

SCOTTISH LEGISLATION 1984

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Over sixty Acts of Parliament were passed in 1984, of which ten were consolidation acts. This is in implementation of the policy of governments in recent years to make legislation more accessible and simpler to update. Of these consolidation acts, we may note the *Mental Health (Scotland) Act 1984*, the *Foster Children (Scotland) Act* and the *Rent (Scotland) Act*. The *Roads (Scotland) Act* totally recasts our highways legislation to cope with modern administrative needs and to make it more easily understood. While in substance it might be looked on as being in the nature of a consolidation Act, the language of its predecessors has been so extensively abandoned that it may be considered as an entirely fresh code.

Chapter Number

4 *Tourism (Overseas Promotion) (Scotland) Act* As an earner of foreign exchange, tourism in Scotland comes third after oil and whisky exports, with earnings of around £250 million a year. Altogether, in 1984 it generated over one billion pounds in revenue, and provided over 50,000 full-time equivalent jobs. Only 9% of all visitors to Scotland come from overseas, but these provide over one quarter of all expenditure on tourism in Scotland. That there is scope for lucrative expansion is clear.

The *Development of Tourism Act 1969 (c.51)* set up the various “national” tourist boards for Scotland, England and Wales, but reserved to the British Tourist Authority responsibility for overseas promotion.

In implementation of a promise in the government’s general election manifesto, this Act complements the provisions in the *Local Government and Planning (Scotland) Act 1982 (c.43)* which permit islands and district councils, but only with the consent of the Secretary of State, to incur expenditure directly, or indirectly by way of contributions to expenses incurred by others, for overseas promotion of tourism, conferences and the like in their area.

The Act accordingly enables the Scottish Tourist Board to promote Scotland overseas in its own right, supplementing the efforts of the

British Tourist Authority. So the prime responsibility for encouraging visitors to come to Scotland from abroad will continue to remain with the latter body.

- 6 *Education (Amendment) (Scotland) Act* This is a brief Act, introducing a new section into the *Education (Scotland) Act 1980 (c.44)*, which was a consolidation Act. Section 19 of the 1980 Act enables the Secretary of State by regulations to exercise a general control over standards and general requirements of equipment in educational establishments, with different standards and requirements for different classes of establishment.

Under a non-statutory SED Circular, 689/1968, the approval of the Secretary of State had to be obtained before certain radioactive materials or types of x-ray apparatus could be used in an educational establishment. Doubts had arisen as to the legality of this practice, and it is for this reason that the new rule has been made.

Following section 27(1)(c) of the English *Education Act 1980 (c.20)*, it is now made clear that he may make regulations requiring his approval to be obtained for the use in specified educational establishments of specified materials or apparatus which could involve a serious risk to health. He may differentiate between the establishments to which the regulations will apply.

- 15 *Law Reform (Husband and Wife) (Scotland) Act* Scottish family law has seen many reforms since the passing of the *Succession (Scotland) Act 1964 c.41*, to adapt it to suit the conditions of life in the latter part of the 20th century. Nevertheless, some remarkably antiquated rules survived until the passing of this Act. The Act is based on the Report of the Scottish Law Commission on Outdated Rules in the Law of Husband and Wife, No.76, published in 1983. Its more important provisions are summarised below. Some of them clarify obscure or doubtful areas of law rather than change it significantly.

A promise or engagement to marry has now no contractual effect in Scots law, and no breach of promise action may be brought in the courts of Scotland, irrespective of what system of law applies to the agreement. So even if an engagement is a binding contract under some foreign legal system, it will be impossible to sue for breach in Scotland, even though the Scottish courts would otherwise be convenient to the parties.

Actions of adherence, whereby a deserted spouse sought an order from the court requiring the deserting spouse to resume cohabitation, are abolished.

Formerly, a husband of full age became the curator of his wife for so long as she remained a minor; if he were himself a minor, her parents continued to act as her curators, but he was not himself similarly incapacitated. Now, no married person of full age shall be subject to the curatory of any other person by reason only of being a minor. Effectively, the capacity of a married minor is assimilated to that of any minor whose parents are dead, and who has no curator.

The husband has now lost any right he may have had alone to decide where the matrimonial home should be.

Formerly, a woman could transfer funds to a trust before her marriage so as to secure an alimentary life-rent for herself out of these funds. Similarly, an intending husband might create a similar trust for the benefit of his future wife. The income of these trusts was protected from the creditors of the party creating it. This was an exception to the basic rule that one cannot settle his own property in such a way as to defeat his creditors, and at the same time secure an income for himself. These "ante-nuptial marriage contracts" may no longer afford this protection.

The rule that a husband was liable for debts incurred by his wife before marriage – which arose because in former times a wife's moveable property "went into her husband's pocket" – is abolished. It probably was a dead letter anyway.

At common law a wife was presumed to be *praeposita rebus domesticis*, or manageress of her husband's household. Accordingly, he was liable for contracts which she entered into in this capacity. The ordinary rules of agency appear to be sufficient to deal with modern conditions, and so this specialty of our law has been abolished. A man remains liable to re-imburse anyone who has provided his wife with necessaries when she is entitled to receive aliment from him but he fails to provide it.

A husband ceases to be liable for his wife's expenses in litigation in cases between her and third parties where he had no interest in the subject matter of the dispute.

- 18 *Tenants' Rights, Etc. (Scotland) Amendment Act* This Act continues

the saga of tenants' rights legislation in the form of a series of textual amendments to the original Act of 1980.

The period of occupation of a public sector house required for qualifying for the right to purchase is reduced from three to two years. The range of discounts is extended, to 32% where occupation has been for the minimum qualifying period, and up to 60% after 30 years occupation. The government believes that about 350,000 older tenants could benefit from this extra discount while the reduction of the qualifying period to two years should benefit about 30,000. In all cases, the time spent living in a house as a child of a former tenant of a relevant house, to whose rights he has succeeded, must be included in calculating the qualifying period.

The list of public sector landlords whose tenants may count their tenancy towards calculating the qualifying period for the right to purchase is extended, and may be further extended by order made by the Secretary of State.

Islands councils, unlike mainland councils, are both housing and education authorities. Consequently, teachers and former teachers who occupied a house provided by an islands council specially for a teacher at a particular school inadvertently enjoyed the privilege granted to them by the Act of 1980 to buy or continue to rent when their employment came to an end. These councils are given the right to refuse to sell, and to obtain an order from the sheriff to recover possession from a former teacher or a person who has succeeded to the tenancy of a former teacher, where suitable alternative accommodation is not available for someone who is, or is to be, employed by the council in its capacity as education authority.

As an addition to the so-called "Tenants' Charter", the Secretary of State is enabled to make a scheme, to be published in regulations, to permit public sector tenants under a secure tenancy or in tied houses to carry out repairs that would otherwise be the responsibility of the landlord. Costs that would have been incurred by the landlord will be recoverable to the extent permitted by the scheme, and disputes will be settled according to the regulations – probably by arbitration rather than by the sheriff.

- 26 *Inshore Fishing (Scotland) Act* This Act repeals entirely 15 Acts relating to fishing, from 1756 to 1959, and parts of as many more. It was manifest some twenty years ago that the regulation of inshore fishing

was the subject of legislation that was difficult to understand, and in parts obsolete and irrelevant. A committee on the Regulation of Scottish Inshore Fisheries appointed by Lord Ross of Marnock in 1967 under the chairmanship of Lord Cameron reported in 1970 (Cmnd. 4453) but action was delayed pending the adoption of the European Community's common fisheries policy early in 1983. Before this event, the views of the industry had been sought following the distribution of a departmental consultation paper in 1981.

This is essentially an enabling Act, so that the real meat of the legislation will be contained in orders made by the Secretary of State. These can be varied from time to time to respond to the needs of the industry, and avoid an accumulation of antiquated legislation as happened in the past.

The Secretary of State will be able to make orders regulating fishing in Scotland's coastal waters up to six nautical miles from the base line from which the breadth of the territorial sea is measured. Within this distance, United Kingdom fishermen have exclusive rights. The orders may prohibit fishing for all fish, or for specified kinds of fish, or fishing by specified methods, or from a specified kind of boat, for specified periods. Any prohibition may be subject to exceptions. If you catch the wrong fish or catch them by the wrong method, in the course of otherwise lawful fishing, you have to return them to the sea.

The intention is to create static gear reserves and fish nursery areas, where fishing by trawl, seine and other mobile gears will be banned. It is also intended to abolish the general restrictions on the use of certain types of trawl gear within three miles of the coast. As a consequence of this, fishing by trawl, seine or other mobile gears is banned within half a nautical mile of any fixed salmon net.

Other provisions are essentially a re-enactment of existing legislation concerning the enforcement powers of British sea fisheries officers, penalties and recovery of fines.

- 31 *Rating and Valuation (Amendment) (Scotland) Act* This Act follows the Green Paper on "Alternatives to Domestic Rates" and the White Paper entitled "Valuation and Rating: Proposals for Reform" published in 1983 (Cmnd. 9018).

The method of calculating loss of rate support grant is amended to ensure that in future the loss of grant will be directly proportional to the

amount of overspending on the part of an individual authority, as compared with the Secretary of State's guidelines.

The machinery of "rate-capping" is streamlined so as to enable the Secretary of State to control more effectively rate increases generally, or failure to reduce them. This is however regarded by the government as a power to be exercised only as a last resort.

The imposition of rates on non-domestic ratepayers is a notorious example of taxation without representation. They meet about 60% of the rates bill. An amendment to the *Local Government (Scotland) Act 1973 (c.65)* requires local authorities, before fixing a rate, to inform and consult non-domestic ratepayers and bodies representing their interests, in accordance with procedure to be laid down by the Secretary of State. The government hopes that in this way local authorities may become advised of the likely impact of proposed rate levels on employment in their area.

The *Rating (Disabled Persons) Act 1978 (c.40)* is amended. It had been held in *Royal Blind Asylum and School v. Lothian R.C.* 1982 SLT (Sh.Ct.) 89 that the 100% rate rebate specified in that Act did not apply unless the whole premises were dedicated to the provision of accommodation, facilities and services for disabled persons, and for related ancillary purposes. Briefly, somewhat surprisingly, but following clear decisions of the House of Lords, it was held that fund-raising activities were not ancillary to the actual carrying out of the Asylum's functions. The amendment provides a 50% threshold to qualify for some rebate, and the rebate will be calculated on a pro rata basis in accordance with the use of the premises within the stipulated categories.

Relief from rates may be granted in cases where premises are to be partly occupied for a short time (not defined) and where plant, machinery and equipment is not in active use but is kept on the property where it was last used.

The Secretary of State may impose limits on the amount that a housing authority may transfer out of the general rate fund to the housing revenue account.

In order that members of the public may be better informed as to how the discretionary two-penny rate is spent, authorities are required to keep separate accounts of any expenditure incurred under this head.

The Act also secures better access for the public to documents relating to local authority accounts.

When property changes hands, the new proprietor, tenant or occupier will be able, within six months of the date of entry, to lodge an appeal against its current valuation, just as his predecessor was at the time of revaluation.

In order to speed up the handling of business by the Lands Valuation Appeal Court, most cases will now be handled by one Court of Session judge. There is no appeal to the House of Lords.

Individual caravanners are given the right to have their static leisure caravan valued separately from the rest of the caravan site, as in England and Wales. Other provisions designed to promote equality on both sides of the border exempt reed beds from rates, exclude the common parts of shopping malls from the valuation roll and exempt mooring buoys attached to an anchor or weight and designed to be raised from the sea or river bed from time to time, in calculating net annual value.

Because of the difficulty in finding comparable subjects in Scotland, limited power is given to make comparison with English valuations.

- 36 *Mental Health (Scotland) Act* Having had a major amending Act in 1983(c.39) we now have the consolidation Act, bringing together all the relevant legislation surviving from the *Mental Health (Scotland) Act 1960 (c.61)* onwards. This Act came into force on 30th September 1984.
- 45 *Prescription and Limitation (Scotland) Act* This Act implements the proposals of the Scottish Law Commission contained in its Report No. 74: Prescription and the Limitation of Actions: Report on Personal Injuries Actions and Private International Law Questions, published with a draft Bill in 1982.

The rules concerning the limitation of actions in respect of personal injuries, including such injuries resulting in death, and allowing extensions to the basic three year period from the date when the injuries were sustained, were not easily understood and did not always appear to lead to just results. So the relevant sections of the Act of the same name passed in 1973 (c.52) have been replaced with new ones.

The basic three year period remains, but it may be extended if, for example, the consequences of the injuries were not immediately apparent, or if it had at first appeared that the defender was so impecunious as not to be worth pursuing. It may also be extended if, as is not uncommon where an accident happens on a building or engineering site, records as to who was personally or vicariously responsible may be difficult to trace, and there has consequently been difficulty in ascertaining the identity of whom properly to sue. Perhaps the most important provision of this Act is one concerning the difficulties that have arisen in the past where an obligation has been governed by the law of another country. Some rules regarding the effect of the lapse of time extinguish the obligation, others are procedural and merely prevent a claim being made in the courts. In such a case, if a person pays up on receipt of a claim, he cannot claim the money back on the grounds that no debt was due. If the foreign rule were regarded as purely procedural, imposing a time limit on raising the claim, the Scottish courts would disregard it and, instead, apply Scottish rules as to limitation.

Now the Scottish courts will apply the law which applies to the case also in relation to questions as to the extinction of obligations and to the limitation of time within which proceedings may be brought. If, however, the relevant foreign rule is found to be incompatible with the principles of public policy, for example, because it discriminates against people on grounds of race or origin, then the former practice of the Scottish courts will be observed.

- 54 *Roads (Scotland) Act* This Act replaces with effect from 1st January 1985 all or part of legislation stretching back over more than a century, the oldest long antedating the motor car. It was preceded with the usual rounds of consultation, a consultation document being produced in 1981, following the proposals of the Report of the Committee of Inquiry into Local Government in Scotland under the chairmanship of Lord Stodart (Cmnd. 8115).

The aim of the Act is to provide a code of modern simplified roads law, replacing but largely culled from the multiplicity of general and local acts whose language was somewhat antiquated and which had become increasingly difficult to administer, especially after the restructuring of local government in 1975. It is evolutionary rather than revolutionary in content.

Terminology is rationalised.

The statute book loses words such as "highway", "street" and "lane" and these are replaced by the simple word "road". This leads to a schedule of consequential amendments to other legislation, taking up almost precisely one third of the pages in the Queen's Printer's edition of the Act.

Modernisation also brings consequential metrication, but speeds are still expressed in miles per hour.

It is perhaps worth noting that the Act is largely permissive so far as roads authorities are concerned, leaving these authorities with extensive discretionary powers.

Thus we find expressions such as "as they think fit", "whenever it appears to them necessary or desirable", "as they think necessary", "such steps as they consider reasonable", and "in their opinion".

It is not clear what is the reason for these differing expressions. Some may of course be necessary because of the context, but others appear to be no more than elegant variations. But it is possible that they could occasion difficulties in questions of administrative law, and, especially in relation to the liability of an authority in delict where it has chosen not to exercise its discretion to act.

For example in *Western SMT v. Magistrates of Greenock* 1958 SLT (Notes) 50 Lord Cameron held that the local authority was at fault when its failure to keep a road under proper inspection, use of unsuitable materials and omission to keep the surface in proper repair, led to three buses being involved in skidding accidents in the summer of 1955. Cases such as this may require to be re-examined in the light of the new phraseology. It is not clear whether the above expressions are to be interpreted objectively (what a reasonable authority would do) or subjectively. If the latter, the onus on anyone claiming reparation for personal injury or damage to property against a roads authority might be considerably increased.

Apart from modernisation and clarification of the law, there are several innovations which will be welcome.

One important innovation, following the English *Highways Act 1980* (c.66), is the provision for the deposit of a roads bond with the local roads authority to secure that adequate funds will be available to meet the cost of making up private roads in association with new residential

developments should the developer run into financial difficulties.

The owners or occupiers of land adjoining public roads, or anyone else, may be given written permission by a roads authority to plant or maintain trees, shrubs or other plants by the roadside within the boundary of the road, that is, along the verge. In a number of places the roadside is made more attractive by the planting of, for example, daffodils, and it would be unfortunate if this could not be encouraged so as to beautify the countryside.

The Secretary of State is empowered to provide picnic sites with parking facilities near trunk roads, and erect suitable buildings for toilet services and caterers.

56 *Foster Children (Scotland) Act* This Act brings together provisions relating to foster children in the *Children Acts 1958 (c.65) and 1975 (c.72)*, and in other recent legislation. It came into force on 31st January 1985.

58 *Rent (Scotland) Act* The last consolidation of the Scottish Rents Acts was in 1971 (*c.28*). Relevant legislation from the *Rent Act 1965 (c.76)* onwards is brought together in this Act, which came into force on 31st January 1985.

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