

SCOTTISH LEGISLATION 1990

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Introduction

There were only three “Scotland only” Acts in 1990, but all are of considerable importance, although they may have a somewhat restricted or specialised “market”.

The *Term and Quarter Days (Scotland) Act 1990 (c 22)* introduces some rationality to a formerly rather chaotic system, and divides the year into four terms, as nearly equal as may be.

The *Enterprise and New Towns (Scotland) Act 1990 (c 35)* is really two quite separate statutes. The first part creates Scottish Enterprise and Highlands and Islands Enterprise, in place of the Scottish Development Agency, the Highlands and Islands Development Board and the Training Agency. The New Towns provisions are drafted so as to be able to be conveniently slotted into any reprint of the *New Towns (Scotland) Act 1968 (c 16)* in Statutes in Force, but in the mean time if you are interested only in New Towns you have to buy about ten times as much printed paper as you need.

Finally, the *Law Reform (Miscellaneous Provisions) (Scotland) Act (c 40)* consists of five parts extending to 75 sections and nine schedules. The first three parts deal with the supervision of Scottish charities (drawing on several provisions of the English *Charities Act 1960 (c 58)* for precedents), reform various aspects of the legal profession, modernise the rights of audience in the higher courts and the rules as to who qualifies for judicial appointments, and amend the licensing laws. Part IV contains a dozen miscellaneous reforms, and Part V financial and common form provisions.

It is unfortunate that Parliament persists in refraining from dividing up these miscellaneous provisions Acts into a series of shorter Acts for the convenience of potential users – the new provisions for charities could well have stood alone in any well-organised legal system, and if so printed would have been more convenient for those involved in administering charities. The expression “user friendly” is on every salesman’s lips these days, but when it comes to the actual supply of goods or a service one feels that that is a code for “customer hostile”.

The *Scottish Current Law Statutes* edition of the miscellaneous provisions

Act has no fewer than six annotators, and one may suspect that a not dissimilar number of draftsmen were involved. With modern technology at their fingertips, it is unlikely that they would be inconvenienced if the final product appeared as separate Acts. Alternatively the different groups of provisions could be drafted as separate Bills, but processed together in Parliament, as is already done with groups of related consolidation Bills. The Scottish Office is to be congratulated in splitting up statutory instruments when they are updated, as in the recent case of the Town and Country Planning general development orders, so as to separate procedure from deemed planning permission. Parliament could well follow this example in the interests of economy, efficiency, the environment and consumer choice.

Chapter Number

22 *Term and Quarter Days (Scotland) Act*. This is a useful little Act rationalising dates on which the four Scottish quarter days fall, with effect from 13th July 1991, the anniversary of the passing of the Act. These days are Whitsunday, Martinmas, Candlemas and Lammas, which divided the year into four unequal parts, varying in length from 115 to 65 days. Whitsunday and Martinmas are also term days, familiar to those who paid or still pay feu duty, and so called because in leases they denote the terms or days when a tenant enters or removes from the property leased. Although they may have little relevance now to leases of houses and other urban properties, they are still found in the context of agricultural leases.

Although based on the ecclesiastical calendar, in modern times only Candlemas and Lammas fell on the traditional dates, 2nd February and 1st August respectively. The Scottish Law Commission’s *Report on the Scottish Term and Quarter Days (Scot Law Com No 108)* contains a fascinating history of the fixing of these days. While in principle Martinmas fell on 11th November (the feast day of St Martin of Tours), Whitsunday varied with the date of Easter. Remedial legislation in the *Removings Act 1690 (c 98)* and the *Removings Act 1693 (c 40)* fixed Whitsunday as 15th May, the former for removings, and the latter (repealed by this Act) for all legal purposes.

The completion of the adoption of the Gregorian calendar in 1752 led to local variations, with 26 May and 22nd November as the term days, and various statutes dealing with agricultural leases fixed them as 28th May and 28th November. Consequently, in the same lease, the term dates could vary according to the context of the matter in question, unless specific dates were written into the lease.

So it is not surprising that the initiative to rationalise the system came from the Scottish Landowners’ Federation in 1986 and this was followed by a consultation paper from the Scottish Law Commission later that year.

All four quarter days now fall on the 28th day of their respective months, so that three of the terms now have 92 days and one 89 (or 90 in a leap year).

The new definitions apply to all leases, agreements and undertakings entered into, and all legal documents executed, from 13th July 1991, and they also apply to existing leases, agreements, undertakings and documents, unless some other date has been specified in them. They do not affect any rights or obligations enforceable

before the new provisions came into force.

- 35 *Enterprise and New Towns (Scotland) Act*. This Act sets the scene for the demise of what some might consider to be the jewels in the crown of successive post-war administrations so far as Scotland is concerned – the Scottish Development Agency, the Highlands and Islands Development Board and the five new towns. The SDA and the HIDB, together with the Training Agency of the Department of Employment, are replaced by Scottish Enterprise and Highlands and Islands Enterprise, which took over their responsibilities on 1 April 1991. Although not servants of the Crown, and not enjoying any Crown immunity or other privileges, they may be given directions by the Secretary of State (after due consultation) of a general or specific character as to the exercise of their functions. This, like many other provisions, is in more or less common form, with appropriate adaptations.

Although the opposition moved a reasoned amendment to reject the second reading of the Bill, the Secretary of State claimed that the preceding White Paper *Scottish Enterprise* had received overwhelming support from a wide range of organisations, including the STUC, whose general secretary, Mr Campbell Christie, had taken part in the launching of the government's proposals, and on behalf of the trade union movement had welcomed the proposed integration of training (previously based in the Department of Employment in Sheffield) and economic development. The Scottish Council of Voluntary Organisations, COSLA, the Church and Nation Committee of the General Assembly of the Church of Scotland, the Scottish Council Development and Industry, the CBI in Scotland and others were also cited as supporting integration. Not surprisingly, the opposition did not interpret these expressions of support in quite the same way as did the Secretary of State (who argued that training should be entrusted to the new bodies on the grounds that it was to be regarded as a form of investment), and criticised what it saw as merely a bureaucratic fusion of the investment and training functions of the bodies concerned.

The functions of the two bodies, spelt out in considerable detail, are broadly similar, but with some differences in emphasis. Both are required to prepare plans, subject to approval by the Secretary of State, for relevant training for employment and to help people to establish themselves in self-employment, and to take steps to improve the environment. Consultation with interested parties must not be forgotten. The functions of Scottish Enterprise emphasise economic development and the safeguarding of employment, the promotion of industrial efficiency and international competitiveness, while those of Highlands and Islands Enterprise speak of economic and social development. This difference reflects the difference between the goals of the former SDA and the HIDB.

After consultation with all and sundry, the Enterprise bodies must periodically prepare proposals (subject to the Secretary of State's approval) for development, redevelopment or improvement of any area affected by the exercise of their functions. Implementation of these proposals may be achieved by the bodies themselves, or in co-operation with others, or by others for payment. They also take over responsibility for ensuring that remedial steps are taken to bring into use or to improve the appearance of derelict, neglected or unsightly land. They may acquire, by agreement or compulsorily, derelict land and other land for securing these remedial steps. They may then dispose of the land free of charge to a local authority or new town development corporation, for use as public open space.

Both bodies are given extensive powers to stimulate economic activity in virtually every conceivable way, so that it is unlikely that either will be found acting *ultra vires*. The powers of entry may seem somewhat draconian, but similar powers – although queried at the time – were of necessity given to the HIDB, and earlier to the Milk Marketing Boards and other bodies, to enable them to fulfil their functions. They are given powers to obtain information, subject to safeguards backed by criminal sanctions.

Many functions may be delegated to others. Agreements may be made with persons having interests in land which, like agreements under section 50 of the Scottish Planning Act of 1972, may be registered in the Land Register of Scotland or the General Register of Sasines, as appropriate. These agreements may then be enforced by the Enterprise bodies against subsequent owners and occupiers of the land.

New Towns of the twentieth century owe their birth to the *New Towns Act 1946 (c 68)*, which was drafted essentially from an English point of view, with a single massive "Application to Scotland" section, equal in length to half that of the English provisions. Protests in the House of Lords had led to the distribution of a paper, reproducing the Bill as it applied to Scotland, but the public had to wait almost two decades for a convenient text of the Act. Eventually the 1946 Act was re-enacted along with material from other statutes to produce the *New Towns (Scotland) Act 1968 (c 16)*

Throughout the 1980s it gradually became clear that the future of the new towns idea was in the past. In September 1981 the Scottish Economic Planning Department (SEPD) issued a policy statement on the new towns, *New Towns in Scotland – A Policy Statement*, to serve as a consultative document, resulting in representations from twenty-four organisations and private individuals. Developments such as the sale of houses and private building in new towns were reviewed in an adjournment debate in the House of Commons on 10 April 1984.

A further consultative document, *The Scottish New Towns: Maintaining the Momentum*, was issued by the Industry Department for Scotland (a more appropriate title for the former SEPD). The overwhelming majority of the large number of replies stimulated by this was in standard form. The government published its decisions in a White Paper, *The Scottish New Towns: The Way Ahead* (Cm 711) in July 1989. These provide the basis for Part II of this Act, setting out the procedure for winding up and dissolution of new town development corporations, which will begin during the quinquennium 1991 to 1996.

The Secretary of State may, after consulting a new town corporation and the councils of the region or islands area and of each district in which any part of the new town is situated, make a winding up order by statutory instrument. The order will provide for the winding up of the corporation, specifying the dates for commencement and completion of the winding up. The order may also set out a timetable for the operation, require interim reports from the corporation to him and compliance with directions, and it may contain incidental provisions.

The Secretary of State may also make transfer orders by statutory instrument for the transfer of property, rights and liabilities of a development corporation to Scottish Enterprise, Scottish Homes, a local authority or a statutory undertaker, etc. Arrangements may be made, with Treasury consent, to reduce the liability of the

corporation in respect of advances made to it, having regard to any actual or proposed transfer order.

If the disposal or ordered transfer of land proves to be a white elephant for donees or transferees, the Secretary of State or the corporation with his approval, in either case with the consent of the Treasury, may make grants to them.

Any surplus from the winding up goes to the Exchequer, and any deficit is met by the taxpayer.

- 40 *Law Reform (Miscellaneous Provisions) (Scotland) Act*. It is not generally known that the Charity Commissioners have no jurisdiction in Scotland. However, the organisers of charities have in the past been able to obtain recognition from the Inland Revenue in order to qualify for tax relief, after satisfying the Revenue that their objects are charitable. Unfortunately, because of the Revenue's rules of absolute confidentiality in its dealings with charities, it was unable to acknowledge to anyone, even to an official body, that it had recognised an organisation as a charity, and it had no power to report on any wrongdoing by a charity, except in the field of taxation. This legislation was introduced following the issue of a consultative memorandum, "Supervision of Charities in Scotland", in July 1988. The memorandum elicited numerous responses, which indicated that, within its legally limited competence, the Revenue had a reputation for its helpfulness in dealing with organisations seeking to obtain recognition.

Part I of the Act accordingly begins by lifting the veil of confidentiality, and by defining "a Scottish charity". This is a body, recognised as above by the Revenue, established under the law of Scotland or managed or controlled wholly, or mainly in or from Scotland. Thus a body registered as a charity in England and Wales could be recognised as a Scottish charity.

There are stringent rules (supplemented by a regulation-making power) concerning the keeping of accounts, including the making of an annual report, normally within ten months of the end of the charity's financial year. Failure to observe these rules may lead to the Lord Advocate's obtaining an interdict against the charity, until the situation is remedied.

A body recognised as a Scottish charity must supply a copy of its "explanatory memorandum" (in effect, its constitution) and of its most recent statement of accounts to anyone on request, subject to payment of a reasonable charge and postage. Failure to do so may lead to a complaint by that person to the Lord Advocate, who may obtain an interdict against the charity, again until the situation is remedied. The Revenue may also report a charity to the Lord Advocate for non-charitable activities or outlays.

Non-recognised bodies must not hold themselves out to be charities, and again the Lord Advocate may obtain an interdict. The failure to obtain recognition could be due to haste in raising funds after a disaster, ignorance or incompetence, and so the interdict may be lifted when the body either obtains recognition under this Act or conforms to the English Charities Act 1960. The advantage of this procedure is that where the body continues to hold itself out as a charity the organisers may suffer the pains of contempt of court, and the penalty may be tailored to the enormity or otherwise of the offence.

The Secretary of State may designate particular religious bodies having acts of public worship as their principal activity, where some of the rules laid down in this Act may be inappropriate, so as to grant them exemption from these rules. To qualify, they must have been established in Scotland for at least 10 years, or be the result of amalgamation of bodies, at least one of which has been designated or eligible for designation, or be a splinter group from such a body. They must also have at least 3,000 members over the age of 16 and internal supervisory and disciplinary machinery that will secure the keeping of proper accounts corresponding to those required by this Act.

The Lord Advocate is given extensive powers to investigate Scottish and other charities, registered or non-registered, through the agency of "nominated officers", who may apply to the sheriff to secure the co-operation of those involved in the charity. The Lord Advocate may suspend trustees for up to 28 days if there appears to be any misconduct or mismanagement in administration of the charity and make arrangements for running the charity in the meantime. He may also apply to the Court of Session to exercise its powers to make necessary orders to safeguard the funds of charities and stop non-charitable bodies from acting, and secure the making of suitable arrangements in the circumstances.

The words "charity" and "charitable" have developed technical meanings for the purposes of UK tax law, by a process that is not transparently logical, from the *Charitable Uses Act 1601 (c 4)* enacted by the Parliament of England. While a charitable trust will always be a public trust in Scots law, the concept of public trust is wider than that of charitable trust within the meaning of the tax statutes. (For a discussion of these concepts, see *The Laws of Scotland: Stair Memorial Encyclopaedia, Vol 24, Trusts, Trustees and Judicial Factors*, paras 85 to 111.)

The Court of Session is given enhanced powers, on the application of trustees, to approve schemes to reorganise public trusts whose purposes have been fulfilled or failed, having become impracticable or lacking in usefulness, because of social and economic changes, or where any of their purposes have ceased to be such as enable the trust to become a recognised body. The appropriate sheriff will be able to deal with those applications where the annual income of the trust does not exceed the maximum prescribed by the Secretary of State.

In the case of small public trusts, that is, with an annual income at present not exceeding £5,000, the trustees will be able to make a reorganisation scheme without judicial intervention, by modifying a trust's purposes, transferring its assets to another public trust, or amalgamation with one or more public trusts. If the trust whose purposes are to be modified is a Scottish charity, they must be careful to ensure that it continues to have purposes to qualify as a recognised body. Where annual income at present does not exceed £1,000 and the trust's constitution does not permit the spending of capital, trustees may resolve unanimously to do so. But the trustees must secure due publicity of their intention and notify the Lord Advocate, who may apply to the court to prevent it.

When a bank or building society reports to the Secretary of State's appointee, the "Scottish Charities Nominee", that a Scottish charity's account has been dormant for 10 or more years, and it does not know who is responsible for running the charity, the Nominee may transfer the funds, if they do not exceed £5,000, to another appropriate Scottish charity. If the funds exceed £5,000, the Nominee must notify the Lord Advocate, who may appoint new trustees, apply to the Court of Session to

appoint a judicial factor, or refer the matter back to the Nominee to act as if the amount were not more than £5,000.

Part II of the Act is based on the government's conclusions reached after considering responses to two consultation papers, *The Practice of the Solicitor Profession in Scotland, 1987* and *The Legal Profession in Scotland, March 1989*. The government's proposals were then published in a White Paper, *The Scottish Legal Profession: The Way Forward*, October 1989.

The Act abolishes the solicitors' conveyancing and executry monopolies, and establishes the Scottish Conveyancing and Executry Services Board, to regulate the provision of these services by conveyancing and executry practitioners, and maintain registers of qualified individuals who are "fit and proper persons" and have approved educational qualifications and practical training. In the case of executry practitioners, the Secretary of State will make provisions by regulations for their educational qualifications and practical training and standards of professional conduct. It was originally intended that conveyancing services could be provided by banks, building societies and insurance companies, but following what are known as certain "understandings and agreements" with the Law Society of Scotland on 4 July 1990 these proposals were withdrawn.

There is now a provision which in effect excludes financial institutions from offering conveyancing services by employing qualified conveyancers. There had been considerable concern that if country solicitors were to lose conveyancing their practices would cease to be viable. Banks, building societies and insurance companies and their subsidiaries will be enabled to provide executry services under the supervision of the Board. Relevant regulations made by the Secretary of State will require to be laid in draft before Parliament and be approved by both Houses of Parliament. This will secure a debate on their contents, but not amendment.

The Board has disciplinary powers, analogous to those of the Council of the Law Society and the Scottish Solicitors' Discipline Tribunal. It may impose fines up to £10,000 and require a practitioner to pay up to £1,000 compensation to a client for inadequate professional services.

Because of the overlapping of the jurisdiction of the Sheriff Court with that of the Court of Session and the High Court of Justiciary, it is arguable that Scottish solicitors have felt less pressure to acquire rights of audience in the higher courts than have their English counterparts. Nevertheless, in the name of freedom of consumer choice the Act grants rights of audience to solicitors not only in these courts, but also in the House of Lords and the Judicial Committee of the Privy Council (which in practice now consists of the judicial members of the House of Lords).

To qualify, a solicitor must satisfy the Council of the Law Society that he has completed a course of training, prescribed by the Council, in evidence and pleading relevant to the courts in which he intends to appear and that he is a fit and proper person. Some may be discouraged from applying for rights of audience by reason of the provision that requires an advocate-solicitor to give precedence to instructions to appear in court over all other professional obligations. The Lord President is required to consider the desirability of securing a "level playing-field" for all practitioners appearing in the Court of Session and the High Court of Justiciary. The Council will make rules as to the order of precedence within these higher courts and

related matters. Rules relating to examination of would-be advocate-solicitors made by the Council have to be approved by the Lord President and the Secretary of State.

There is machinery for enabling professional and other bodies to acquire for their members rights to conduct litigation and rights of audience and for rights to practise in Scotland to be given under regulations to legal practitioners qualified to practise in England, Wales and Northern Ireland; lawyers from other member states of the European Community already have such rights under the *European Communities (Services of Lawyers) Order SI 1978/1910*.

Although the Act purports to permit advocates to enter into partnerships with others and to permit multi-disciplinary practices, the bans on such partnerships and practices may continue if the rules of the Faculty of Advocates are approved by the Lord President or made by the Council of the Law Society, and in each case approved by the Secretary of State. Solicitors and incorporated practices will be able to enter into multi-national practices in accordance with orders made by the Secretary of State.

The professional organisations whose members have rights to conduct litigation and rights of audience, as well as the Faculty of Advocates, the Council of the Law Society and the Scottish Conveyancing and Executry Services Board, are required to have arrangements for dealing with complaints against practitioners. In place of the Lay Observer, appointed by the Secretary of State, there will now be a Scottish legal services ombudsman, appointed by the Secretary of State after consultation with the Lord President.

Although sheriffs principal have frequently been promoted to appointment as judges of the Court of Session, sheriffs have not. This Act now provides that all sheriffs who have held office for at least five years, and solicitors who have had a right of audience in both the Court of Session and the High Court of Justiciary for that period, will be eligible for appointment as judges of the Court of Session. Promotion to the Inner House ceases to be on the basis of seniority, but by express appointment by the Lord President and the Lord Justice Clerk, with the consent of the Secretary of State. Persons otherwise qualified to be appointed as judges of the Court of Session may now be appointed as temporary judges and as temporary Lords Commissioners of Justiciary; that is, as judges of the High Court of Justiciary. At the time of writing, two QCs and two sheriffs, who are also QCs, have been appointed on this basis for three year terms.

While contingency fees are still not permitted, advocates may agree to undertake litigation on a speculative basis, where in the event of success the fee may be increased by a percentage limited as prescribed by the Court.

The legal advice and assistance scheme is extended to the provision of executry services by executry practitioners, banks, building societies and insurance companies and their subsidiaries and conveyancing services by independent qualified conveyancers.

Various advisory functions and investigatory powers are given to the Director General of Fair Trading in order to secure effective competition.

There are several amendments in Part III to the *Licensing (Scotland) Act 1976* (c

66), many of them of a procedural nature. Normal weekday permitted hours for licensed premises, licensed canteens and registered clubs, are extended to cover the entire period from 11 am to 11 pm, so that there will be no need to apply for an extension for afternoon opening. On Sundays they continue to be from 12 30 pm to 2 30 pm and 6 30 pm to 11 pm. A "children's certificate" – of which notice must be displayed at all times in any part of the premises to which it applies – permits children under the age of 14 to be present in a bar between 11 am and 8 pm for the consumption of a meal, if accompanied by a person aged 18 or over. Conditions attached may include restrictions on these hours and days. The accidental removal by the Finance Act 1981, of controls over the sale of alcohol wholesale, is remedied.

Sales by persons under the age of 18 engaged in off-sale premises must be specifically approved by the licence holder or on his behalf by someone aged 18 or over. This is designed to prevent teenagers working at supermarket check-outs from selling alcohol to their underage friends.

The new rules do not affect off-licences.

Part IV contains the true miscellany of reforms.

Children under the age of 16 giving evidence in any criminal proceedings in the sheriff court or the High Court may, on cause shown, be permitted by the court to do so through a live television link. The case may be transferred by the sheriff from a sheriff court that does not have the necessary accommodation and equipment to another more suitable sheriff court within the sheriffdom. Consequently the Act makes it competent in general to try an offence in a sheriff court in a district different from the one where the offence is alleged to have been committed. A third party may give evidence that an accused had been identified before the trial by a child witness giving evidence in these circumstances.

Further provisions refine the rules about probation, community service orders and the giving of advice, guidance and assistance, if requested, to persons within 12 months of release from prison and introduces supervised attendance orders as an alternative to prison on fine default.

In order to co-operate with other countries in the struggle against drug trafficking, machinery is introduced so that, when a confiscation order has been imposed on a convicted drug trafficker in a country designated by Order in Council, the Court of Session may register it as an external confiscation order. The order is then enforceable as if it were a confiscation order made by the High Court of Justiciary under the *Criminal Justice (Scotland) Act 1987 (c 41)*.

The definition of homelessness and of persons threatened with homelessness in what is now the *Housing (Scotland) Act 1987 (c 26)* is modified to include a reasonableness test, for example if property is run-down, damp or overcrowded (qualified by comparison with other properties in the area in general), and perhaps having regard to the possibility of violent victimisation there. Certainly, the Act covers violence or serious threats of violence from a previous cohabitant of the applicant.

A potentially important but somewhat esoteric provision gives the force of law in Scotland from 1 January 1991 to the Model Law on International Commercial Arbitration as adopted on 21 June 1985 by the UN Commission on International

Trade Law (UNCITRAL) in the form set out in Schedule 7 to this Act.

In March 1985 a Departmental Advisory Committee had been set up by the Department of Trade and Industry under the chairmanship of Mustill LJ to consider possible modifications to the then draft Model Law for implementation in the three UK jurisdictions.

In July 1986 a Scottish Advisory Committee on Arbitration Law was appointed by the Lord Advocate, with John Murray QC (Lord Dervaird) in the chair. Following publication of a joint report by the committees, and subsequent consultations, eventually, and perhaps not entirely unexpectedly (the cynic might say), the Mustill Committee was against adoption of the Model Law but the Dervaird Committee recommended that it be adopted in Scotland with amendments. The Model Law was drafted in the six languages of UNCITRAL and is consequently not always precisely expressed. However, the Act permits recourse to *travaux préparatoires*. This is the mass of documents accumulated in drafting the Model Law – reports and comments by the Working Group that drafted the Model Law for UNCITRAL, UNCITRAL itself, and interested governments and organisations.

British courts, unlike their continental counterparts, have traditionally been reluctant to have recourse to this material in interpreting international conventions, still less national legislation. However, over the past two decades, material such as this has been consulted for guidance, particularly in the English Court of Appeal and the House of Lords, by more adventurous members of the higher judiciary, whether overtly or covertly. Lord Hailsham has even confessed in a debate in the House of Lords to having committed the cardinal sin of looking up Hansard to find out what an Act was all about.

Although the Model Law applies to international commercial arbitrations, it is permissible to adopt it for domestic or non-commercial arbitrations. Somewhat surprisingly in a Scottish Act, the text in Schedule 7 uses the English term "arbitrator" throughout, defining it as including an arbiter (the appropriate Scots term), and speaks of "waiver" where we would use "personal bar", but perhaps a "moron in a hurry" might be misled by the latter expression.

Perhaps due to failure by those instructing the draftsman fully to understand the effect of exemption clauses in non-contractual notices, Part II of the Unfair Contract Terms Act 1977 applied only to exemption clauses in contracts. This led to some decisions that were considered unsatisfactory. Part II has now been amended, so that these notices will now be controlled by the 1977 Act, as in England.

Since 1 January 1991 courts have been able, in civil cases, on the application of one of the parties or of their own accord, to require a party to give a sample of blood or other body fluid or tissue for laboratory analysis (for blood tests or DNA profiling), or to consent to the taking of a sample from a child of whom he or she has custody or care, or is the tutor. There was no common law power to do so, and indeed, until recently, such analysis was of value rather to exclude an individual from a class than to prove identity or a genetic relationship. In the event of refusal, or failure to take necessary steps for provision of the sample, the court may draw adverse conclusions.

It is prudent to grant a close relative a power of attorney to be effective if one is subsequently incapacitated. Unfortunately, it was considered that, if the incapacity were mental, the power lapsed – at the very time when it was most necessary.

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Powers of attorney granted on or after 1 January 1991 will not lapse in these circumstances. Those who have granted powers of attorney before that date are advised to grant new ones, or to add a suitable clause at the end of an existing deed.

Certain provisions in the *Companies Act 1989 (c 40)* amending the *Companies Act 1985 (c 6)*, concerning the execution of documents by companies in Scotland, were defectively drafted. The defects are remedied and documents signed or subscribed by a company between 31 July 1990 and the coming into force of the new provisions on 1 December 1990 are saved and deemed to have been validly executed.

Hamish McN Henderson, Deputy Editor, The Laws of Scotland: Stair Memorial Encyclopaedia.

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