



LAW COMMISSIONS ACT 1965

First Programme of the Scottish Law Commission

*Laid before Parliament
by the Secretary of State for Scotland and the Lord Advocate
under Section 3(2)
of the Law Commissions Act 1965*

EDINBURGH
HER MAJESTY'S STATIONERY OFFICE
ONE SHILLING NET

The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law of Scotland. The Commissioners are—

The Honourable Lord Kilbrandon, LL.D., *Chairman*.

Mr. G. D. Fairbairn, S.S.C.

Professor J. M. Halliday.

Professor T. B. Smith, Q.C., D.C.L., LL.D.

The Secretary of the Commission is Mr. A. G. Brand, M.B.E. Its offices are temporarily at 1 Grosvenor Crescent, Edinburgh 12, pending removal to the Old College, University of Edinburgh, South Bridge, Edinburgh 8.

SCOTTISH LAW COMMISSION

To: THE RIGHT HONOURABLE WILLIAM ROSS, M.B.E., M.P.,
Her Majesty's Secretary of State for Scotland, and

THE RIGHT HONOURABLE GORDON STOTT, Queen's Counsel,
Her Majesty's Advocate.

Section 3(1)(b) read along with section 6(2) of the Law Commissions Act 1965 imposes on the Scottish Law Commission a duty to prepare and submit to you from time to time programmes for the examination of different branches of the law with a view to reform, including recommendations as to the agency (whether the Commission or another body) by which any such examination should be carried out.

We have the honour to submit the first of these programmes together with a brief explanatory memorandum.

C. J. D. SHAW
Chairman.

16th September, 1965.

FIRST PROGRAMME

Branches of the Law of Scotland
recommended for examination

1. Evidence.
2. Obligations.
3. Prescription and the Limitation of Actions.
4. Judicial Precedent.
5. Interpretation of Statutes.

In terms of section 3(2) of the Law Commissions Act 1965 this programme was approved by the Secretary of State and the Lord Advocate on 21st October 1965.

Memorandum by the Commission

1. At their first meeting the Commission decided to seek the views of the legal profession in Scotland as to what branches of the law most urgently require reform, and accordingly, invitations were issued to professional bodies and individuals to submit proposals in this connection to the Commission. A number of proposals have been received, more are awaited and of necessity it will take some time before these proposals are considered.

2. We also decided to examine reports by other bodies concerned with law reform with a view to considering whether, so far as the recommendations in these reports have not yet been implemented, the subjects of the reports require further examination. It may well be, too, that Government departments and other interested bodies will wish to suggest to the Commission branches of the law which appear to them to call for examination.

3. In the meantime, however, we are of the opinion that pending the receipt and consideration of these proposals, reports and suggestions, we can usefully commence the examination of the subjects included in this first short programme. These subjects have been selected, for the reasons explained below, as being suitable for examination by us now and because we think that the examination of them could conveniently be embarked upon at once. We would like to emphasise, however, that this is only a first programme and that it is our intention when we have considered all the proposals and suggestions made to us to submit a more comprehensive programme for the longer term.

4. We are conscious that the examination of these branches of law may involve questions of social policy appropriate for consideration by more widely representative bodies, but we take the view that our preliminary work will enable us at least to supply valuable information derived from other systems of law.

5. The legal profession in Scotland and the general public have been invited to draw our attention at any time to anomalies or defects in the present law. These we shall consider and, if appropriate, either include in future programmes for further examination or recommend for reform by way of inclusion in a Scottish Law Reform (Miscellaneous Provisions) Bill.

6. As many of the matters we shall have to consider in examining the branches of law included in our programme will be of common interest to ourselves and to the Law Commission, we shall work in close consultation with them, as indeed, section 3(4) of the Law Commissions Act 1965 enjoins us to do, and we shall take a particular interest in any matters included in the programmes of the Law Commission which are relevant to the consideration of reform of the law of Scotland.

7. The following is a brief exposition of the particular branches of the law included in the first programme.

Evidence

8. Our recommendation is that the law of evidence should be examined by

us with a view to its reform, to the consolidation of the relevant statutes, and ultimately to codification.

9. Our intention is that the examination be carried out on the widest basis, consideration being given to such matters as the admissibility of evidence in both civil and criminal cases, privilege, the requirements of corroboration, the competence of hearsay evidence and the value of circumstantial evidence. Evidence in relation to the authentication of writs, notarial execution and the negative prescription would also be considered as well as other collateral subjects (including matters of procedure) which may come to light in the course of the examination.

Obligations

10. We propose a comprehensive review of the law of obligations arising by force of law, voluntary obligations, and delictual obligations with the ultimate object of codification.

11. Under the first heading fall, for example, obligations of a quasi-delictual nature where the law imposes liability irrespective of fault, and also the law relating to unjust enrichment including in particular the *condictio indebiti* (which in general terms means the remedy for unjustified retention of benefits and payments where such retention would be inequitable in the circumstances), *negotiorum gestio* (which in general terms means compensation for administration of another's affairs where express authorisation could not in the circumstances have been given) and situations at present covered by the remedies of restitution, repetition and recompense.

12. Under the second heading fall obligations arising from unilateral promises, with special reference to the *jus quaesitum tertio* (which in general terms means stipulation under contract for a benefit to a third party), promises of reward and promises to keep offers open. The law regarding error, fraud and other factors vitiating consent affecting formation of contract will be examined, as also will the effect of doctrines of good faith. Thereafter, it will be necessary to deal with void and voidable contracts and the rights of third parties acquiring in good faith property originally transferred under such contracts. The law relating to constitution and proof of obligations will be considered; in this matter the inquiry will coincide with the proposed review of the law of evidence. It is proposed to examine standard form contracts, and clauses purporting to exclude liability and to consider in this context the fundamental nature of certain aspects of obligation as well as the proper scope of freedom of contract. Examples of other topics falling under this heading are penalty clauses, frustration and liability in agency. All the matters which we instance appear to stand in need of review.

13. In the law of delictual obligation, the broad question of how far liability should rest on fault, whether proved or presumed, is one that we propose to investigate on a comparative basis for fact-finding purposes. Within the framework of the present doctrine, however, there are a number of topics which merit consideration. These include patrimonial loss caused by fault not at present giving rise to damages, (*e.g. Reavis v. Clan Line Steamers Ltd.* 1925 S.C. 725) as also attacks on personality which do not cause patrimonial loss, as by insult, or invasion of privacy. Cases of non-patrimonial damage will make necessary some examination of the law relating to compensation for injury to feelings

generally. It is intended to reconsider the question of damage for abuse of rights and for financial loss caused by non-physical means (cf. *Robinson v. National Bank of Scotland* 1916 S.C. (HL) 154 and *Hedley Byrne and Co. Ltd. v. Heller and Partners Ltd.* [1964] A.C. 465). In the context of an examination of the law of obligations we would consider the law relating to strict liability generally and in particular liability for animals and for dangerous agencies escaping from land, giving special attention to the Reports on these matters by the Law Reform Committee for Scotland.

14. We have drawn attention to the particular matters mentioned above only to illustrate certain aspects of the law of obligations with which we propose to concern ourselves, but we would emphasise that this list is by no means exhaustive and that there will doubtless be many related matters which will have to be considered in the course of our examination.

Prescription and the Limitation of Actions

15. We recommend that the law of prescription be examined by us with a view to reform. The various kinds of prescription of rights and obligations, some closely connected with the law of evidence and the law of obligations, and therefore requiring consideration in relation to these topics, are based upon very old statutes and the whole law of prescription, positive as well as negative, now stands in need of clarification, co-ordination and modernisation. As a cognate subject we propose to examine the law relating to the limitation of actions with special reference to the Law Reform (Limitation of Actions) Act 1954 and Part II of the Limitation Act 1963. It should be possible to have the examination of these topics completed independently, and long before the larger subjects of evidence and obligations have been finally dealt with.

Judicial Precedent

16. We propose to examine doctrines of precedent which apply or (in some cases) are believed to apply in Scots law, and to consider relevant comparative solutions in jurisdictions having affinity with Scots law, with a view to the clarification and rationalisation of the effect of judicial decisions as a source of law.

17. First it will be expedient to examine variations of attitude regarding precedent which seem to exist in the various courts administering justice in Scotland herself. Among the problems which seem to merit detailed examination we may mention specifically the limits within which a quorum of judges may refuse to follow the law as laid down in a single precedent by a quorum exercising equivalent jurisdiction, and the collegiate powers of a Whole Court, Seven Judges or Full Bench to reconsider and reorientate existing trends established by judge-made law.

18. It has never been expressly decided that the House of Lords is bound in a Scottish appeal by the rigid doctrine of *stare decisis* (the binding single precedent) enunciated for English law by *London Street Tramways v. L.C.C.* [1898] A.C. 375; the position regarding Scotland is therefore uncertain.

19. Having considered the existing and ideal scope of precedent within the Courts in Scotland, we should wish to turn our attention to an examination of

what elements in a particular decision should be regarded as law in subsequent cases, whether the judgment pronounced or the ground for the decision, if clearly ascertainable.

Interpretation of Statutes

20. We recommend that the law relating to the interpretation of statutes should be examined by us.

21. We would propose to examine the recognised rules for the interpretation of statutes in relation to their consistency with each other, and their adequacy for the ascertaining of the intention of the Legislature. Clearly, we must be in close consultation with the Law Commission about this proposal.

