

## SCOTTISH LEGISLATION 1993

*Hamish McN Henderson*

### INTRODUCTION

There were eight 'Scotland only' Acts in 1993, two of them being consolidation Acts, which are always welcome. In addition there was a **Statute Law (Repeals) Act**; only a few of the repeals are 'Scotland only' in effect, but attention is drawn below to the well documented Law Commissions' Report that accompanies it. The **Damages (Scotland) Act**, the **Bankruptcy (Scotland) Act** and the **Prisoners and Criminal Proceedings (Scotland) Act** all introduce reforms that should be welcome in their relevant fields, while the **Carrying of Knives etc (Scotland) Act** is a sad comment on the conduct of a minority of the population.

The late Professor J D B Mitchell often used to comment that one of the problems in this United Kingdom is that we have a Parliament, not a Legislature! What he meant is made clear by two of the 1993 crop.

The **Leasehold Reform, Housing and Urban Development Act 1993 (c28)**, nearly 200 sections and over 20 Schedules in length, has a mere 20 sections applying to Scotland. Most of these contain several new sections amending the **Housing (Scotland) Act 1987 (c 26)**. A Legislature with procedures befitting the closing years of the 20th century, and which had any regard for the convenience of the citizen, would have enacted these as a separate statute.

The **Education Act 1993 (c 35)**, which adds yet another statute to the series for England and Wales going back to the famous Butler Act of 1944, runs to

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over 300 sections and to 21 Schedules. It contains a useful three-page index in section 306. Only one section, amending the **Education (Scotland) Act 1980 (c 44)**, forbidding corporal punishment that is 'inhuman or degrading', applies to Scotland expressly. However, a DIY section provides that the 'amendment or repeal by this Act of an enactment which extends to Scotland...extends also to Scotland...' Presumably the Scottish Office Education Department will produce some useful circulars for guidance.

### **CHAPTER NUMBER 5: DAMAGES (SCOTLAND) ACT 1993**

The law of damages awarded for personal injury or disease caused through the fault of another, whether to the victim or to the victim's relatives or executors, has been evolving in recent years, but the consequences of the **Damages (Scotland) Act 1976 (c 13)** have not been altogether satisfactory. (For this Act, see **The Scottish Government Yearbook 1981**, page 262.)

Following a reference from the Secretary of State, the Scottish Law Commission published a Discussion Paper entitled **The Effect of Death on Damages, Discussion Paper No. 89**, in November 1990. The subsequent Report of the same name, (Scot Law Com No. 134), published in March 1992, and containing a draft Bill, led to the introduction of a Bill in the House of Lords on 16 July 1992, which came into force as an Act on 18 April 1993. This Act, as is now common with amending statutes, consists of a series of textual amendments to the 1976 Act, thus facilitating their incorporation into any reprint of the principal Act. (For a conveniently accessible reprint, see J M Thomson, *Delictual Liability* (Butterworth, 1994), Appendix.)

The fact that, under the 1976 Act, any claim for non-patrimonial loss (solatium) died with the victim, caused disquiet to the families of victims who had suffered from industrial diseases such as mesothelioma, asbestosis and pneumoconiosis, being diseases that might not manifest themselves for many years. Both the Secretary of State, in his reference, and the Commission, in its Report, spoke of a possible incentive or inducement for defenders and their agents to permit or cause delays, so that a settlement or proof might not be reached until after the death of the victim. While they found no evidence that the law was being exploited, the possibility itself might be sufficient reason for reform. At least one BBC radio programme, probably with the English context mainly in mind, left the impression that there was more than a suspicion that potential claims were handled in a somewhat dilatory fashion.

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The 'loss of society award', which replaced solatium for pain and suffering at the loss of a near relative, is redefined. It may relate to the emotions caused in contemplation of the deceased's suffering before his death, or by his death, or to the loss of benefit from the deceased's society and guidance. The court need not give a break-down as to how the sum is calculated.

The Act also makes it clear that any provisional award of damages to the deceased does not prevent a claim by the relatives, but it is to be taken into account in calculating their loss of support.

If an entitled relative himself dies, his executor may raise an action or stand in his shoes as pursuer in an existing action of damages; compensation is limited, however, to the loss attributable to the time immediately before that relative died. Similarly, the deceased victim's claim to solatium no longer dies with him, but, like his claim for patrimonial loss, passes to his executor.

The rules concerning the transmission of claims for loss of society or for solatium apply where the death of the victim or of the entitled relative occurred on or before 16 July 1992, unless the case had been already settled or a final judgment given before 18 April 1993. It is relatively unusual for Parliament to give retrospective effect to legislation, but, since damages will normally be met by insurance, and the benefits to victims' families (albeit a relatively small number) may be considerable, this must be regarded as a special, and proper, exception.

Because of their very personal nature, claims arising out of alleged defamation, and similar situations, still will not pass to the executor, unless an action is already in train. The deceased might well have had his reasons for not pursuing the case, although obviously there will be situations where he might have taken action had he survived.

In the case of proceedings commenced on or after 18 April 1993, damages by way of solatium for loss of expectation of life are available only where the deceased was aware of that loss, or likely to become so. Previously it had been held that damages could be awarded where the victim was unconscious and unaware of his state.

### **CHAPTER NUMBER 6: BANKRUPTCY (SCOTLAND) ACT 1993**

It was hoped that the **Bankruptcy (Scotland) Act 1985 (c 66)** would provide Scotland with a modern code of bankruptcy law. (For this Act, see **The**

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**Scottish Government Yearbook 1987** pp 353-356.) Procedure was introduced to deal with bankruptcies where the interim trustee reports that the debtor's assets are unlikely to be adequate to pay a dividend to creditors (colloquially known as 'small assets' cases), and he is subsequently appointed to be permanent trustee. Unfortunately, this has proved to be very costly to the tax-payer, since the trustees' expenses and remuneration may then be met out of public funds.

The 1985 Act proved attractive to debtors and to insolvency practitioners, because the debtors could sign a trust deed 'for the benefit of creditors generally' - without the consent of their creditors - and the insolvency practitioners, as trustees, would then petition for sequestration, fully assured that they would be paid out of public funds.

The Scottish Law Commission, in its 1982 report on **Bankruptcy and Related Aspects of Insolvency and Liquidation** (Scot Law Com No 68), on which the 1985 Act was based, had not expected any significant increase in the number of sequestrations, then in the low hundreds a year. It estimated that the increased expenditure would be in the region of £6000 to £7500, while the total increase in the expenses of the office of the Accountant of Court in his capacity as Accountant in Bankruptcy would be between £30,000 and £40,000. In fact, the numbers rose dramatically, from 560 in 1986-87 to over 8500 in 1991-92, with correspondingly spiralling government expenditure, expected to increase from just under £20 million in 1991/92 to over £80 million in 1994/95.

This Act consists of a series of textual amendments to the 1985 Act. These involve many alterations and innovations to the relevant procedural rules. The government has undertaken to reprint the Act in its amended form.

The office of Accountant in Bankruptcy is separated from that of Accountant of Court. In addition to his staff, he will be able to appoint insolvency practitioners, to act on his behalf. He himself may be appointed to be the interim or permanent trustee.

The Act reduces the ability of a debtor to petition for his own sequestration, a device which can be adopted in order to avoid liability for one's debts. The debtor may not petition for sequestration if there has already been an award of sequestration within the previous five years.

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However, insolvency practitioners appear to have extraordinary ingenuity, and it remains to be seen whether the new provisions will achieve the intended greater protection of the interests of the general body of creditors.

**CHAPTER NUMBER 9: PRISONERS AND CRIMINAL PROCEEDINGS (SCOTLAND) ACT 1993**

This is perhaps the most important Scottish Act passed in 1993, coming into force, for the most part (subject to certain savings), on 1 October.

The early release of convicted prisoners with a determinate sentence, by remission of one-third of their total sentence, was introduced in the 1930s. The 'treatment model' of imprisonment (one of whose leading advocates was Lord Longford, the author in 1964 of a Labour Party paper entitled **Crime - A Challenge to us All**), led to the establishment of the Parole Board for Scotland under the **Criminal Justice Act 1967 (c 80)** as part of the machinery for permitting the release of convicted prisoners on parole. Consequently, a paroled determinate-sentence prisoner could be released even earlier than formerly, while prisoners with an indeterminate sentence could be released only on parole.

The parole system proved to be remarkably successful, with an annual recall rate varying from just over 10% to only 0.4% in 1986. Nevertheless, the government adopted a more restrictive attitude to prisoners serving long sentences. The system could therefore be criticised on the grounds that it gave the executive too much power and that there was a lack of 'due process' and observance of the rules of natural justice in the decision-making process.

A committee appointed in 1987 under the chairmanship of Lord Kincaid produced a report, **Parole and Related Issues in Scotland**, Cm 598, in February 1989. Many of the proposed reforms can be achieved without legislation. The Act itself provides a scheme for early release. Short-term prisoners (serving a term of less than four years) will normally be released after serving half their sentence, but may be subject to a 'supervised release order' made at the time of passing sentence. Long-term prisoners (serving four years or more) will normally be released on licence after serving two-thirds of their sentence, or after serving half if it, if the Secretary of State is so recommended by the Parole Board, which must now include a serving High Court Judge. Further provisions lay down the procedure for considering the release of life prisoners, and those serving concurrent and consecutive sentences.

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The Secretary of State may at any time release any prisoner on licence, on compassionate grounds, normally after consulting the Parole Board. This wide power avoids the limitations of the parole scheme or the exercise of the Royal Prerogative of Mercy. The new principles are applied in modified form to young offenders and to children detained in solemn and in summary proceedings.

The Act was preceded by a series of reports on evidence prepared by the Scottish Law Commission. Accordingly, it spells out rules (in addition to existing ones as to search and the securing of evidence) with regard to the taking of prints and impressions of any external part of the body, and their destruction if it is decided not to prosecute, or where prosecution ends otherwise than with conviction, an absolute discharge or probation. A constable may, with the authority of an inspector or above, take an extensive range of samples from the external hair, by cutting or combing it, of fingernails or toenails or material under these, and of blood, other body fluid or tissue, by swabbing or rubbing externally.

Other provisions give detailed rules with regard to admissibility of various forms of documentary evidence, and of audio and video records, evidence from abroad by television, and the taking of evidence from children.

However, the traditional Scottish rule that all material evidence in criminal cases requires to be corroborated (a rule that may be attributable to Biblical authority) suffers an important derogation; corroboration is no longer required for conviction of an accused for theft or destruction of birds' eggs. Since the financial penalties for the offence are high, the economic consequences of a wrongful conviction could be grave.

The Lord Advocate may appeal against a sentence imposed after conviction by a jury, if he thinks it is unduly lenient, or on a point of law. In summary cases, the prosecutor will also be able to appeal on grounds of undue leniency in classes of case specified by order of the Secretary of State. In a summary case, on appeal by the convicted person, or even when a person chooses not to appeal against conviction, the prosecutor may lodge a minute consenting (in whole or in part) to, or applying for, the conviction to be set aside. A High Court judge may then set it aside in whole or in part (when a less severe sentence may be imposed), and award such expenses (formerly limited to £40) to the convicted person as he thinks fit.

**CHAPTER NUMBER 13: CARRYING OF KNIVES ETC  
(SCOTLAND) ACT 1993**

The carrying of any 'article which has a blade or is sharply pointed' (eg hat-pins, pins for attaching jewellery to clothing, knitting needles and skewers) in a public place was made a criminal offence in the rest of the United Kingdom by the **Criminal Justice Act 1988 (c 33)**, and this Act applies substantially the same rules to Scotland. The expression 'public place' is specially defined so as to include any place to which the public has or is permitted access at the material time. This will include car parks at shopping centres and railway stations, and at blocks of residential flats. Payment for access is not relevant. Such was the public concern at the time when the Bill was before Parliament that it was given immediate effect on its receipt of the Royal Assent, but was expressly not made retrospective in regard to any events taking place before it came into force.

Police constables are given wide powers to stop, detain, search, and arrest without warrant anyone that they have reasonable grounds for suspecting as having a prohibited article, and to request his name and address. The penalties are potentially severe - up to six months imprisonment or a fine up to the statutory maximum, presently £5000, or both, on summary conviction, and up to two years imprisonment or a fine, or both, on conviction on indictment, in all cases with the possibility of forfeiture of the article.

The penalty for obstructing a constable and for concealing a prohibited article when he is carrying out these duties is a fine, on summary conviction, of up to level 3 on the standard scale, at present £1000.

Pocket-knives with a blade whose cutting edge is no more than 3 inches (no metrication here) are exempted, and the defence of 'good reason or lawful authority' is available, with the onus of proof on the accused. It is also a defence to have the article for use at work, such as tradesmen's tools, for religious reasons or as part of any national costume - essential concessions in a multi-cultural multi-ethnic society.

**CHAPTER NUMBER 15: PROTECTION OF ANIMALS  
(SCOTLAND) ACT 1993**

Under the **Protection of Animals (Scotland) Act 1912 (c 14)** the penalty for certain actings which constitute the offence of cruelty to animals has been for

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some time a maximum fine of level 4 on the standard scale (currently £2500), or imprisonment for up to six months, or both. This Act increases the maximum fine to level 5 on the standard scale (£5000). The Bill was supported by the Scottish Society for the Prevention of Cruelty to Animals. In practice, imprisonment is seldom resorted to, and fines have averaged between £200 and £250, with the majority being not more than £100.

#### **CHAPTER NUMBER 20: LICENSING (AMENDMENT) (SCOTLAND) ACT 1993**

This is a two-section Act correcting an oversight when the **Planning and Compensation Act 1991 (c 34)** repealed section 51 of the **Town and Country Planning (Scotland) Act 1972 (c 52)**. This enabled a potential developer to apply to the planning authority for a 'determination' as to whether or not planning permission was required for a proposed development. The 1991 Act telescopes this procedure with that for issuing 'established use certificates' but it omitted to make the necessary consequential amendment to the **Licensing (Scotland) Act 1976 (c 66)**.

An applicant for the grant or provisional grant of a new licence for the sale of alcoholic liquor for consumption on the premises must produce a certificate of suitability in relation to planning. A section 51 certificate no longer being obtainable, this Act now requires the applicant to produce the new-style certificate, to the effect that the proposed use or operation would be lawful.

Although the Bill was introduced as a Private Member's Bill, with all-party support, it was in practice a government Bill.

#### **CHAPTER NUMBER 44: CROFTERS (SCOTLAND) ACT 1993**

This Act is based on the draft Bill annexed to the Report of the Scottish Law Commission (Cm 2187), as accepted by the Joint Committee on Consolidation Bills with minimal amendments on 16 June 1993.

The **Crofters (Scotland) Act 1955 (c 21)** revived the use of the word 'crofter' in our statute book and consolidated the previous legislation. The original Crofters Commission had been set up, with both administrative and judicial functions, under the **Crofters Holdings (Scotland) Act 1886 (c 29)**, but it was replaced on 1 April 1912 by the Scottish Land Court, created by the **Small Landholders (Scotland) Act 1911 (c 49)**.

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The 1955 Act established the present Crofters Commission, which performs its regulatory, administrative and advisory functions in the seven crofting counties, namely, the former counties of Argyll, Caithness, Inverness, Orkney, Ross and Cromarty, Sutherland and Zetland. Since then there has been a number of important statutes affecting this area, the most recent being the **Crofter Forestry (Scotland) Act 1991 (c 18)** (discussed in **Scottish Affairs**, No 4, Summer 1993). These Acts and some minor amendments proposed by the Scottish Law Commission are conveniently brought together.

#### **CHAPTER NUMBER 45: SCOTTISH LAND COURT ACT 1993**

As indicated above, the Scottish Land Court, whose jurisdiction covers the whole of Scotland, is the statutory successor to the original Crofters Commission. Continuity was maintained by the appointment of the last chairman of the old Crofters Commission as first chairman of the Land Court.

The chairman has the same rank and tenure of office as a Senator of the College of Justice. At present, he is also President of the Lands Tribunal for Scotland, and the two organisations occupy the same building. The Land Court is unique in that one of its maximum of seven members is required to be a Gaelic speaker. It is not the practice to fill all seven places, and all members are not necessarily full-time. Although its quorum is three, it may delegate powers to any one or any two members, and in practice most cases relating to smallholdings are dealt with by one of the present three 'agricultural members' (qualifications unspecified in the Act), sitting with a legal assessor. There is a limited form of appeal to the Court of Session on a point of law, but no further appeal to the House of Lords.

This Act is a consolidating Act, bringing together provisions, one paragraph of which is derived from the Act of 1886, but most from the **Small Landholders (Scotland) Act 1911 (c 49)**, with items from seven statutes passed over the last 55 years.

#### **CHAPTER NUMBER 50: STATUTE LAW (REPEALS) ACT 1993**

The Law Commissions produced their Fourteenth Report (Cm 2176) on what is still called Statute Law Revision (but deals mostly with repeals) in April 1993. This included a draft Bill, which, apart from one provision, came into force on its enactment the following November, and repeals 'certain enactments which.....are no longer of practical utility'. Obvious examples of

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these are a score of statutes applying to what is now the Republic of Ireland. According to the subject matter concerned, the Act extends to all three jurisdictions within the United Kingdom, with some provisions applicable to the Isle of Man and the Channel Islands and such colonies as we have left.

There must be few who regard lists of repealed statutes as suitable for bed-time reading, but the Report itself is a mine of fascinating information of interest to the student of Scottish legal history, and for those of a literary bent there is even a quotation from 'Vanity Fair'. A few examples of repealed statutes will suffice.

The **Heritable Jurisdictions (Scotland) Act 1746 (c 43)**, which abolished most of the heritable jurisdictions whereby the grantees held local courts, was enacted in the immediate aftermath of the '45 with a view to reducing the power of the clan chiefs and feudal landowners. The Act came into force on 25 March 1748, which was the English New Year's day, Scotland having adopted 1 January (in line with continental countries) as early as 1600, under an Ordinance issued by the Privy Council assembled by James VI.

The hereditary itinerant jurisdiction of the Lord High Constable of Scotland in all crimes within a certain distance (which varied from time to time) of the King's person, of Parliament or the Privy Council, was the only major jurisdiction preserved under the Act of 1746. It was formerly exercised jointly with the Marischal. However, it is no longer exercised. Nevertheless, the status of the Constable as one of the Great Officers of the Royal Household in Scotland and as an Officer of the Crown still exists in the person of the Earl of Erroll. The report cites the authority of Dr George Pryde to the effect that the barony courts' jurisdiction ceased to exist in the 18th or 19th century. Nevertheless, the title is still occasionally used, as, for example, by David Baxter, Baron of Earlshall, near St Andrews, and by Sir Nicholas Fairbairn of Fordell.

The Report includes a short history of the Piracy Acts 1698, 1721 and 1744, all of which are repealed. There is a footnote on Captain Kidd and a reference to a piracy case brought under Scottish common law, reported as recently as 1971 (*Cameron v HM Advocate* 1971 JC 50).

The repeal of residual provisions of the **Bank Notes (Scotland) Act 1765 (c 49)** draws attention to the abolition of the practice in Scotland in the 18th century of issuing bank notes payable, at the option of the issuer, on presentation, or after a specified period with interest at 5 per cent. The example was followed by employers and by businesses organised for the

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purpose. The Report describes notes with an option clause as being in effect 'a forced loan in regard to which the lender had no say'. Nevertheless, the practice may have been more honest, if not more reputable, than the current one whereby more powerful debtors can conserve their working capital by deferring payments to less powerful creditors. At least the notes with optional clauses would be negotiable for value.

The 1765 Act deplored the issue of notes 'for small sums less than twenty shillings lawful money of Great Britain whereby great Inconveniencies [sic] have arisen'. The Report tells us that notes of as little as one shilling Scots (one old penny sterling) were issued. So notes for any value less than twenty shillings were banned. That would be equal to having a note for something more than £50 as the smallest note in circulation today! Older readers may recall that, at the other end of the scale, for a short time in the early days of the last war, postal orders as low as sixpence (2.5p) could be used as legal tender - enough then to buy three copies of **The Scotsman** newspaper or one paperback book.

In the 18th century it appears to have been the practice for servants to write their own flattering references, and for employers to write similarly fraudulent references for servants that they were anxious to pass on to other unfortunate employers. So the **Servants' Characters Act 1792 (c 56)** was passed to deal with the problem throughout Great Britain. Although the doctrine of desuetude does not apply to post-Union statutes, this Act appears never to have been enforced in Scotland, and in fact contemporary writers ignored it. The common law can cope with this mischief, and so the Act has been repealed as far as Scotland is concerned. However, it still has relevance in England and Wales, where the former original fine of £20 'in real money' has now been raised to level 2 on the standard scale, ie £400. Taking inflation into account, this is quite a bargain.

The part of the Report on Companies legislation tells of the loss of early registers compiled under the **Chartered Companies Act 1837 (c 73)**. No trace even of the existence of a register in Scotland has been found.

The Act of 1993 repeals these and many other surviving provisions which had their effect long ago, and are therefore no longer necessary.

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