to give the applicant and others staying at the property time to find alternative accommodation.

7. The Act also provides for the debtor, the proprietor (if different) and the occupier of the property to receive notice of any enforcement action and encourages them to obtain legal advice on their rights. Any order made by the sheriff has to be sent for recording in the Register of Inhibitions and Adjudications.

### **Section 1 Application to suspend enforcement of standard security**

8. Where a creditor has issued a calling-up notice or a notice of default, made an application under section 24 of the 1970 Act or commenced proceedings under section 5 of the 1894 Act, this section allows the debtor or the proprietor (where the proprietor is not the debtor) to apply to the court for an order under *section 2* suspending the creditor's rights of enforcement. A debtor or proprietor can apply only where the property subject to the security is that person's sole or main residence.

9. The section also allows the debtor's or proprietor's non-entitled spouse to apply to the court where the security subjects are the sole or main residence of the non-entitled spouse, whether or not it is the sole or main residence of the debtor or proprietor.

10. This section also allows an application to be made by a person living together with the debtor or proprietor as husband or wife or in a same sex relationship with the characteristics of husband and wife (who is referred to in these Notes as a "partner"). The partner of the debtor or proprietor may apply where the security subjects are the sole or main residence of both the debtor or proprietor and the partner (and, in such a case, no further tests require to be met before the partner can apply). Where the security subjects are no longer the sole or main residence of the debtor or proprietor, the (former) partner can only make an application if (a) the security subjects are still his or her sole or main residence, (b) he or she lived with the debtor or proprietor throughout the six month period up to the date when the security subjects ceased to be the sole or main residence of the debtor or proprietor, and (c) the security subjects are the sole or main residence of a child under sixteen years of age of the debtor/proprietor and partner (and child here includes a step-child and someone brought up by or treated by the debtor/ proprietor and (former) partner as their child).

11. Applications to the court must be made within the time limits specified in *subsection (4)*. *Subsections (5) and (8)* make provision, in cases where a calling-up notice or notice of default have been served, for shortening the time limits with consent.

12. The effect of *subsection (7)* is that a creditor is not entitled to exercise rights to enforce a standard security at any time when an application under this Act is competent (or when an application has been made but not yet determined by the court).

## **Section 2 Disposal of application**

13. Where the court considers it reasonable in all the circumstances, the court may under this section, suspend the creditor's rights to such extent, for such period and subject to such conditions as it thinks fit and/or, in the case where the application is made during proceedings under section 24 of the 1970 Act or section 5 of the 1894 Act, continue the proceedings to such date as it thinks fit. In effect, this allows the court—

- to give the applicant reasonable time to remedy the default, where (in the view of the court) the applicant is likely to be able to achieve this, or
- to give the applicant and others staying at the property sufficient time to arrange alternative accommodation and avoid risking homelessness.

14. In reaching its decision, the court will take into consideration particular factors in the overall circumstances of the case. These particular factors are the nature and the reason for the default by the debtor; the ability of the applicant to fulfill within a reasonable period the obligations under the standard security which the debtor has defaulted on; any action by the creditor to help the debtor fulfil these obligations; and the ability of the applicant and any other person living in the property to arrange alternative accommodation, thus avoiding the risk of homelessness.

15. Where the applicant clears the default while an order is in force, the standard security has effect as if the default had not occurred.

16. A calling-up notice requires the debtor to repay the whole loan rather than simply make good any arrears or rectify any other forms of default. In this case the "default" is the failure to comply with the notice. As such, if the court decided to give the applicant time to remedy the 'default', the applicant would be required to repay the whole sum borrowed and any interest, which for most debtors would be extremely difficult. So by opting to serve a calling-up notice rather than a notice of default, a creditor would effectively deprive the debtor of the opportunity of obtaining an order allowing time to clear the arrears or otherwise rectify any default. The effect of *subsection (4)(a)* is that the court may suspend enforcement of the calling-up notice until the notice expires under the 1970 Act. By attaching conditions to the order the court can thus allow the applicant to repay the arrears only, rather than the whole debt as required under the calling-up notice.

17. The section also allows the creditor or the applicant to apply to the court to change the terms of the order or revoke it, or further to continue proceedings to a future date.

### **Section 3 Registration of order under section 2**

18. Section 3 seeks to avoid the risk of a fraudulent or accidental sale by a creditor in the face of a section 2 order suspending that creditor's rights of enforcement by requiring the clerk of the court to send a notice about the order, with a certified copy of the order attached, to the Keeper of the Register of Inhibitions and Adjudications (Registers of Scotland) for recording. Section 3 gives the Scottish Ministers power to prescribe the form and content of the notice that must be sent to the Keeper.

### **Section 4 and the schedule Notices to debtors, proprietors and occupiers**

19. *Section 4* amends the forms used in connection with a calling-up notice or notice of default and provides for notices to be given to the debtor and proprietor where a creditor applies to the court for a warrant under section 24 of the 1970 Act or commences proceedings under section 5 of the 1894 Act. The section also provides for a notice to be sent in each case to the occupier of the property. The latter notices contain wording designed to bring matters to the attention of spouses and partners. The notices, which will be sent by recorded delivery, inform each party of their rights and advise them to consult a solicitor. They also inform them that advice, including advice about managing debt, is also available from Citizens Advice Bureau or other advice agencies. The wording of the notices is given in the *schedule* to the Act.

### **Sections 5 to 7**

20. These sections contain formal provisions about Crown application, interpretation, short title and commencement. Under *section 7*, the Act is to come into force on a day specified by the Scottish Ministers by way of statutory instrument. The commencement order may include transitional, transitory and savings provisions.

## **GLOSSARY OF TERMS**

21. A **standard security** is the legal agreement that secures the money borrowed (the debt) from a bank, building society or other creditor on an interest in land (usually a property such as a house). A standard security is the legal term in Scotland for what is commonly called a mortgage and can be secured to borrow money for the purchase of a property or for some other reason such as to pay for a wedding or a new car.

22. A debtor **defaults** when they fail to comply with an obligation under the standard security, most commonly by failing to keep up mortgage repayments. Other defaults include failure to maintain the property and renting out the property without obtaining the consent of the creditor.

23. There may be cases where the debtor does not own the property which is used as security for the money borrowed. In such cases the owner is the **proprietor** and the debtor takes on the obligations of repaying the loan.

24. Where one spouse has the right to occupy the matrimonial home either as owner or as tenant of the property and the other spouse does not have that right, that other spouse is the **non-entitled spouse**.

25. A **calling-up notice** is issued by the creditor and requires the debtor to repay the whole sum borrowed and any interest within two months. The creditor may be entitled to serve a calling-up notice even where the debtor is not in default, but failure to comply with the notice is itself a default. A

calling-up notice expires five years from the date of the notice or from the date of the last offer for sale, if the creditor exercised the right to sell.

26. A **notice of default** is issued by the creditor and requires the debtor to remedy the default within one month. A notice of default expires five years from the date of the notice.

27. The creditor can apply to the court for a **warrant under section 24** of the 1970 Act to obtain the right to exercise any of the remedies available to the creditor when the debtor is in default. Remedies include undertaking necessary maintenance to the property and selling the property to pay off the outstanding debt.

28. The creditor can apply to the court under **section 5** of the 1894 Act to eject the debtor where the debtor is in arrears and still occupies the property.