

SCOTTISH LEGISLATION 1983

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Election years tend to result in a fairly light crop of legislation, but in 1983 there were actually three more Acts passed than in 1982, although their bulk was less.

Of the sixty public general Acts passed, six were consolidation Acts. Those of interest to Scotland were the *Representation of the People Act*, derived mainly from the Act of 1949; the *Pilotage Act*, consolidating the Acts of the same name of 1913 and 1936, with some material derived from the *Merchant Shipping Act 1979*; the *Litter Act*, bringing together in a dozen sections material scattered through a dozen and a half different sources; the *Car Tax Act* which gathers together in a similar number of sections similarly fragmented material; the very technical *Value Added Tax Act*; and the *Medical Act* which is derived mainly from Acts of the same name passed in 1956, 1959 and 1978.

There were only four “Scotland only” Acts, all passed before the General Election. Two of them are procedurally of some interest. The *Solvent Abuse (Scotland) Act* has the distinction of being one of fewer than a dozen and a half 10-minute-rule Bills that have been successfully enacted since 1945.

The *Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Act* is the enactment of the first public Bill since the Union of 1707, of which the second reading debate has taken place in Scotland.

Chapter Number

- 12 *Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Act* This is really a miscellaneous provisions Act, with four sections of substance, but it is likely to have considerable significance socially throughout the country and economically in relation to the administration of justice.

Less than half a line is sufficient to give Sheriff Courts jurisdiction concurrent with that of the Court of Session in actions of divorce. The Royal Commission on Legal Services in Scotland in its report (Cmnd 7846), published in 1980, had recommended that the Sheriff Court should be given exclusive jurisdiction as a court of first instance in divorce actions. However, the Government, having considered comments which it received on the report, preferred to give pursuers the option. It will be possible to choose the Sheriff Court within whose jurisdiction either party has resided for forty days before the summons is served. Scottish domicile, or habitual residence in Scotland for one year, continue to be requirements.

There had been considerable debate as to whether the extension of the Sheriff's jurisdiction would reduce the cost of divorce actions to the client. The Society of Solicitors in the Supreme Courts had presented the Government with calculations which demonstrated that divorce in the Sheriff Court would in fact prove to be more expensive. But the Government was persuaded by figures based on those in a recent report on the Scottish Legal Aid Scheme, which seemed to indicate that a saving of about one sixth should be achieved.

This provision was due to come into force on May 1, 1984. The simplified procedure by way of affidavit introduced in the Court of Session in January 1983 for divorce based on non-cohabitation for two or five years, where there are no children under sixteen, and no financial claims, and where neither party suffers from mental incapacity, would be extended to the Sheriff Court when the Act came into effect.

The implementation of the fixed penalty procedures of the Transport Act 1982 was expected to lead to a substantial reduction in the workload of Sheriff Courts, and consequently only a small increase in the number of staff and of sheriffs was envisaged.

Chapter Number

- 12 The general rule that facts alleged in evidence must be corroborated is relaxed in such classes of undefended actions for divorce as the Lord Advocate may prescribe. The clause is similar in language to section 9 of the *Law Reform (Miscellaneous Provisions)(Scotland) Act 1968 (c. 70)*, which removed the need for corroboration in actions of damages for person injuries. The court may in its discretion call for further evidence. Initially, this relaxation will be restricted to cases proceeding by way of affidavit.

The Secretary of State is given powers to regulate fees and outlays of counsel and solicitors in legal aid case, and in legal advice and assistance cases. When introducing the Bill in the House of Lords, the Lord Advocate pointed out that the placing on the Secretary of State of the duty to regulate fees, where he is responsible for their payment, follows the general pattern on the remuneration of professional services in the National Health Service and elsewhere. Formerly, the High Court of Judiciary had power to prescribe counsel's fees for criminal work, but in practice an informal table was provided by the Faculty of Advocates to the Law Society. In civil matters, fees were regulated by the Court of Session.

Similarly, the Act transfers from the High Court of Judiciary and from the Court of Session to the Secretary of State powers to regulate certain fees paid to courts in criminal and civil proceedings. These fees are designed to contribute towards the cost of running the courts. the Government's policy on the level of costs to be recovered by way of court fees can be studied in the Treasury Minute on the Twelfth Report from the Committee of Public Accounts for the Session 1981-82 (Cmnd 8759).

- 33 *Solvent Abuse (Scotland) Act* This Act consists of a short textual amendment to Part III of the *Social Work (Scotland) Act 1968 (c. 49)*, which deals with children's hearings. Section 32 lists eight conditions, any of which, if satisfied, may entitle a children's hearing to impose compulsory measures of care upon a child.

The new condition is that the child has misused a volatile substance by deliberately inhaling, other than for medical purposes, that substance's vapour. The expression "volatile substance" covers more than solvents, so that the legislation applies also to items such as shoe polish and sticking plaster, which are also capable of abuse by sniffers.

Chapter Number

33 “Glue sniffing” has been discussed in Parliament from time to time for a decade and a half and in recent years the problem has become acute. In 1981 there were thirty-three deaths from solvent abuse in the United Kingdom and of these eleven occurred in Strathclyde. Concern was expressed in Parliament during the debates on this Bill that the sale of solvents for the purpose of solvent abuse was not a statutory offence.

However, the decision of the High Court of Judiciary in the case of *Khaliq v. Her Majesty's Advocate* on November 17, 1983 (1984 SLT 137) has removed the need for legislation. It was held that the charge that the accused had sold quantities of solvents, particularly Evostik glue, to eighteen named children and many others, in tins, tubes, crisp packets and plastic bags, for the purpose of inhalation of the vapours of these solvents (knowing that the children would do this, and that the inhalation was or could be injurious to their health or endanger their lives) effectively set forth facts relevant and sufficient to constitute a criminal offence.

39 *Mental Health (Amendment) (Scotland) Act* This is a major Act consisting of a series of textual amendments to the *Mental Health (Scotland) Act 1960 (c.61)*, which will facilitate a reprint of that Act in Statutes in Force, or an early consolidation Act. It follows the publication in April 1982 of a consultative paper, “Review of the Mental Health (Scotland) Act 1960”, by the Scottish Home and Health Department, and in November 1982 of a “Memorandum on Proposals for the Amendment of the Mental Health (Scotland) Act 1960”. Much of the Act parallels provisions in the English *Mental Health (Amendment) Act 1982 (c.51)*, which was speedily followed by the consolidating *Mental Health Act 1983 (c.20)*.

The Act reflects progress in the diagnosis and treatment of people suffering from mental illness in the last 20 years, and changes in the attitude of society to the rights, or lack of rights, of such people. Only a few highlights are discussed here.

In keeping with modern attitudes, the term “mental deficiency” gives way to the less pejorative expression, “mental handicap”, and “defective” becomes a person “protected by the provisions of this section”, i.e. s.96 of the 1960 Act. The intention may be commendable, but whether it achieves the desired end is open to doubt. Adults may follow the lead given by Parliament. Children can often be cruel.

Chapter Number

39 The minimum number of members of the Mental Health Commission for Scotland is increased from seven to ten, of whom three must be women. The maximum will in future be left to the discretion of the Secretary of State.

Formerly the Commission had a duty to visit patients “regularly, and as often as they may think appropriate”. Now the Commission must visit a patient either during each successive year in which the authority to detain him is renewed, and where no appeal has been made to a sheriff against detention.

The advisory duties of the Commission are extended; in addition to advising the Secretary of State, it must now advise also area health boards and local authorities on any matter arising out of the Act that has been referred to it by the Secretary of State or any of these bodies. In addition it must bring to the attention of the Secretary of State and of any other body, any matter concerning the welfare of patients, which it considers should be brought to their attention.

Under the 1960 Act the Commission had published only four reports. Starting in 1985, it will be required to publish an annual report.

The maximum period of detention for treatment and assessment in an emergency is reduced from seven days to seventy-two hours. This period may be extended for a further twenty-eight days under new provisions added by this Act. This will happen when a psychiatrist reports to the board of management of the hospital that it is appropriate for the patient to be detained for at least a limited period. Where practicable, the consent of the patient's nearest relative or a mental health officer is required, and its absence must be explained in the report. The local authority must arrange for a mental health officer to interview the patient within three weeks of the start of the twenty-eight days, who reports to the responsible medical officer and the Mental Welfare Commission on the patient's social circumstances. This may affect the course of treatment to be followed. The patient has a right to appeal to the sheriff within the twenty-eight days, to order his discharge.

A voluntary patient may be detained by a nurse for up to two hours where it is necessary for the patient's health or safety, or for the protection of others and where it is not practicable to secure the immediate attendance of a doctor to make an emergency

Chapter Number

- 39 recommendation. This provision is designed to avoid the risk of legal liability of nurses where they seek on medical grounds to restrain voluntary patients from leaving hospital.

Formerly, the initial period of detention of long-term patients was a year, renewable for a further year and subsequently at two-yearly intervals, with the approval of the sheriff. Each of these periods is now halved. The patient may appeal to the sheriff against his detention, once in each period of renewal.

The 1983 Act inserts a new Part in the Act of 1960 dealing with consent of compulsorily detained patients.

The more rigorous forms of treatment require the consent of the patient *and* a second opinion. These forms are surgical operations to destroy brain tissue or its functioning, and other forms specified in regulations, probably hormone treatment and sterilisation. The class was defined in the Review of the (English) Mental Health Act 1959 as being “hazardous, irreversible or not fully established”.

Others forms of treatment specified in regulations, and the administration of medicine by any means (after the lapse of three months since the medicine was first administered for the patient’s mental disorder) require the consent of the patient *or* a second opinion. This category is expected to include non-hazardous, non-reversible and well-proven methods of treatment by surgery, treatment with medicines and electro-convulsive therapy.

These requirements as to consents and second opinions do not apply to any treatment immediately necessary to save a patient’s life, nor to others (not being irreversible or hazardous), immediately necessary to alleviate serious suffering by the patient, or to control violent or dangerous behaviour. Treatments that are not irreversible are similarly permitted if immediately necessary to prevent a serious deterioration of the patient’s condition.

In both cases, the regulation-making power ensures flexibility, as knowledge of treatment develops. The responsible medical officer must make a report on the patient before each successive renewal of his detention.

The patient may withdraw his consent to treatment at any time

Chapter Number

- 39 before its completion. But the Act contains safeguards, permitting continuation of treatment if discontinuance is considered likely to cause serious suffering to the patient.

Medical treatment for his mental disorder, being treatment not falling within the above cases, does not require the patient’s consent if it is given by, or under the direction of, the responsible medical officer.

- 46 *Agricultural Holdings (Amendment) (Scotland) Act* Modern economical developments and recent legislation guaranteeing security of tenure to tenant-farmers and their surviving spouses or children as successors, indefinitely from one generation to the next, have combined to reduce the number of farms available for letting.

In order to try to secure some mitigation of this problem, the Scottish Landowners Federation and the National Farmers’ Union of Scotland made joint proposals on rents, arbitration and inheritance. This was followed by the setting-up of a working party by the Department of Agriculture and Fisheries for Scotland to examine and establish the precise intention of these proposals and consider any other relevant matters, with a view to preparing appropriate instructions to the Parliamentary Draftsman for amendment of the Scottish Agricultural Holdings Legislation. This Act is based on the recommendations of the working party.

There are some who may consider the Act to be a public relations exercise of little value, economically or socially, because many landlords are now tempted to take advantage of the provisions of the *Limited Partnership Act 1907 (7 Edw.VII c.24)* and enter into partnerships with those who would have been their tenants. There is then no tenancy to terminate, but a partnership to dissolve.

The substantive part of the Act is in the form of a series of textual amendments to the *Agricultural Holdings (Scotland) Act 1949 (c.75)* and includes a revised version on the ninth schedule to that Act. Some provisions from other statutes are reproduced in the 1982 Act so that they may be conveniently incorporated in a future Statutes in Force reprint, thus relieving some of the pressure of demand for an early consolidation of this code.

The Act begins with establishing guidelines to help the arbiter or the

Chapter Number

- 46 Scottish Land Court in a question of variation of rent to determine the rent properly payable, disregarding distortions in the market and having regard to the current economic conditions of the relevant sector of the agricultural industry.

The rent review period is reduced from five years – which was rather long during a period of high inflation – to three years, as in England.

The Act preserves the expectations of succession to tenancies entered into before the end of 1983, and so the onus of proving to the Scottish Land Court that the statutory grounds for serving a notice to quit on a successor tenant in fact exist continues to lie with the landlord. But where a tenancy is let on or after January 1, 1984, the onus of disproving them will in most cases lie on the successor tenant. A new ground added in relation to post-1983 leases is that the successor tenant does not have sufficient financial resources to enable him to farm the holding with reasonable efficiency.

The jurisdiction of the Scottish Land Court is extended, so that it may hear an appeal in rent review cases not only on a question of law but also on one of fact, where, because the parties have failed to agree on an arbiter, the arbiter has been appointed by the Secretary of State or (where a Government Department is involved) by the Land Court; where arbiters are appointed by the parties, the arbiter remains final on fact. Many parties may take advantage of existing provisions of the Act of 1949 and concur in invoking the jurisdiction of the Scottish Land Court itself to act as arbiter.

INDEX OF SCOTTISH LEGISLATION

The 1982 Yearbook contains an Index of Scottish Legislation covering the years 1970-1980 (see pages 307 to 312). The 1983 and 1984 Yearbooks updated the Index down to 1982.

Readers may wish to update their copies to cover 1983. The following items should be entered at the appropriate places in alphabetical order.

Abuse, Solvent, 1983 c. 33. Agricultural Holdings, 1983 c. 46. Aid, Legal, etc., 1983 c. 12. Court Fees, etc., 1983 c. 12. Divorce Jurisdiction, Court Fees and Legal Aid, 1983 c. 12. Fees, Court, etc., 1983 c. 12. Health, Mental, (Amendment), 1983 c. 39. Holdings, Agricultural, 1983 c. 46. Jurisdiction, Divorce, etc., 1983 c. 12. Legal Aid, etc., 1983 c. 12. Mental Health (Amendment), 1983 c. 39. Solvent Abuse, 1983 c. 33.