

SCOTTISH LEGISLATION 1986

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Nearly 70 Public General Acts were passed in 1986. Four of these were consolidation Acts of which three are of interest to Scotland. These are the *Insolvency Act (c.45)*, which brings together recent legislation, especially from the *Companies Act 1985 (c.6)* and *Insolvency Act 1985 (c.65)*, relating to corporate insolvency throughout Great Britain and to individual insolvency in England and Wales, the *Company Directors Disqualification Act (c.46)* and the *Parliamentary Constituencies Act (c.56)*. The *Building Societies Act (c.53)* applies throughout the United Kingdom and introduces the first major reforms of the law relating to these institutions for over a century. Despite its length, much detail is still left to be completed by Statutory Instruments.

Although there were only four "Scotland only" Acts in 1986, two others are included in this article: the *Marriage (Prohibited Degrees of Relationship) Act*, because it amends the *Marriage (Scotland) Act 1977* in important details, and the *Salmon Act*, because some of its provisions applying to England and Wales are essentially designed to complement the Scottish provisions as to the licensing of salmon dealers, and to secure more effective law enforcement.

Altogether three of the Acts will be seen to continue the progressive reform of Scottish family law that has been piloted by the Scottish Law Commission throughout the past decade.

**Chapter Number**

**9** *Law Reform (Parent and Child) (Scotland) Act*. This short Act implements the report of the Scottish Law Commission on *Illegitimacy* (Scot Law Com No 82) published in January 1984.

Perhaps the most important provision is the effective abolition of the concept of illegitimacy for most purposes, except in relation to the transmission of hereditary titles, coats of arms and other hereditary honours or dignities.

Otherwise, the fact that a person's parents are not, or have not been, married to each other is to be ignored in establishing the legal relationship between that person and any other person. Future documents are to be interpreted according to this rule, unless they

manifest a contrary intention. The provisions are not retrospective, so that existing documents are not affected. Several statutes passed before the commencement of this Act are however amended.

While a mother has full parental rights automatically (unless they are modified by an order of the court), a child's father has them only if he is married to the child's mother, or was married to her at the time of the child's conception, or subsequently. Parental rights means rights of tutory, curatory, custody or access, and any right or authority relating to the welfare or upbringing of a child conferred on a parent by any rule of law.

These rights may be modified by a court, and may be given to any person claiming interest. Such a person may be a grandparent, a foster parent, or anyone who has been in fact looking after a child. The statutory right to claim custody given to relatives, step and foster parents by the *Children Act 1975 (c.72)* is replaced by these more general provisions.

The presumption that a man is the father of a child if he was married to its mother at any time from its conception to its birth continues, even if the marriage is later held to be void or voidable. Otherwise, if both a man and the child's mother have acknowledged that he is the father and he has been so registered in any register of births kept in any part of the United Kingdom, the presumption applies.

Consent to the taking of blood samples to determine parentage may be given on behalf of a pupil child (that is, a boy under the age of 14 years and a girl under the age of 12 years) by the child's tutor, or by anyone having custody or care and control of the child. Where a person is incapable of giving consent, the court may do so if no-one else is entitled to do so, or if it is not reasonably practicable to obtain consent from the person entitled, or if that person refuses to accept responsibility for giving or withholding consent. The Court does not appear to have power to overrule a positive refusal of consent.

Lawyers will have to get used to an extended meaning of the word "parentage" and its opposite, "non-parentage". "Parentage" means that a person is or was the parent, or is or was the child, of another person. But in an age when American visitors come back to the old country to meet with their ancestors, this is not surprising.

Actions for declarator of parentage, non-parentage, legitimacy, legitimation or illegitimacy (formerly bastardy), are competent in both the Court of Session and the sheriff court. These actions may be necessary because of the express words of future deeds such as wills, excluding "illegitimate" issue from bequests, or in questions of

succession to titles of honour. It is just conceivable that, because of the circumstances in a special case, a grant of a title of honour might expressly permit devolution of the title to an individual born outwith marriage.

- 16 *Marriage (Prohibited Degrees of Relationship) Act*. This Act contains provisions for England and Wales on the one hand and for Scotland on the other, in tandem, so as to amend the *Marriage (Scotland) Act 1977 (c.15)*.

It amends the rules relating to the prohibition of marriage between persons related by affinity.

Marriage between an individual and his or her step-child, step-grandchild, step-parent or step-grandparent is prohibited unless both parties are over 21 and unless the younger party has never before the age of 18 lived in the same household as the older party and never been treated by him or her as a child of his or her family. It is not clear whether or not holiday visits to a step-grandparent constitutes living in that person's household, nor precisely how one distinguishes between treating a step-grandchild as a child of one's family as opposed to treating him or her as a grandchild.

There are now no restrictions on marriage between grandparents-in-law and grandchildren-in-law (e.g., a man of 70 may marry the grandmother of his former teenage wife or the teenage ex-wife of his grandson). But a parent-in-law may marry a son or daughter-in-law only if both parties are over 21 and if the former spouses of both are dead.

The Act should work reasonably satisfactorily in most cases, but it is not impossible to envisage some bizarre situations, both within and without the law.

- 36 *Incest and Related Offences (Scotland) Act*. In Scotland the law of incest has for over four centuries been governed by the Incest Act 1567 (c.15), which incorporated the eighteenth chapter of the Book of Leviticus as the law of the land. In modern times charges of incest have been restricted to cases falling within the terms of that Act, because of uncertainty as to the scope of the relevant common law.

However, the extensive prohibitions of intercourse based on affinity, which endured after death or divorce, were limited where legislation permitted the marriage of persons so related, on the principle that if persons were free to marry intercourse between them could not be incestuous, expressed in the *Criminal Procedure (Scotland) Act 1938 (c.48) s.13*, now repealed. But the law of incest generally ignored

illegitimate relationships, and those arising from adoption.

The Scottish Law Commission in 1981 produced a *Report on the Law of Incest in Scotland (Cmnd 8422)* and a draft Bill was appended to the Report.

The *Incest and Related Offences (Scotland) Act 1986* gives effect to the proposals in the Report and the draft Bill, by textual amendment of the *Sexual Offences (Scotland) Act 1976 (c.67)*. Incest is now restricted to normal hetero-sexual intercourse between persons who are related by consanguinity in a degree listed in the Act, whether of the full or the half blood, or by adoption; or between an adoptive or a former adoptive parent and child. So such intercourse between persons related by affinity no longer constitutes incest. No account is taken of the fact that the relationship is traced through, or to, any person whose parents are not or have not been married to one another. In other words, the natural genetic relationship is regarded in establishing the consanguinity.

Intercourse between step-parents and step-children, and between step-grandparents and step-grandchildren, no longer constitutes incest. But a step-parent or former step-parent who has sexual intercourse with a step-child or former step-child will be guilty of an offence if the step-child is under 21 or has, before the age of 18, lived in the same household and been treated as a child of the step-parent's family. Anomalously intercourse between step-grandparents and step-grandchildren is not a criminal offence in similar circumstances, yet these individuals may fall within the prohibited degrees of marriage set out in the *Marriage (Prohibited Degrees of Relationship) Act 1986 (c.16)*. Thus these provisions are somewhat imperfect mirror images of the rules relating to the prohibition of marriage between persons related by affinity, contained in the *Marriage (Scotland) Act 1977 (c.15)* as amended by the *Marriage (Prohibited Degrees of Relationship) Act 1986 (c.16)*.

The Act creates a new offence, where a person of or over the age of 16 years has intercourse with a child under the age of 16, if he or she is a member of the same household as the child and stands in a position of trust in relation to that child.

There are certain defences to charges of contravention of this Act, based mainly on ignorance of the relevant facts or lack of consent on the part of an accused person. The Act may be criticised because it tends to shift the burden of proof on to the accused to prove his ignorance and therefore his innocence. In the *English Sexual Offences Act 1956 (c.69)* the onus is on the prosecution to prove the accused's knowledge of the relationship

The sheriff court is given jurisdiction to try alleged offences under this Act. Formerly the High Court had exclusive jurisdiction. Although the sheriff may sentence a person convicted of an offence under this Act to up to 2 years imprisonment on conviction on indictment, or only three months on summary conviction, he may, if he considers his powers to be inadequate, remit the convicted person to the High Court, which may impose a sentence of life imprisonment.

- 47 *Legal Aid (Scotland) Act*. Since 1949 the administration of legal aid in Scotland has been the responsibility of the Law Society of Scotland. The Royal Commission on Legal Services in Scotland, in its report published in May 1980 (Cmnd. 7846), recommended that the Law Society should cease to have this responsibility. Most members of the Commission favoured an independent authority. In March 1985 the Scottish Home and Health Department, having considered the Commission's Report, issued a consultation paper with proposals for changes in the administration of legal aid. The *Legal Aid (Scotland) Act 1986* gives effect to these proposals, and repeals the *Legal Aid (Scotland) Act 1967 (c.43)* in its entirety, and the *Legal Advice and Assistance Act 1972 (c.11)* so far as Scotland is concerned. However, any schemes, regulations, orders or rules of court made under these Acts remain in force until replaced.

The Act transfers responsibility for the provision of legal aid to the newly established Scottish Legal Aid Board. The Board has between 11 and 15 members, appointed by the Secretary of State who also appoints one of them as chairman. Members must include at least two members of the Faculty of Advocates, at least two members of the Law Society of Scotland, appointed after consultation with these two professional bodies, and at least one person with experience of the procedure and practice of the courts.

Much of the existing legislation on legal aid is re-enacted, with appropriate modifications. Virtually all details of the scheme will be covered by regulations made by the Secretary of State, as in the past. He does not appear to be required to enter into consultations with the legal professions before making regulations, but it is understood that these take place. Many regulations require to be laid before each House of Parliament and to be approved by a resolution of each House. Although this procedure does not permit amendments to be made, it ensures that the regulations will be subjected to more than the usual rather limited scrutiny in Parliament, and to consequent publicity.

Rules of Court, regulating procedure in relation to legal aid, are made by way of Acts of Adjournment by the High Court of Justiciary and Acts of Sederunt by the Court of Session.

All the provisions of the Act had come into force by 1st April 1987, except those relating to legal aid in contempt proceedings and Part V. This Part authorises the employment of solicitors by the Board to give advice and assistance, to act for persons receiving legal aid, generally to give advice to local organisations such as Citizens' Advice Bureaux, to promote contact between these organisations and local solicitors, and to give advice orally in cases where that should suffice. In matters of professional conduct, the same rules apply to solicitors employed by the Board as would apply if the Board were a firm of solicitors. However, they may act separately for different individuals who may have conflicting interests. Similar provisions in the 1972 Act have never been operated, and the Lord Advocate indicated, at the Second Reading in the House of Lords on 20 February 1986, that this Part is unlikely to come into force in the foreseeable future.

- 62 *Salmon Act*. In form this is a "GB" Act, but the greater part of it applies to Scotland only. The Government's Bill was preceded by the Second Report on Scottish Salmon and Trout Fisheries (by a committee chaired by Lord Hunter) in 1965 (Cmnd. 2691), and the District Salmon Fishery Boards (Scotland) Bill, introduced in the House of Lords by Lord Thurso in February 1985. The Act makes fresh provision for the administration of salmon fisheries in Scotland, and for the licensing and regulation of salmon dealing throughout Great Britain. Seven entire Acts, from 1696 to 1882, are repealed, but in order to understand the new Act it is still necessary to have access to some of the older legislation.

Salmon angling contributes many millions of pounds to the economy of remoter rural areas, but there appears to be some uncertainty as to how many. The Parliamentary Under-Secretary of State, moving the Second Reading of the Bill, is reported in Hansard as giving the figure as being between £22 million and £140 million per annum. Clearly, the industry provides a significant amount of employment in these areas, but the anglers will continue to come only so long as they find a reasonable chance of catching fish. This Act aims to secure the improvement of salmon fisheries throughout Great Britain, and protect them more effectively from criminal activities.

For the most part, this Act does not apply to the River Tweed, where fisheries are administered by a Council on behalf of the Tweed Commissioners, under the *Tweed Fisheries Act 1969* (c.xxiv). There are also special provisions relating to the River Esk (Dumfriesshire).

The new legislation is designed to bring all rivers flowing directly or indirectly into the sea within a salmon fishery district, based on the districts established under older legislation, and extending seaward for

three miles from mean low water springs. Existing legislation affecting any particular district is reapplied to the new district for that area. The Secretary of State may make a designation order following an application to him by a district salmon fishery board, or, in the absence of a board, by two proprietors in the area affected by the proposed order, or by a combination of any of these. The order may abolish districts and create new ones, including amalgamations. It will designate the annual close time and the periods within that time when fishing for salmon by rod and line is permitted, with different provisions for different parts of a district, if desired.

The Secretary of State has extensive powers to make regulations after consultation concerning the due observance of the weekly close time, construction of dams, meshes, materials and dimensions of nets, etc. (The weekly close time is from 12 noon on Saturday to 6 a.m. on Monday. During this time no fishing at all is permitted, except by rod and line on Saturday and Monday).

The exercise of other powers depends on the initiative of a district salmon fishery board, or, where there is no board, of two proprietors. These relate to the making of orders prescribing the precise dates of the annual close time, which must be not less than 168 days, and the fixing and variation of estuary limits. Boards may also apply to him for the making of regulations specifying baits and lures.

Proprietors continue to be classified as "upper proprietors" and "lower proprietors", above and below a dividing line fixed by the Secretary of State or under earlier legislation, or taken as the normal tide limit. This is to identify the angling and the netting proprietors. Any individual proprietor may of course on occasion come within both categories.

The former district salmon fishery boards continue as "transitional district boards", and will be phased out over three years and replaced by new boards, holding office for three years.

These new boards are in fact the committees of associations of the proprietors of salmon fishery districts. Upper and lower proprietors have separate representation, with not more than three from each category, plus a chairman. Each proprietor may have up to four votes depending on the valuation of the fishery as entered in the valuation role.

Where there are joint proprietors or several persons with fishery rights, they must choose one of their number to be the proprietor for the purposes of this Act, e.g. voting. There are special provisions for the rare occasion where there is only one proprietor in a district.

The boards are required, if practical, to co-opt up to three representatives of salmon anglers and also three of the tenant netmen in the district. The number must be the same for each category.

The Act sets out in detail the financial and other powers and duties of district salmon boards, which may be established even for a district with no salmon in its waters, because steps may be taken to clean up and restock a river. Boards are financed by way of a "fishery assessment" at a rate based on the valuation of individual fisheries as entered on the valuation roll. The general powers and duties of boards are essentially to protect and improve fisheries within their district and increase the stock of salmon. They include the power to appoint water bailiffs.

One important power given to boards is to authorise expenditure for the purchase of heritable property out of money accruing from the fishery assessment, or borrowed, or from elsewhere. Boards have already bought the netting rights of lower proprietors, in order to abandon them for the benefit of salmon anglers.

The permitted methods of fishing for salmon in the sea are by rod and line, net and coble or bag net, fly net or other stake net. The *Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951* restricts salmon fishing in inland waters to rod and line or net and coble.

A system for licensing dealers in salmon (which includes sea trout) will be brought in by order of the Secretary of State within the licensing machinery of the *Civic Government (Scotland) Act 1982 (c.45)*. Similar provisions, appropriately adapted, apply to England and Wales.

While the common law may be adequate to deal with the theft or reset of farmed salmon, since wild salmon are the property of no-one legislation must create specific offences. The Act creates the new offence of being in possession of salmon, believing that it has been taken unlawfully anywhere in Great Britain, or possessing it in circumstances where it would be reasonable for the accused to suspect that it had been so taken. For reasons of urgency, a constable may search any premises other than a dwellinghouse without warrant if he has reasonable grounds for suspecting that this offence has been committed.

The gathering of evidence is further facilitated by extending the list of offences for which powers of search may be granted to a water bailiff, constable or person appointed by the Secretary of State. The power of a water bailiff to search vehicles on private land near to water without warrant is extended to cover stationary vehicles parked on roads near

water or private land.

Corroboration is not required in order to secure a conviction. The need for it is also no longer required in relation to those offences under the *Salmon Fisheries (Scotland) Act 1868 (c.123)* where private prosecution was previously permitted. Now these prosecutions will be brought only by the procurator-fiscal.

It is an offence to introduce salmon or salmon eggs into inland waters without the written consent of the district salmon fishery board (if there is one for the district), or if the waters form part of a fish farm.

Exemption from certain offences may be made by the Secretary of State if every affected proprietor and the relevant district salmon fishery board (if there is one) agree, e.g. to allow salmon ranching or other developments in salmon fishing.

Acts or omissions done for scientific purposes or for the protection or improvement of salmon stocks are exempted, if written permission has been given by the relevant district salmon fishery board or the Secretary of State, as appropriate.

The Secretary of State and the Minister of Agriculture, Fisheries and Food, are required by early November 1989 to prepare a report for Parliament reviewing the nature and extent of fishing in the areas of the Yorkshire and Northumbrian water authorities, and the salmon fishery districts from the River Tweed to the River Ugie. This will involve monitoring the migration of salmon from the salmon net fisheries off the north east coast of England and the east coast of Scotland towards Scottish rivers. The purpose is to ensure that, in these areas and districts, sufficient salmon return to spawn in rivers, and that fishing for salmon by nets there is properly managed.

- 65 *Housing (Scotland) Act*. This Act consists of a series of textual amendments to earlier legislation, mainly the *Tenants' Rights, Etc. (Scotland) Act 1980 (c.52)*. To this extent, it parallels provisions for England and Wales in the *Housing and Planning Act 1986 (c.63)*.

Secure tenure and the right to buy are extended to the tenants of regional councils, police authorities and fire authorities, subject to safeguards for "operational" houses belonging to these authorities.

The minimum discounts on flats are increased to 44% after two years up to a maximum of 70% after thirty years, because these have been selling more slowly than other types of houses. The *Housing and Planning Act 1986* contains complementary provisions, enabling the Secretary of State (by order, subject to Parliamentary approval of the

draft order) to increase these, and the percentage increase for each complete year after the first two.

These increases are not retrospective to affect negotiations already in train, but a tenant could withdraw his application to buy, submit a new one, and risk the valuation's having increased in the mean time.

Restrictions on the discount on the sale of recently built houses are relaxed, being moved forward from houses first let after 15 May 1975 to those first let after 31 December 1978, and affect houses let before that date but improved after it. A later date may be substituted by an order of the Secretary of State, with Treasury consent, and modifications made in relation to different areas, cases or classes of case.

The period within which the discount is recoverable by the landlord authority on re-sale by the former tenant is reduced from five years to three years, the amounts due in the second and third years being altered to 66% and 33% respectively. Disposals by the executor of a deceased owner, or by an owner by way of gift to a member of his family who has already lived with him for a year are exempt.

The principle behind the reduction in the time is that the previous rules about repayment were an unnecessary barrier to mobility. An additional aid to mobility will be the power given to the Secretary of State to contribute by way of grants or claims towards the cost of schemes to make it easier for tenants to move to a house in the area of a different authority by way of transfer or exchange of houses.

In order to avoid the need for intending purchasers to complain to the Lands Tribunal for Scotland against what may be considered to be unreasonable conditions to a sale imposed by landlord authorities, the Secretary of State may issue a direction requiring them not to include these conditions. If they are included, they will have no effect as regards the offer to sell. There are further minor provisions associated with the continuing game of leap-frog between recalcitrant authorities and the Secretary of State in his efforts to counter devices adopted by those authorities who attempt to put difficulties in the way of intending purchasers.

While a local authority may be able to afford to fight a case in the Lands Tribunal and appeal to the Court of Session, the tenant of modest means is unlikely to be able to do so. Accordingly the Secretary of State is given discretion to give financial or other assistance to a tenant or purchaser in relation to any proceedings, prospective or actual, under Part I of the 1980 Act (the right to purchase). The case must normally raise a question of principle and the giving of assistance must be in the public interest.

A number of machinery provisions amending the *Housing Associations Act 1985 (c.69)* deal with the administration of these associations. Certain controls under the *Building (Scotland) Act 1959 (c.24)* are relaxed by way of amendments arising from a Statement of Intent by the Secretary of State placed in the Library of the House of Commons on November 29, 1984, following consideration of the responses to a consultative paper issued in October 1983. Small additions to buildings such as porches and car-ports may be excluded by regulations from the full requirement of the Building Standards Regulations; class warrants may be issued to the effect that particular designs conform to particular provisions of the Building Standards Regulations; in certain cases under what is known as "self-certification of design", an applicant will be able to certify that the design of a building complies with these Regulations. Arrangements for remission of fees are made more flexible. The intention is to grant exemptions from fees where work is carried out entirely for the benefit of disabled people.

To sum up. This might have been more aptly entitled the *Housing (Miscellaneous Provisions) (Scotland) Act*.

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