

SCOTTISH LEGISLATION 1985

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The Acts of Parliament passed in 1985 were both numerous and voluminous. Of the 76 passed, five were *Scotland only* Acts, about several of the others are not without interest to the student of the government of Scotland.

Contrary to the usual practice, England and Wales had the “bumper supplement”, in the long awaited *Insolvency Act*; Part I prescribes the qualifications for the profession of insolvency practitioner, and Part II deals with what is called “Company Insolvency, etc”. These provisions apply, for the most part, north and south of the Border. But Part III, dealing with individual insolvency, and many of the miscellaneous provisions of Part IV – together more than half the Act – apply to England and Wales only. It is of course arguable that it is Parts I and II which comprise the “bumper supplement”, by extending to Scotland what is essentially an England and Wales Act. Whichever way it is, the Scottish practitioner is going to have to buy a lot of unnecessary paper.

This is of course not the fault of the draughtsmen, but of the rules of parliamentary procedure and the associated pressures of the parliamentary timetable. Now that the prices of Acts of Parliament and all other Stationery Office publications are so high, it would be reasonable for Parliament to adopt a modified version of the procedure followed for consolidation Bills, so that Acts could be passed and printed in a form convenient to the public to which they are addressed, even if Bills from which they derived were arranged in the traditional manner for the convenience of debate.

The same criticism may be applied to the *Law Reform (Miscellaneous Provisions)(Scotland) Act 1985*, which could well have been split up into about 25 short Acts, to suit the diverse interests, and the convenience, of various users. These would have been no briefer than many of the other Acts which found their way on to the statute book in 1985.

There were nine consolidation Acts in 1985; three deal with various

aspects of company law and three with housing law, the leading ones in each of these groups running to nearly 750 sections and 25 Schedules and to 625 sections and 24 Schedules respectively. The *Housing Associations Act* is an interesting risotto of Great Britain, England and Wales, and *Scotland only* provisions. These two groups are each accompanied by separate *Consequential Provisions Acts*. This is a useful innovation, because relatively peripheral or transitional matters are not included in the substantive legislation.

An important feature of the *Consequential Provisions Acts* is the fact that, each in its own way, they unambiguously state that the re-enactment of provisions in the consolidation Acts, and the repeal of the old legislation, do not affect the continuity of the law. So, contrary to the view expressed by some authorities, these consolidation Acts clearly do not represent a fresh start. These authorities have deplored the practice of counsel of indulging in legal archaeology when dealing with problems involving the interpretation of consolidation Acts; accordingly, decisions under Acts now repealed by the consolidation process are still relevant and must not be ignored. Legal archaeology will therefore continue to flourish, aided by invaluable tables of derivations and destinations.

The programme of privatisation is helped on its way with the controversial *Trustee Savings Bank* and *Transport Acts*.

The decision in the costly fluoridation case, in which a judge of the Court of Session held, at the instance of an edentulous lady from Glasgow, that it was unlawful to add fluoride to water supplies, was overturned by the *Water (Fluoridation) Act*, for the benefit of the inhabitants of the whole of Great Britain.

Whether the battle to promote a return to Victorian standards will be assisted by the less publicised, and presumably less controversial, three-clause *Betting, Gaming and Lotteries (Amendment) Act*, or the almost as brief *Gaming (Bingo) Act*, is open to question. The former permits us to go to the dogs, or follow the horses, every day except Sundays, Good Friday or Christmas Day, an increase of just under 140% at any one site. The latter gives us the opportunity to reap the benefits of modern technology and so to indulge in multiple bingo and thus to win even bigger prizes.

#### Chapter Number

16. *National Heritage (Scotland) Act* This Act provides for the establishment of two new boards and amends the law in relation to two others.

The Royal Scottish Museum has, since 1901, been part of the Scottish Education Department, and the National Museum of Antiquities of Scotland has, since 1954, had its own board of trustees.

Under the new Act, we now have the Board of Trustees of the National Museums of Scotland. This takes over the Royal Scottish Museum and the National Museum of Antiquities of Scotland, together with what are usually known as the Royal Scottish Museum's outstations, such as the Museum of Flight at East Fortune in East Lothian, and the Museum of Costume in Shambellie House, near Dumfries.

The Board will have from nine to fifteen members, appointed by the Secretary of State, and will be financed by a grant-in-aid from the Scottish Education Department. Members will have to be suitably qualified, as laid down in the Act, and at least one will be a Fellow of the Society of Antiquaries of Scotland. In turn, the Board will appoint a Director of the National Museums of Scotland, with the approval of the Secretary of State, and other staff.

The Board may work with other, non-national, museums, and bodies such as the National Trust for Scotland, but the precise nature of collaboration is left to the Board itself to decide.

The administration of the Royal Botanic Garden, but not the ownership of the land and buildings occupied by it, is transferred from the Department of Agriculture and Fisheries of Scotland to the Board of Trustees of the Royal Botanic Garden, Edinburgh. This Board will have from five to nine members, appointed by the Secretary of State from persons qualified as laid down in the Act. The Regius Keeper of the Royal Botanic Garden will be appointed by the Queen, and the rest of the staff by the Board.

Despite its name, the Board's activities need not be confined to Edinburgh. Its responsibilities will cover the outstations at the Younger garden at Benmore, the Logan garden near Stranraer and the Dawyck garden near Stobo.

One of the oddities of the Act is the provision that prevents the Board from altering the hours when the Garden is open to the public without the consent of the Secretary of State. But as his consent is also required for the fixing or alteration of any fees charged to members of

the public for entry, this is probably meant to protect the public from any action by the Board to try to meet cuts that might be imposed by the government by reducing facilities.

The Board of Trustees of the National Galleries of Scotland is increased, so as to consist of from seven to twelve members, appointed by the Secretary of State, again from persons with suitable qualifications as listed. The Board will appoint a Director of the National Galleries of Scotland, with the approval of the Secretary of State, and other staff.

The constitution of the Board of Trustees of the National Library of Scotland is updated. It will consist of thirty-two members, of whom eleven will be ex officio, such as the Secretary of State, the Queen's and Lord Treasurer's Remembrancer, the lord provosts of the four cities, and others to represent the law and the church. Five will be appointed by the Queen on the recommendation of the Secretary of State; these must include at least one representative of organised labour. As the Library started life as the Advocate's Library, and still serves this purpose, the Faculty appoints five members, while the Scottish universities appoint four, and CoSLA two. The appointment of the Librarian is subject to the approval of the Secretary of State.

Instead of the Keeper of the Records of Scotland being ex officio chairman of the Scottish Records Advisory Council, an outside chairman may now be appointed. The Keeper is given express power to accept responsibility for the safe keeping of records other than public ones, to acquire records and accept gifts and loans of records.

33. *Rating (Revaluation Rebates)(Scotland) Act* Following the revaluation of properties in Scotland in 1985, it became apparent that there had been a substantial shift of rateable value from manufacturing industry towards domestic property. Unless there were an adjustment in the imposition of rates, this shift of rateable value would have caused a corresponding shift of the rates burden.

The Secretary of State sought two remedies. He made an order reducing the level of industrial derating from 50% to 40%, and announced an intention to increase the domestic rate relief first to five pence, and subsequently to eight pence, in the pound. In the commercial sector the overall effect was considered to be neutral, but there were wide variations in individual cases in this sector, some increases being regarded as crippling, or even fatal.

Because these steps did not provide an adequate remedy to the hardship caused by revaluation, the government introduced a Bill to require the making of rebates in certain circumstances.

The Act enables the Secretary of State to make an order obliging rating authorities to grant rebates according to a formula contained in the order. To qualify for rebate, the new rateable value has to be more than three times the old. The Secretary of State indicated that the rebate would be subject to a maximum of £10,000 on any one property.

The rebate scheme does not apply to lands and heritages occupied by local authorities, joint committees and joint boards, for the purpose of their functions. Nor does it apply to those buildings which enjoy partial derating because they are used for livestock production, nor to industrial and freight transport lands and heritages, since they already enjoy industrial derating.

Rebates should be awarded automatically, without the need for the individual ratepayer to lodge a claim, but a claim procedure was envisaged for the benefit of anyone who might fail to receive a rebate through inadvertence.

37. *Family Law (Scotland) Act* This Act is based on two reports on Family Law by the Scottish Law Commission – the Report on Aliment and Financial Provision (November 1981, Scot.Law.Com.No.67) and the Report on Matrimonial Property (June 1984, Scot.Law.Com.No.86). The Act brings the law into line with modern social practices and attempts to deal with the often intractable financial problems arising on divorce.

At common law, the obligation to aliment each other had always existed mutually between ancestors and descendants. In modern times, however, the burden of maintaining elderly parents and grandparents has fallen increasingly on the state. The obligation is now, by this Act, limited to that of parents to aliment their children, and of individuals to aliment children accepted as children of the family, including, for example, step-children. The word "individuals" is used, in order to ensure that the provisions will apply to single-parent families. Children are defined as persons under the age of 18, or, if they are undergoing educational or vocational training, under the age of 25.

Husbands and wives now have a mutual obligation to aliment each other. Formerly, it was doubtful whether a wife had any duty to aliment her husband, if he could maintain himself at subsistence level. The duty applies to the spouses of valid polygamous marriages. It ceases on death or divorce.

Nevertheless, the common law rule, which entitles anyone who is left without support on the death of a relative, who was liable to aliment him or her, to claim aliment out of the estate of the deceased, or against anyone who has benefited from the succession, is preserved. Claims have been rare, presumably because the law of intestate succession and the rules concerning legal rights of surviving spouses and children have effectively covered most situations; families may have made arrangements amicably, or individuals may have relied on state benefits. The common law rule will in future be applicable to the more restricted list of persons to whom the obligation of aliment is now owed.

These rights to claim aliment may be enforced in the Court of Session or in local sheriff courts. Payments of aliment must be made periodically, and not in one lump sum; but extraordinary single payments may be ordered to meet special needs, including child-bearing, funeral and educational expenses. The amount of any award may be fixed by the court, having regard to all the circumstances of the case, including the needs and resources of the persons concerned, and their earning capacities. If the defender already maintains a person voluntarily, such as an aged friend or relative, that fact will be relevant in quantifying liability.

Future liability may be excluded by agreement, but the agreement may be set aside by the court, if it was not fair and reasonable at the time when it was entered into.

In an action for divorce, either party may apply to the court for an "order for financial provision". Readers not familiar with Scottish legal terminology should note that the term "aliment" is used only during the subsistence of a marriage. On divorce, the anglo-american word "alimony" is not used. For the purposes of this Act, actions for declarator of nullity of marriage are treated in all respects as if they were actions for divorce, even for the benefit of the part denying the existence of the marriage.

An order for financial provision may provide for the payment of a capital sum, the transfer of property, such as houses and motor cars, and the making of periodical financial allowances. The power to transfer the ownership of the matrimonial home may reduce the hardship suffered by many women in the past, when the house has been sold "over the head" of the ex-wife. The principles by which the court is to be guided, in order to establish fair treatment of both parties, are set out in great detail.

Only in exceptional circumstances will an order awarding periodical allowances be made to endure for more than three years. This is considered to be long enough to permit the spouse making the application to adjust to the changed circumstances. The order ceases to have effect on the remarriage of the party to whom payments are being made; if the other party dies, the order may continue to operate as a claim against his estate.

The Act is aimed at securing a clean financial break on divorce, and at bringing to an end the concept of periodical payments as a "meal-ticket for life".

During and after a marriage, there is a rebuttable presumption that household goods that are kept for the joint domestic purposes of the spouses – but not money, investments, motor vehicles and domestic animals – are owned by spouses equally. Similarly, any money saved, or property bought with such money, by either spouse out of a housekeeping allowance provided by either of them, is presumed to belong to each in equal shares.

66. *Bankruptcy (Scotland) Act* This Act provides Scotland with a modern code of law on bankruptcy, concerning debtors other than limited companies. So it applies to individuals, living and dead, partnerships, trusts, clubs and the like.

The technical term used throughout the Act to describe "bankruptcy" is "sequestration". "Bankruptcy" appears only in the short title, and in the expression "Accountant in Bankruptcy".

There is plenty of background material for anyone wishing to study the context of this Act. The principal source is the Scottish Law Commission's Report on Bankruptcy and Related Aspects of Insolvency and Liquidation (February 1982, Scot.Law Com. No.68). But the newfangled insolvency practitioners created by the *Insolvency*

*Act 1985 (c.65)*, which deals with company insolvency for the whole of Great Britain, and individual insolvency for England and Wales, appear in the Scottish Act. So it is also useful to have regard to the two reports of the Review Committee on Insolvency Law and Practice – the Cork Committee – (July 1980, Cmnd 7968 and June 1982, Cmnd 8558) and to Bankruptcy: A Consultative Document (July 1980, Cmnd 7967).

The old Scots *Bankruptcy Acts, 1621 c.18 and 1696 c.5* disappear, as does the *Bankruptcy (Scotland) Act 1913 (c.20)*. So “conjunct and confident persons” become “associates”, “fraudulent preferences” become merely “unfair preferences” and “notour bankruptcy” becomes “apparent insolvency”. Trust deeds for behoof of creditors survive (except that they are now said to be “for the benefit of creditors generally”), as a useful and economical device for gathering in the assets of a debtor. Indeed, they are encouraged, by the introduction of rules whereby they become “protected trust deeds”, which will no longer be liable to be superseded by sequestration at the instance of a non-acceding creditor, nor liable to be treated as unfair or fraudulent preferences, as they were under the 1696 Act.

Both the Court of Session and the sheriff courts will have jurisdiction in bankruptcy, but, if proceedings begin in the Court of Session, most of the subsequent procedure will normally be remitted to the appropriate sheriff.

The newly created Accountant in Bankruptcy, who is responsible for the general supervision of the administration of sequestration and personal insolvency, is in fact the Accountant of Court (i.e. of the Court of Session), who already had certain responsibilities in this connection. He is now required to maintain a register of insolvencies, with details of estates sequestrated and of trust deeds for the benefit of creditors generally which become protected trust deeds.

Insolvency practitioners are defined in the *Insolvency Act*. They are such members of professional organisations recognised by the Secretary of State as are permitted by these organisations to act as insolvency practitioners. Effectively, this means solicitors and accountants.

At the beginning of the sequestration it is the court which appoints a qualified insolvency practitioner, whose name appears on the list of interim trustees maintained by the Accountant in Bankruptcy, as

interim trustee, to safeguard the estate of the debtor until a permanent trustee is appointed. Individuals on the list of interim trustees may not refuse office.

Within 28 days, unless the sheriff allows more time, at a statutory meeting of creditors, the creditors elect a qualified insolvency practitioner as the permanent trustee, unless the assets are such as to make the payment of a dividend unlikely. In this case, the court appoints the interim trustee as permanent trustee, and the expenses of sequestration, including his fees, will be met out of public funds. One may expect that even in cases where there is an election the interim trustee will be elected as permanent trustee.

All the property of the debtor rests in the permanent trustee, so that he can deal with it as if he were a beneficial owner. There are, however, restrictions on disposing of the debtor's family home; the authority of the court may have to be obtained to do this. The court will take into account the needs and financial resources of the debtor's spouse, or of a former spouse, of any child of the family, and the interests of the creditors. The interests of the so-called non-entitled spouse under the *Matrimonial Homes (Family Protection)(Scotland) Act 1981 (c.59)* are also protected.

Perhaps the most important step forward taken by this Act is the reduction of the entitlement of the Crown to priority for unpaid taxes, and of local authorities for unpaid rates. Especially in a small community, the bankruptcy of one tradesman could have a domino effect, and pull down other tradesmen with it. The Crown and local authorities have broader backs.

The Scottish Law Commission adopted a root and branch approach, and proposed the abolition of all these antiquated priorities. The Cork Committee found that the ancient prerogative of the Crown was supportable neither by principle nor by expediency, but tolerated it where the debtor has acted as a tax collector and not as a tax payer. The Treasury's attitude was that it was an involuntary creditor – but are not most of us, in the ultimate analysis?

The Bill, as introduced into Parliament, followed the Treasury line, but common sense prevailed. Preferential ranking of Crown debts is limited mainly to deductions of PAYE from the salaries of employees, to social security contributions, and to car tax, referable to the twelve months before sequestration, and to VAT for the six months before

this date. Employees have priority in relation to contributions to occupational pension schemes and arrears of pay up to a limit to be fixed in regulations. Rates are no longer granted priority.

In most cases, the debtor will be automatically discharged three years after sequestration. He may obtain a certificate to that effect from the Accountant in Bankruptcy. However, the permanent trustee, or any creditor, may apply to the sheriff at least three months before the end of the three years for deferment of discharge. Deferment may be granted for up to two years, and is renewable. But the debtor whose discharge has been deferred may, at any time, petition the sheriff for discharge.

Sometimes sequestrations go off the rails. Formerly it was necessary to apply to the Court of Session to exercise its equitable jurisdiction, the *nobile officium*, to put things right. Now the sheriff is empowered to cure defects in procedure where any requirements of the Act or relevant regulations have not been complied with, to put it back on the rails again.

- 73 *Law Reform (Miscellaneous Provisions)(Scotland) Act* This Act concerns many aspects of the law as its name implies, and it is one of the most wide-ranging of the Law Reform Acts passed in recent years. Only a relatively brief, and somewhat selective, outline of its details can be given here.

The Act restricts the power of a landlord of commercial or industrial premises to rely on provisions in a lease which terminate it automatically, or permit him to terminate it, for simple non-payment of rent, without giving the tenant a notice requiring him to pay within a stated time limit. This time limit in most cases will be not less than 14 days. Where the breach of the lease is non-monetary, such as failure in an obligation to carry out repairs, the test will be what a fair and reasonable landlord would do in the circumstances.

Where it is considered that a document, other than a testamentary document (an expression which is wider in meaning than a will), has failed to express accurately the common intention of the parties to an agreement, or the intention of the grantor of a document relating to unilateral juristic acts, such as covenants and other promises, at the date when it was executed, the Court of Session or the local sheriff court may make an order to rectify the document, with retrospective effect.

The court must have regard to all relevant evidence, written or oral. The interests of third parties are protected. Thus, the retrospective effect of a rectifying order may be modified. In appropriate circumstances, the rectifying order may itself be rescinded, or an innocent third party compensated by the person who applied for the order. But an application to the court for rescission or compensation must in all cases be made not later than five years after the making of the rectifying order.

Recent conflicting decisions of the courts have demonstrated the state of confusion of the law of Scotland in relation to negligent misrepresentation. The Act of 1985 attempts to remedy this, and to clarify the law. Formerly, if a person had been induced to enter into a contract by negligent misrepresentation made by, or on behalf of, another party to the contract, he was nevertheless considered by traditional jurists to be prevented from recovering damages from that other party for any loss or damage suffered, if the misrepresentation was merely negligent.

On this view, he had to be satisfied with rescission of the contract, and restitution of property, alone, unless he could prove fraud. It will now be sufficient to prove a duty of care, and the fact that the misrepresentation was negligent. This brings these special cases of negligent misrepresentation into line with the general principle which is the basis of delictual liability, namely, fault, or *culpa*. This brings Scots law roughly into line with that of England, and perhaps also with the developed law of the later Roman Empire.

Under the Act of 1985, all actions based on verbal injury, including the most common form, namely, actions of defamation, must now be brought within three years of the date when publication of the defamatory material first comes to the notice of the pursuer. Formerly the period of time was five years. The new rule brings the time limit into line with that for claims based on personal injury.

The *Matrimonial Homes (Family Protection)(Scotland) Act 1981 (c.59)* has now been heavily amended, to strengthen the right of occupation of the so-called non-entitled spouse (that is, the spouse who does not have a legal title to the home, as owner or tenant). The Act of 1985 removes some technical difficulties that have developed in the conveyancing of houses as a result of the Act of 1981.

Another provision brings Scots law into line with English law, by removing the privilege against self-incrimination in civil proceedings relating to the protection of intellectual property, and to the prevention of "passing-off". This will help the owners of copyright in actions relating to pirating of video-tapes.

In Scotland, consumers have had problems in pursuing their claims in the courts, because of the expense involved and the difficulty which ordinary citizens have found in understanding the existing procedure for summary causes, which was introduced in 1976 under the *Sheriff Courts (Scotland) Act 1971 (c.58)*.

So we now have a new "small claims procedure". The precise descriptions of cases which will fall within the new procedure, including the maximum value of any claim, will be laid down in an order made by the Lord Advocate. The draft order will have to be approved by both houses of Parliament, so that it will not be possible to slip it through without discussion and publicity. This should guarantee that discussions will take place with interested pressure groups before the draft is laid before parliament. The normal rules of evidence will not apply to this procedure. In very small claims (as prescribed by the Lord Advocate), no expenses will be awarded; in others, they will be limited.

The children's hearings, conducted by children's panels, which were established by the *Social Work (Scotland) Act 1968 (c.49)* to replace traditional juvenile courts, have stimulated interest among lawyers, sociologists, criminologists and others in many countries. Several improvements are made to the system, *inter alia*, to facilitate the adoption of children who are subject to supervision under the Act of 1968.

Further provisions deal with the detention of young offenders over 16 but under 18 years of age. It also deals with the functions of the Parole Board in relation to the small number of children under 16 who are detained after a jury has found them guilty of an offence, and the supervision of these children when they are released after the expiry of their detention.

Several new sections are inserted in the *Criminal Procedure (Scotland) Act 1975 (c.21)*. The rules of evidence in trials relating to rape and other sexual offences have, for the most part, been established at common law. These rules have not always been observed in recent

cases. The Scottish Law Commission advised that the rules should be reformed. The new sections effectively lay down a code of rules for eliciting evidence in these trials.

Scotland has many serious problems arising from the abuse of drugs. Further new sections are inserted in the *Criminal Procedure (Scotland) Act 1975*. Where a person has been found guilty by a jury of offences concerning the production, supply, possession, importation or exportation of certain drugs, the court is required, in addition to imposing a prison sentence, to impose a fine effectively to confiscate any profits likely to have been made by the offender from the crime for which he has been convicted. If the fine is not paid, the term of imprisonment will be increased by up to two years. It is to be noted that it is only the profits obtained by the individual offender from the particular crime before the court that will be confiscated. Profits obtained by a co-accused, or arising from a previous course of drug trafficking, are immune.

Scottish solicitors (who have traditionally worked together in partnerships) now, for the first time ever, will be permitted to carry on their practices as bodies corporate, called "incorporated practices". Detailed rules as to the management and control of incorporated practices will be made by the Council of the Law Society of Scotland. The shareholders and directors of incorporated practices will themselves normally be practising solicitors, and subject to the usual disciplines of the profession.

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