

# ACCA

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LAW

SCOTTISH VARIANT  
SUPPLEMENT

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# Introduction

This is a supplement to the **BPP Learning Media Study Text for ACCA Paper F4 Corporate and Business Law (English Variant)**. It should only be read in conjunction with this Study Text.

The purpose of this supplement is to **identify** the **main features** of **Scottish law** that are different from English law described in the Study Text.

Each chapter in this supplement contains a **Chapter approach**, setting out the **key differences** between English and Scottish law relevant to that chapter and, in the light of those differences, **how** you should approach that chapter in the Study Text.

# Law and the legal system (Scottish variant)

## Chapter approach

**Do not read Chapter 1 in your Study Text at all.**

Work through the following *Introduction to Scottish law*.

## Introduction

Welcome to your study of **Corporate and Business law**. In this chapter we set the scene and framework of the Scottish law.

We start by **defining** what law is and why it is important to society. Our study continues by considering the **different types of law** that we have and how they have developed over time.

The chapter concludes with an analysis of the **Criminal and Civil court systems**. Tribunals are also discussed as an alternative method of dispute resolution.

The **Scottish legal system** consists of practical sets of procedures and rules designed to provide resolutions to ordinary problems. Publicity tends to focus on the higher courts and the Court of Session. However the vast majority of cases are heard in the Sheriff courts.

Many people, when they think of the law, have an image in their minds of judge and jury, or 'cops and robbers'. These are manifestations of **criminal law**. Business conduct is generally regulated by **civil law**. The distinction between criminal and civil law is fundamental to the Scottish legal system. In order to understand the Scottish legal system, it is necessary to understand the differences between criminal and civil cases.

However we begin by considering what law is and the types of law which exist.

# 1 What is law?

## FAST FORWARD

'Law is a formal mechanism of social control', *Business Law 5th Edition*, David Kelly, Ann Holmes and Ruth Hayward

**Human society** has developed over thousands of years from a primitive culture where the very survival of the species was at stake to the complex, diverse and dominating species that humans are today.

Much of the success of this development can be attributable to **rules** and **regulations** laid down by society. With a little further study the need for such rules becomes clear. In the early days of human existence, **survival** was achieved by working as a group. There was a fine line between **life** and **death**, for example the **stealing** of food from another group member could eventually result in starvation or death of the victim.

**Social order**, created by rules is at the foundation of the society that we see today. The framework that was created influences how **individuals interact** and how **businesses** operate. In other words, it provides social control.

The framework of social control can be viewed as having two aspects:

- **Formal** control mechanisms
- **Informal** control mechanisms

**Law** is a formal control mechanism. It provides a **structure** for dealing with and resolving disputes that may arise, as well as providing some **deterrent** to those wishing to disrupt social order.

Informal mechanisms include **ethical** and **moral guidance**. These are 'norms' or behavioural expectations that society has developed over time through its culture. Such mechanisms have **little formal structure** to organise, control or to punish – such matters are dealt with informally by pressure from other individuals or groups.

## 2 Types of law

The Scottish legal system distinguishes several different types of law.

- Common law
- Statute law
- Private law and public law
- Criminal law and civil law
- Historical law such as, Feudal law, Canon law, Institutional law and Customs

### 2.1 Common law

This is known as **judicial precedent** or **judge-made law**. Where cases are brought before a court, the judge follows the decision of a previous case if the facts are similar. If the point of law is new, then the judge's decision becomes law and future similar cases should follow the same decision.

### 2.2 Statute law

Whilst the judiciary is responsible for the creation of common law, **Parliament** is responsible for **statute law**. Statute law is usually made in areas so **complicated** or **unique** that suitable common law alternatives are unlikely, or would take an unacceptable length of time, to develop – Company law is one example of this. We shall be studying statute law as a source of law in the next chapter.

## 2.3 Private law and public law

Most of the law that you will be studying for in this exam is **private law**. That is law which deals with **relationships** and **interactions** between businesses, customers, employees and other **private individuals, groups or organisations**.

The **state** provides a **framework** for dealing with **disputes** and for **enforcing decisions**, but it is for individuals themselves to handle matters between them. For example, the Sale of Goods Act 1979 regulates the sale of goods. It provides **rules** that must be adhered to when making a sale. Should any dispute arise that is covered by the act, it is up to **the parties** to decide the matter **themselves** using rules laid down by the legislation, the **state** does not get involved.

**Public law** is mainly concerned with **government** and the **operation** and **functions** of **public organisations** such as councils and local authorities. It will not be of great interest to you in your studies of corporate law, however examples of public law can be found in **planning rules** that must be adhered to when building or expanding offices.

A key **distinction** between **public** and **private** law is who takes up the case when a wrong is committed. The **state** prosecutes the alleged perpetrator under **public** law, whereas we have already seen, under **private** law it is for the **individual** concerned to take action.

**Criminal law** is a part of **public** law. We shall see in the next section that it is concerned with behaviour that the **state** considers unwelcome and wishes to prevent. Criminal law also deals with how those guilty of committing unlawful behaviour should be **punished**.

## 2.4 Criminal and civil liability

### FAST FORWARD

The distinction between **criminal liability** and **civil liability** is central to the Scottish legal system.

It is often the **criminal law** about which the general public has a clearer perception and keener interest. Some of the high profile criminal cases are deemed extremely newsworthy. **Civil law**, on the other hand, receives less overt media coverage. However, every time you buy or sell goods, or start or finish an employment contract, your actions, and those of the other party, are governed by civil law.

The distinction between **criminal** and **civil liability** is central to the legal system and to the way the court system is structured.

### 2.4.1 Criminal law

### FAST FORWARD

Crime is conduct prohibited by law.

- The **State** is the **prosecutor**, the accused is **punished** and fines are payable to the State.
- There is an **accused** and a **prosecution**, and the case must be proved beyond reasonable doubt.
- The courts **must be used** to settle the matter.

### Key term

A **crime** is conduct prohibited by the law.

In a criminal case the State is the prosecutor (in rare cases it may be a private person) because it is the community as a whole which suffers as a result of the law being broken. **Persons guilty of crime are punished by fines payable to the State or imprisonment.**

The **Procurator Fiscal Service** has responsibility for the investigation and prosecution of crime, although the police will often be involved in the initial investigation.

In a criminal trial, the **burden of proof** to convict the **accused** rests with the **prosecution**, which must prove its case **beyond reasonable doubt** (the standard of proof).

A criminal case might be referred to as *R v Smith*. The prosecution is brought in the name of the Crown (R signifying *Regina*, the Queen).

## 2.5 Civil law

### FAST FORWARD

**Civil law** regulates disputes over the rights and obligations of persons **dealing with each other**.

- The State has no role, there is **no concept of punishment** and **compensation** is owed to the wronged person.
- There is a **pursuer** and a **defender**, and the case must be proved on the **balance of probabilities**.
- The parties are free to settle the dispute **outside the court system**.

### Key term

**Civil law** exists to regulate disputes over the rights and obligations of persons dealing with each other.

In civil proceedings, the case must be proven on the **balance of probability**, to convince the court that it is **more probable than not that the assertions are true**.

Terminology in civil cases is different from that in criminal cases. The **pursuer** sues the **defender**. A civil case would therefore be referred to as, for example, *Smith v Megacorp plc*.

One of the most important areas of civil liability for business, and accountants in particular, is the law of **contract**. The law of contract is looked at in detail in Chapters 4–7.

## 2.6 Distinction between criminal and civil cases

### FAST FORWARD

It is not an act or event which creates the distinction between criminal and civil cases, but the **legal consequences**.

A single event might give rise to criminal and civil proceedings.



### Illustration 1

A broken leg caused to a pedestrian by a drunken driver is a single event which may give rise to:

- A **criminal case** (prosecution by the State for the offence of driving with excess alcohol), and
- A **civil case** (the pedestrian sues for compensation for pain and suffering).

The two sorts of proceedings are usually easily distinguished because three vital factors are different:

- The **courts** where the case is heard
- The **procedures**
- The **terminology**



### Illustration 2

In criminal cases the rules of evidence are very strict. For example, a confession will be carefully examined to see if any pressure was brought to bear upon the accused, but an admission in a civil case will not be subjected to such scrutiny.



### Question

### Legal proceedings

While on a sales trip, one of your employees is involved in a car accident. The other vehicle involved is damaged and it is alleged that your employee is to blame. What legal proceedings may arise as a result of this incident?



## Answer

Your employee may be guilty of a driving offence such as careless driving. The police, to whom the incident should be reported, will investigate, and if the facts indicate a driving offence, the Procurator Fiscal Service will prosecute them, probably in a Justice of the Peace Court. The owner of the damaged vehicle (or his insurers) may sue the driver at fault in civil proceedings to recover damages. A claim would probably be brought in the Sheriff Court.

### 3 The system of courts

#### FAST FORWARD

The court system is split into **civil** and **criminal** courts.

The **courts** have to be organised to accommodate the working of the legal system. There are four main functional aspects of the court system which underlie its structure.

- Civil and criminal law** differ so much in substance and procedure that they are best administered in separate courts.
- Local courts** allow the vast bulk of small legal proceedings to be decentralised.
- Although the courts form a single system, there is some **specialisation** both within the Court of Session and in other courts with separate functions.
- There is a system of review by **appeals** to higher courts.

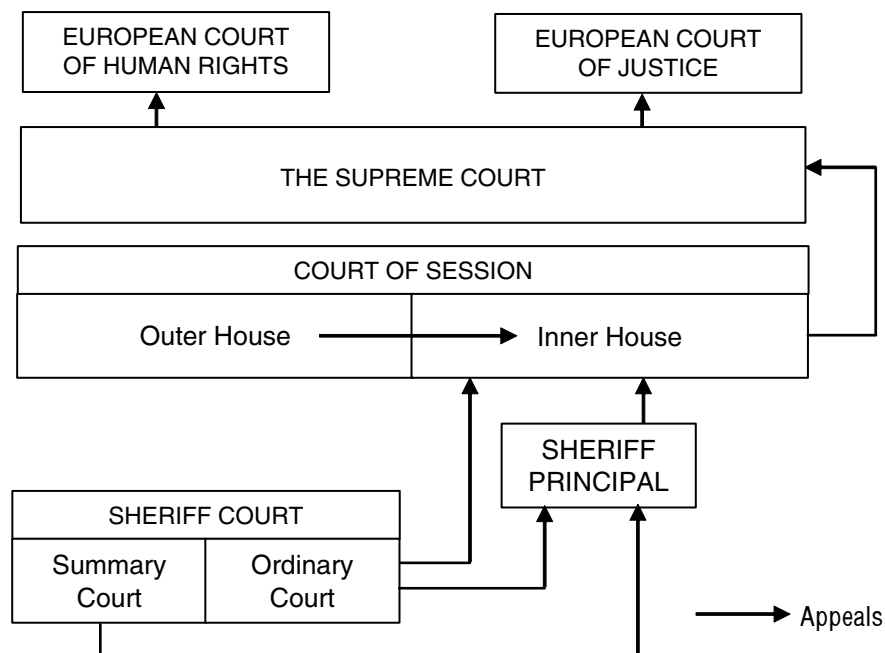
### 4 The civil court system

#### FAST FORWARD

The **civil court structure** comprises the following.

- Sheriff courts** hear claims in contract, family and debt amongst other things.
- The **Court of Session** hears more complex cases and appeals from the Sheriff Court.
- The **Supreme Court** hears appeals from the Court of Session.

The diagram below sets out the Scottish civil law system.



## 4.1 Procedure of the Civil System

There are three types of procedure for civil matters in the Civil Court System:

- Small claims procedure
- Summary cause procedure
- Ordinary action procedure

The **small claims procedure** deals with claims up to the value of £3,000. The procedure is intended to be faster, cheaper and more informal than the summary procedure.

The **summary cause procedure** is for claims between £3,000 and £5,000.

The **ordinary action procedure** is for claims over £5,000.

The pursuer serves a summons on the defender, which has been registered by the court. It states that the defender should attend court, or a decree in absence may be granted against them. It will also contain a summary of the alleged facts. Both parties have an opportunity to adjust their cases in response to statements, allegations and arguments put forward by the other party. Then the matter goes forward for decision by the court.

## 4.2 Sheriff Court

The majority of civil cases in Scotland commence in the **Sheriff Court**.

Scotland is divided into **six sheriffdoms**. Each sheriffdom is divided into Sheriff Court Districts, each of which has a Sheriff Court.

Each Sheriff Court will have one or more Sheriffs attached to it who act as judges in the Sheriff Court. The senior judge in the Sheriffdom is known as the **Sheriff Principal**.

### 4.2.1 Jurisdiction of the Sheriff Court

The jurisdiction of the Sheriff Court is determined by **subject matter** and **geography** relating to the **defender** in the case.

In civil matters, the Sheriff Court will have jurisdiction over the defender where:

- The defender is **resident** within the geographical jurisdiction of the court, or
- The action is against the defender's business, which has a **place of business** within the geographical jurisdiction of the court
- The action is concerned with a **contract to be performed** within the geographical jurisdiction of the court
- The action concerns **land** or **buildings** in the sheriffdom of which the defender is the tenant.
- The defender is being sued for a **delict** (wrongful act) which took place in the sheriffdom.

The Sheriff Court has a **wide jurisdiction over subject matter**. This includes actions relating to debt, family life, contract and property. Sheriff Courts can hear cases of debt and damage without financial limit and have exclusive jurisdiction of cases of £5,000 and below.

### 4.2.2 Appeals from the Sheriff Court

For **small claims**, appeal on a point of law may be made to the **Sheriff Principal only**. There is no further appeal.

Under the **summary procedure**, an appeal may be made to the **Sheriff Principal** on a point of law. The Sheriff Principal will require that the Sheriff prepares a Stated Case setting out his findings in fact and law. It is possible to make a **further appeal** to the **Inner House of the Court of Session**.

Under the **ordinary procedure**, an appeal can be made to the **Sheriff Principal** and then on to the Inner House of the Court of Session as in a summary case. However, it is **also possible** under the ordinary procedure to **appeal directly** to the **Inner House of the Court of Session**. There is a further appeal on a point of law to the **Supreme Court**.

## 4.3 Court of Session

The **Court of Session** in Edinburgh is divided into the **Outer House** and the **Inner House**. The Outer House is a court of first instance for civil claims not initiated in the Sheriff Court. The Inner House is mainly a court of appeal, as has been seen above.

### 4.3.1 Jurisdiction of the Court of Session

The jurisdiction of the Court of Session is similar to the Sheriff Court, except that the Court of Session has jurisdiction over the whole of Scotland. It cannot hear cases which belong in the Sheriff Courts.

### 4.3.2 Outer House of the Court of Session

The Outer House consists of **22 Lords** ordinary sitting alone or, occasionally, with a civil jury.

There are two types of case which may be brought in the Outer House of the Court of Session. These are **actions** (such as those brought at Sheriff Courts) and **petitions**.

#### Key terms

An **action** is a case brought to enforce a legal right against a defender who resists it or to protect a legal right that the defender is infringing.

A **petition** is a case brought to obtain the power of the Crown to do something or to require something to be done which the petitioner has no existing legal right to.

### 4.3.3 Procedure in the Outer House

The procedure for an **action** is **similar to the ordinary procedure** in the **Sheriff Court**. If the dispute concerns questions of law and the parties agree the facts, the matter will be debated by lawyers and the court will give a decision. Where there is a dispute over facts, evidence will be presented to the judge.

A **petition** is an application by one side to the court, which may be contentious or not. The court decides whether parties should be made aware of a petition, once it has been made to the court. Parties may lodge answers to matters in a similar way as a defender to an action may lodge defences.

### 4.3.4 Appeals from the Outer House

Appeals from the Outer House of the Court of Session go straight to the Inner House.

### 4.3.5 Inner House of the Court of Sessions

The Inner House has two divisions which are equal in authority. Generally an appeal may be heard by either division. In some difficult cases, the divisions may sit together.

### 4.3.6 Personnel in the Inner House

Judges attached to the Court of Session are known as **Senators of the College of Justice** or **Lords of Council and Session**. Each Division in the Inner House is made up of six judges, with a quorum (in all but exceptional cases) of three. An extra Division of three judges now often sits due to pressure of business.

### 4.3.7 Appeals from the Inner House

Appeals may be made from the Outer House to the Inner House. Appeals on decisions in the Inner House may be made to the Supreme Court.

## 4.4 Supreme Court

The **Supreme Court** consists of **12 judges** known as '*Justices of the Supreme Court*' and its members include a **President** and a **Deputy President**.

Its **role** is to hear appeals on the most important legal issues, and also hears devolution issues relating to Scotland. It has no jurisdiction in Scottish criminal cases.

The **Supreme Court's role** was inherited from the judicial function that the House of Lords held until October 2009. You may therefore come across decisions of the House of Lords when reading cases.

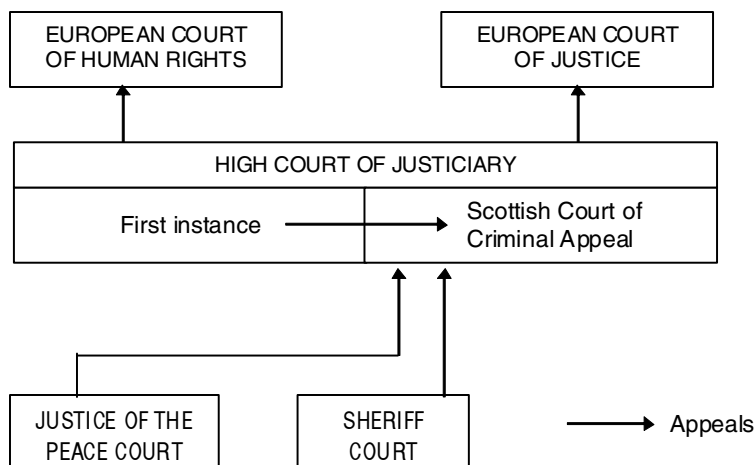
## 5 The criminal court system

### FAST FORWARD

The **criminal court structure** comprises the following.

- **Justice of the Peace Courts** hear minor offences.
- The **Sheriff Court** tries more serious criminal offences.
- The **High Court of Justiciary** hears serious cases and appeals from Justice of the Peace (JP) courts and Sheriff Court.

The diagram below sets out the Scottish criminal court structure



### 5.1 Justice of the Peace (JP) Courts

The Justice of the Peace Courts are the lowest criminal court in Scotland. There is a court in every District or Islands Council. These Courts were previously known as District Courts.

#### 5.1.1 Jurisdiction

Two things affect a criminal court's jurisdiction: **geography** and **subject matter**. To be dealt with in the court a crime must come within its jurisdiction and have been committed in the relevant district.

The court deals with **minor offences** such as breaches of the peace, traffic offences, or theft or fraud of small amounts.

#### 5.1.2 Personnel

The prosecutor on behalf of the State is the **Procurator Fiscal**. The case is heard in front of a judge who will either be a **Justice of the Peace (JP)** or a **Stipendiary Magistrate**. A JP is not legally qualified but sits with a legally qualified clerk. Procedure is summary ie there is no jury.

#### 5.1.3 Sentencing

A **Justice of the Peace** may impose fines of up to £2,500 and imprisonment of up to 60 days. A **Stipendiary Magistrate** may impose fines of up to £10,000 and imprisonment of up to 12 months (depending on the nature of the crime).

#### 5.1.4 Appeals

Appeals from the JP Court go straight to the High Court of Justiciary sitting as the Scottish Court of Criminal Appeal.

## 5.2 Sheriff Court

The Sheriff Court (discussed above in relation to civil matters) deals with the vast majority of criminal cases. Again, the prosecutor on behalf of the state is the **Procurator Fiscal**.

### 5.2.1 Jurisdiction of the Sheriff Court

The Sheriff Court can deal with all crime committed in its geographical jurisdiction except crimes of murder, rape and treason.

### 5.2.2 Procedure of the Sheriff Court

In relation to criminal cases, there are two types of procedure in the Sheriff Court, **summary** and **solemn**.

The **summary procedure** is used for less serious cases. The Sheriff sits alone, without a jury, and decides both guilt and penalty. A document known as the Summary of Complaint is served on the accused. The Sheriff is allowed to fine up to £10,000 or imprison convicted persons for up to 12 months.

The **solemn procedure** is used for more serious cases. The Sheriff sits with a jury of 15 persons. The jury decides whether the accused is guilty on the facts. The Sheriff advises the jury as to the law and also carries out the sentencing. A document known as the Indictment is served on the accused. The Sheriff is allowed to sentence with an unlimited fine and/or imprisonment up to five years.

If the Sheriff feels that he does not have the capacity to sentence **sufficiently severely**, he may remit the case to the High Court of Justiciary for sentencing.

### 5.2.3 Appeals from the Sheriff Court

Appeals may be made to the High Court of Justiciary sitting as the Scottish Court of Criminal Appeal.

## 5.3 High Court of Justiciary

The High Court of Justiciary is both a court of first instance (for major crimes such as murder, rape and treason) and also a court of appeal.

### 5.3.1 Jurisdiction of High Court of Justiciary as a Court of first instance

The **High Court of Justiciary** has jurisdiction over all crimes committed in Scotland, unless they are crimes that are specifically limited to the lower courts. Procedure in the High Court is always solemn ie in front of a jury of 15 people. There is no limit to the sentencing power of the High Court of Justiciary. Appeals may be made to the High Court sitting as the Scottish Court of Criminal Appeal.

### 5.3.2 Jurisdiction of High Court of Justiciary as Scottish Court of Criminal Appeal

The High Court of Justiciary may hear appeals from the District courts, the Sheriff Courts or the High Court of Justiciary (first instance cases). There is no jury in appeal cases. The judges may quash the conviction, refuse the appeal or modify the sentence.

## Chapter Roundup

- 'Law is a formal mechanism of social control', *Business Law 5th Edition*, David Kelly, Ann Holmes and Ruth Hayward
- The distinction between **criminal liability** and **civil liability** is central to the Scottish legal system.
- Crime is conduct prohibited by law.
  - The **State** is the **prosecutor**, the accused is **punished** and fines are payable to the State.
  - There is an **accused** and a **prosecution**, and the case must be proved beyond reasonable doubt.
  - The courts **must be used** to settle the matter.
- **Civil law** regulates disputes over the rights and obligations of persons **dealing with each other**.
  - The State has no role, there is **no concept of punishment** and **compensation** is owed to the wronged person.
  - There is a **pursuer** and a **defender**, and the case must be proved on the **balance of probabilities**.
  - The parties are free to settle the dispute **outside the court system**.
- It is not an act or event which creates the distinction between criminal and civil cases, but the **legal consequences**.
- The court system is split into **civil** and **criminal** courts.
- The **civil court structure** comprises the following.
  - **Sheriff courts** hear claims in contract, family and debt amongst other things.
  - The **Court of Session** hears more complex cases and appeals from the Sheriff Court.
  - The **Supreme Court** hears appeals from the Court of Session.
- The **criminal court structure** comprises the following.
  - **Justice of the Peace Courts** hear minor offences.
  - The **Sheriff Court** tries more serious criminal offences.
  - The **Court of Justiciary** hears serious cases and appeals from Justice of the Peace (JP) courts and Sheriff Court.

## Quick Quiz

1 **Fill in the blanks** in the statements below, using the words in the box.

- The distinction between (1) ..... and (2) ..... liability is central to the Scottish legal system.
- (3) ..... allows parties to bring their dispute before a non-legal independent expert so that he may decide the case.

• criminal	• arbitration	• civil
------------	---------------	---------

2 What is the standard of proof in civil proceedings?

3 What kind of judge sits in the Supreme Court?

4 All the following statements relate to criminal and civil law. Which one of the statements is correct?

- A A criminal case may subsequently give rise to a civil case, but a civil case cannot subsequently give rise to a criminal case.
- B The main purpose of civil law is to compensate the injured party and to punish the injuring party.
- C A custodial sentence can be passed on the defendant in a civil case, providing the defendant is a natural person and not an incorporated body.
- D Trial by jury is never possible in a civil court.

## Answers to Quick Quiz

1 (1) criminal (2) civil (3) arbitration

2 The case must be proved on the balance of probability

3 Justices of the Supreme Court

4 D. Juries are only used in criminal cases.





# Sources of law (Scottish variant)

# 2

## Chapter approach

While the sources of law in England and Scotland are very similar, they are sufficiently different that **you should not read Chapter 2 in the Study Text**.

Instead, work through the notes given below on *Sources of Scottish Law*.

## Introduction

Sources of law are the means by which the law is brought into existence. Law in Scotland will either have a common law source or have a statutory source. The **historical** sources of law come from the **common law**. These are judicial precedent (sometimes called case law), institutional writings, custom and equity.

The system of precedent, whereby judges apply legal decisions decided in previous cases to facts presenting in current cases, was inherited by Scotland from England. This is largely because certain decisions of the Supreme Court in civil matters are binding on Scotland. This **doctrine of judicial precedent** has a number of associated rules to make it work, which are considered in Section 1 of this Chapter.

In the absence of a judicial precedent on a matter, **institutional writings** may be taken to give an authoritative statement of law on the matter.

**Custom** is a historic source of law which incorporates the responses of the community practised over generations.

The Court of Session in Scotland may practice an **equitable right of nobile officium** to promote fairness in the law.

The law is not static but changes and develops, reflecting the values and institutions of each era. There has been an increasing flow of new laws designed, for example, to deal with social problems and to develop the national economy.

**Legislation** is brought through Parliament. Scottish legislation may be brought at Westminster in the form of law that applies to the whole of the UK or in the form of a statute that applies only to Scotland, or through the Scottish Parliament.

As there is a need for detail which Parliament does not have time to determine, detail is often left for civil servants or local authorities to provide in **delegated legislation**. There are a number of situations which might lead to a need for laws to be **interpreted**. There are several different sources of assistance for a judge in this task of **statutory interpretation**.

This chapter provides the **basis** for much of the law you will learn in the rest of the text, particularly contract and employment which are heavily case law based.

# 1 Judicial precedent

## FAST FORWARD

Decisions made in the courts are **case law**, which is judge-made law based on the underlying principle of consistency. Once a legal or equitable principle is decided by an appropriate court it is a **judicial precedent**.

The **decisions** of a few courts in the Scottish legal system are **binding on future judges** under the system of judicial precedent. This is as a result of the influence of English law in Scottish law. Precedent is historically an English concept.

## Key term

A **precedent** is a previous court decision which another court is bound to follow by deciding a subsequent case in the same way.

In any later case to which that principle is relevant the same principle should (subject to certain exceptions) be applied. This doctrine of consistency, following precedent, is expressed in the maxim **stare decisis** which means 'to stand by a decision'.

The doctrine of **judicial precedent** means that a judge is bound to apply a decision from an earlier case to the facts of the case before them, provided, among other conditions, that there is no material difference between the cases.

Judicial precedent is based on three elements.

<b>Reports</b>	There must be adequate and reliable reports of earlier decisions.
<b>Rules</b>	There must be rules for extracting a legal principle from a previous set of facts and applying it to current facts.
<b>Classification</b>	Precedents must be classified into those that are binding and those which are merely persuasive.

## 1.1 Law reports

### FAST FORWARD

There are major series of **law reports** on general law bound as annual volumes.

Every case has a title, usually (in a civil case) in the form *Carlill v Carbolic Smoke Ball Co*. Some cases are cited by reference to the subject matter. Thus case names have included *Re Barrow Haematite Steel Co* (a company case), *Re Adams and Kensington Vestry* (a trust case) and in shipping cases the name of the ship, for example, *The Wagon Mound*.

As regards content a full law report includes details of the following.

- Names of the parties
- Court in which the case was decided
- Judge or judges
- Date of the hearing
- Points of law established
- Earlier cases cited
- Previous history of the litigation
- Facts
- Names of counsel and their arguments
- Verbatim text of the judgement
- Order of the court
- Whether leave to appeal was granted
- Solicitors
- Reporting barrister

## 1.2 Applying a precedent to a case

### FAST FORWARD

In order that judicial precedent provides consistency in law, the **ratio decidendi** must be identified. The material facts must be the same. The status of the court which set the precedent must be such as to bind the present court. *Rationes decidendi* are the reasons for the decision being made – they alone are binding. **Obiter dicta** are comments made by the deciding judge in passing and are persuasive only.

The doctrine of judicial precedent is designed to provide **consistency** in the law. Four things must be considered when examining a precedent before it can be applied to a case.

- A decision must be based on a **proposition of law** before it can be considered as a precedent. It may **not** be a decision on a **question of fact**.
- It must form part of the **ratio decidendi** of the case.
- The **material facts** of each case must be the same.
- The preceding court must have had a **superior (or in some cases, equal) status** to the later court, such that its decisions are binding on the later court.

### 1.2.1 *Ratio decidendi*

A judgement will start with a description of the facts of the case and probably a review of earlier precedents. The judge will then make **statements of law applicable to the legal problems** raised by the material facts which, **if the basis for the decision**, are **known as the ratio decidendi** of the case, which is the **vital element which binds future judges**.

#### Key term

'The **ratio decidendi** of a case is any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him, or a necessary part of his direction to the jury.'

*(Cross: Precedent in English Law)*

Statements made by a judge are either classed as *ratio decidendi* or *obiter dicta*. There are two types of *obiter dicta* (which means something said 'by the way').

- A judge's statements of legal principle might not form the basis of the decision.
- A judge's statements might not be based on the existing material facts but on hypothetical facts.

#### Key term

**Obiter dicta** are words in a judgement which are said 'by the way'.

They **do not** form part of the **ratio decidendi**; they are not binding on future cases but are merely persuasive.

It is not always easy to identify the *ratio decidendi*. In decisions of appeal courts, where there are three or even five separate judgements, the members of the court may reach the same conclusion but give different reasons. Many judges indicate in their speeches which comments are *ratio* and which are *obiter*.

### 1.2.2 Distinguishing the facts

Although there may arguably be a finite number of legal principles to consider when deciding a case, there is an infinite variety of facts which may be presented.

It is necessary to consider how far the facts of the previous and the latest case are similar. If the differences appear significant the court may **distinguish the earlier case on the facts** and thereby **avoid following it as a precedent**.

### 1.2.3 Status of the court

**Not every decision made in every court is binding as a judicial precedent.** The **court's status** has a significant effect on whether its decisions are binding, persuasive or disregarded.

Some decisions of the **Supreme Court** may be **binding on all the Scottish civil courts**. Examples would include decisions on legislation relevant to the whole of the UK or to Scotland.

The **Inner House** of the **Court of Session** binds the **Outer House** and the **Sheriff court**. It also binds **itself**, but if the judges of both divisions of the Inner House sit together as seven judges, they can overturn a decision of a division of the Inner House.

COURT	BOUND BY	DECISIONS BINDING ON
<b>Sheriff Court</b>	<ul style="list-style-type: none"> <li>• The Court of Session</li> <li>• Supreme Court</li> <li>• European Court of Justice</li> </ul>	<ul style="list-style-type: none"> <li>• No one</li> <li>• Not even itself</li> </ul>
<b>Court of Session (Outer House)</b>	<ul style="list-style-type: none"> <li>• Court of Session (Inner House)</li> <li>• Supreme Court</li> <li>• European Court of Justice</li> </ul>	<ul style="list-style-type: none"> <li>• No one</li> <li>• Not even itself</li> </ul>
<b>Court of Session (Inner House)</b>	<ul style="list-style-type: none"> <li>• Own decisions (in any division)</li> <li>• Supreme Court</li> <li>• European Court of Justice</li> </ul>	<ul style="list-style-type: none"> <li>• Sheriff Court</li> <li>• Court of Session (Outer House)</li> <li>• Itself (subject to an exception discussed above)</li> </ul>
<b>The Supreme Court</b>	<ul style="list-style-type: none"> <li>• Itself (except in exceptional cases)</li> <li>• European Court of Justice</li> </ul>	<ul style="list-style-type: none"> <li>• All Scottish Civil Courts on points of law relevant to Scotland</li> <li>• Itself (except in exceptional cases)</li> </ul>
<b>The European Court of Justice</b>	<ul style="list-style-type: none"> <li>• No-one</li> <li>• Not even itself</li> </ul>	<ul style="list-style-type: none"> <li>• All UK Courts</li> </ul>

All Scottish criminal courts will follow precedents set by the High Court of the Justiciary. No other Scottish Criminal Court makes binding precedents.

### 1.3 Persuasive precedents

#### FAST FORWARD

**Persuasive precedents** are not necessarily followed in later cases.

Apart from binding precedents, reported decisions of any court may be treated as **persuasive precedents**. Persuasive precedents may be, but need not be, followed in a later case.

A court of higher status is not only free to disregard the decision of a court of lower status, it may also deprive it of authority and expressly **overrule** it. Remember that this does not reverse the previous decision. Overruling a decision does not affect its outcome.

#### Key terms

Where an earlier decision was made by a lower court, the judges can **overrule** that earlier decision if they disagree with the lower court's statement of the law. **The outcome of the earlier decision remains the same, but will not be followed.**

If the decision of a lower court is appealed to a higher one, the higher court may **reverse** the decision if they feel the lower court has wrongly interpreted the law. **When a decision is reversed, the higher court is usually also overruling the lower court's statement of the law.**

If, in a case before the Supreme Court, there is a dispute about a point of European Union law it must be referred to the **European Court** for a ruling. The European Court does not create or follow precedents as such, and the provisions of EU directives should not be used to interpret UK legislation.

## 1.4 Avoidance of a binding precedent

### FAST FORWARD

A precedent which should be binding can be avoided on the grounds of **different facts**, **obscure ratio decidendi**, **faulty process**, being in **conflict** with fundamental legal principles, and **being too wide**.

Even if a precedent appears to be binding, there are **a number of grounds on which a court may decline to follow it**.

- It may be able to **distinguish the facts**.
- It may declare the *ratio decidendi* **obscure**, particularly when a decision by three or five judges gives as many *rationes*.
- It may declare the previous decision made **per incuriam**: without taking account of some essential point of law, such as an important precedent.
- It may declare it to be in **conflict with a fundamental principle of law**; for example where a court has failed to apply the doctrine of privity of contract: *Beswick v Beswick 1968*.
- It may declare an earlier precedent to be **too wide**. For example, the duty of care to third parties, first propounded in *Donoghue v Stevenson 1932*, has since been considerably refined.



### Question 1

### Precedents

Match each of the following definitions to the correct term.

- A court higher up in the hierarchy overturns the decision of a lower court on appeal in the same case.
  - A principle laid down by a lower court is overturned by a higher court in a different, later case.
  - A judge states that the material facts of the case before them are sufficiently different from those of an earlier case as to enable the application of a different rule of law.
- Distinguishing
  - Overruling
  - Reversing

### Answer 1

- (3)
- (2)
- (1)



### Question 2

### Binding precedent

Fill in the following table, then check your answer.

Name of court	Binds	Is bound by
<b>Sheriff court</b>		
<b>Court of Session (Outer House)</b>		
<b>Court of Session (Inner House)</b>		
<b>Supreme Court</b>		
<b>European Court of Justice</b>		

## 2 Institutional writings

### FAST FORWARD

Institutional writings may be consulted as a **last resort**.

**Institutional writings** are the legal writings of certain legal scholars which may have legal status in the absence of other provisions.

The works of the following people have the status of **institutional writing**:

- Sir Thomas Craig (1655)
- Viscount Stair (1681)
- Lord Bankton (1751)
- Professor John Erskine (1772)
- Baron Hume (1786 through to 1822)
- Professor George Bell (1810 and 1829)

Institutional writings should only be consulted where there is no statutory provision or precedent on a point.

## 3 Custom

### FAST FORWARD

**Custom** underlies many old laws but is unlikely to create new laws.

Customs are the traditional law of communities that have existed for a long time. They are a subsidiary source of common law. Custom is extremely unlikely to create new law.

## 4 Equity

### FAST FORWARD

A remedy on the **basis of fairness** may be given when the law as it stands does not.

Scottish law is based on principles of fairness. As well as applying the strict rules of law to cases set before them, judges in the Court of Session and High Court of Justiciary may exercise the right of '*nobile officium*'.

The *nobile officium* is a right which allows them to grant an equitable remedy although the law does not provide for it.

## 5 Statute law (primary legislation)

### FAST FORWARD

UK statute law takes the form of **Acts of Parliament**.

Statute law is made by Parliament (or in exercise of law-making powers delegated by Parliament). Until the United Kingdom entered the European Community (now the European Union) in 1973 the UK Parliament was completely **sovereign**.

In recent years however, UK membership of the European Union has restricted the previously unfettered power of Parliament. There is an **obligation**, imposed by the Treaty of Rome, **to bring UK law into line with the Treaty itself and with directives**. Regulations, having the force of law in every member state, may be made under provisions of the Treaty of Rome.

### Exam focus point

EU law is not listed on your syllabus.

## 5.1 Parliamentary sovereignty

Parliamentary sovereignty gives rise to a number of consequences. Parliament may:

- **Repeal** earlier statutes
- **Overrule** case law developed in the courts, or
- **Make new law** on subjects which have not been regulated by law before.

No Parliament can legislate so as to prevent a future Parliament changing the law:



### Case Study 1

*Vauxhall Estates v Liverpool Corporation 1932*

*The facts:* If compensation for compulsory purchase were assessed under an Act of 1919 the claimants would receive £2,370, whereas if it were assessed under an Act of 1925 they would only receive £1,132. The Act of 1919 provided that any Act inconsistent with it would have no effect.

*Decision:* This provision in the 1919 Act did not apply to subsequent Acts because Parliament cannot bind its successors.

The judges have to **interpret** statute law and they may find a meaning in a statutory rule which those Members of Parliament who promoted the statute did not intend.

The **validity** of an Act of Parliament cannot be questioned.



### Case Study 2

*Cheney v Conn 1968*

*The facts:* The claimant objected to his tax assessment under the Finance Act 1964 because some of the tax collected was used to fund the manufacture of nuclear weapons. He alleged that this was contrary to the General Conventions Act 1957 and in conflict with international law.

*Decision:* The 1964 Act gave clear authority to collect the taxes.

In practice, Parliament usually follows certain **conventions** which limit its freedom.

In addition to making new law and altering existing law, Parliament may make the law clearer by passing a **codifying** statute (such as the Sale of Goods Act 1979) to put case law on a statutory basis, or a **consolidating** statute to incorporate an original statute and its successive amendments into a single statute (such as the Companies Act 2006).

## 5.2 UK Parliamentary procedure

A proposal for legislation in Westminster is originally aired in public in a **Government Green Paper**. After comments are received a **White Paper** is produced, which sets out the intended aim of the legislation. It is then put forward in draft form as a **Bill**, and may be introduced into either the House of Commons or the House of Lords. When the Bill has passed through one House it must then go through the same stages in the other House.

In each House the successive stages of dealing with the Bill are as follows.

**Stage 1** *First reading.* Publication and introduction into the agenda. No debate.

**Stage 2** *Second reading.* Debate on the general merits of the Bill. No amendments at this stage.

**Stage 3** *Committee stage.* The Bill is examined by a Standing Committee of about 20 members, representing the main parties and including some members at least who specialise in the relevant subject. If the Bill is very important all or part of the Committee Stage may be taken by the House as a whole sitting as a committee.

**Stage 4** *Report stage.* The Bill as amended in committee is reported to the full House for approval.

**Stage 5** *Third reading.* This is the final approval stage.

When it has passed through both Houses it is submitted for the **Royal Assent** which is given on the Queen's behalf by a committee of the Lord Chancellor and two other peers. It then becomes an Act of Parliament (or statute) but it does not come into operation until a commencement date is notified by statutory instrument.

## 5.3 Scottish Parliament

The **Scottish Parliament** in Edinburgh has powers to make law pertaining to certain matters, such as **education** and **health**. Unlike the UK Parliament, the Scottish Parliament is forbidden to enact legislation which is contrary to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The **UK Parliament** still retains its **full legislative power** over **constitutional issues, defence, economic and fiscal policy, foreign affairs, employment and social security**. It allows the Scottish Parliament to legislate on other matters including a limited right to raise taxes.

Legislation created by the Scottish Parliament are known collectively as the Scotland Acts. The first Acts were passed in 1999 following the creation of the Scottish Parliament by the Scotland Act 1998 which received Royal Assent in the UK Parliament in November 1998.

Details of all Acts passed by the Scottish Parliament can be found online at:  
<http://www.scottish.parliament.uk/parliamentarybusiness/Bills/72402.aspx>

### 5.3.1 Scottish Parliamentary procedure

A Bill is presented to the Scottish Parliament together with a statement from the **Presiding Officer** that it falls within the Parliament's power, plus an indication from the **Minister of the Scottish Executive** as to its objectives.

The stages for the Bill in the Scottish Parliament, once presented, are as follows:

**Stage 1** Lead Committee considers the general principles and reports to Parliament

**Stage 2** If Parliament accepts the general principles, it goes back to the Lead Committee, or to a committee of the whole Parliament, for detailed consideration and suggested amendments.

**Stage 3** Parliament then decides if it should be passed.

**Royal Assent is required**, as with Acts of the UK Parliament. If there is any doubt as to whether the new Act does indeed fall within the scope of the Scottish Parliament's jurisdiction, it is referred to the Judicial Committee of the Privy Council.

## 5.4 Advantages and disadvantages of legislation

### Advantages

- The House of Commons is elected at intervals of not more than five years. Hence the law making process is theoretically responsive to public opinion.
- Statute law can in theory deal with any problem.
- Statutes are carefully constructed codes of law.
- A new problem in society or some unwelcome development in case law can be dealt with by passing an Act of Parliament.



### Disadvantages

- Statutes are bulky (about 70 public statutes are passed each year and the complete set of statutes runs to more than 40 volumes of several hundred pages each).
- Parliament often lacks time to consider draft legislation in sufficient detail.
- A substantial statute can take up a lot of Parliamentary time.
- Statute law is a statement of general rules. Those who draft it cannot anticipate every individual case which may arise.

## 6 Delegated legislation (secondary legislation)

### FAST FORWARD

UK statute law may also take the form of **delegated legislation**, such as **statutory instruments** and **bye-laws**.

To save time in Parliament, Acts usually contain a section by which power is given to a minister, or public body such as a local authority, to make **subordinate or delegated legislation**.

### Key term

**Delegated legislation** means rules of law, often of a detailed nature, made by subordinate bodies to whom the power to do so has been given by statute.

### 6.1 Forms of delegated legislation

Delegated legislation appears in various forms.

- **Orders in Council** allow the government to make law through the Privy Council, bypassing the full parliamentary procedure.
- Ministerial powers are exercised by **statutory instruments**. Statutory instruments are the most common form of delegated legislation.
- **Local authorities** are given statutory powers to make **bye-laws**.
- Parliament gives power to certain **professional bodies** to regulate their members' conduct.
- **Acts of Sederunt and Acts of Adjournal** may be made by the judiciary to control court procedure.
- All **acts passed by the Scottish Parliament** are effectively delegated legislation since the power to legislate has been delegated to it from the UK Parliament under the Scotland Act 1998.

### 6.2 Control over delegated legislation

Parliament does exercise some **control** over delegated legislation by keeping the making of new delegated legislation under review.

This includes:

- Some statutory instruments do not take effect until approved by **affirmative resolution** of Parliament.
- Most other statutory instruments must be laid before Parliament for 40 days before they take effect.

There are standing **Scrutiny Committees** of both Houses whose duty it is to examine statutory instruments with a view to raising objections if necessary.

A **statutory instrument may be challenged** in the courts on the grounds that it **exceeds the prescribed limits** or has been made **without due compliance** with the correct procedure.

Both statutes and delegated legislation under it are expressed in **general terms**. It is not possible to provide in the Act for each eventuality which falls within its remit. It therefore often falls to judges to interpret Acts.

### 6.2.1 Striking out delegated legislation under the Human Rights Act 1998

One of the consequences of the Human Rights Act 1998 is that higher courts can **strike out** secondary legislation which does not comply with the Convention on Human Rights. This acts as another **control** over **delegated legislation**.

### 6.3 Advantages and disadvantages of delegated legislation

Delegated legislation has the following **advantages**:

- Parliament does not have time to examine matters of detail.
- Much of the content of delegated legislation is technical and is better worked out in consultation with professional, commercial or industrial groups outside Parliament.
- If new or altered regulations are required later, they can be issued **without referring back to Parliament**.
- The system allows the law to be enacted quickly.

The **disadvantages** of the system are as follows.

- Because delegated legislation can be produced in large amounts, the **volume** of such law-making becomes unmanageable.
- The system is **unrepresentative** in that power is given to civil servants who are not democratically elected.
- The different sorts of delegated legislation which may be produced by virtue of one statute can greatly **confuse** users.

## 7 Statutory interpretation

#### FAST FORWARD

It is important that courts are equipped to **interpret** statutes in order to apply them in the real world.

There are a number of situations which might lead to a need for statutory interpretation.

- (a) **Ambiguity** might be caused by an error in drafting.
- (b) **Uncertainty** may arise where the words of a statute are intended to apply to a range of factual situations and the courts must decide whether the case before them falls into any of these situations.
- (c) There may be **unforeseeable developments**.
- (d) The draft may use a **broad term**. Thus, the word vehicle may need to be considered in relation to the use of skateboards or bicycles.

There are a number of different sources of assistance for a judge in his task of statutory interpretation. These are the **principles of statutory interpretation** and consist of:

- Rules
- Presumptions
- Other aids (intrinsic or extrinsic)

### 7.1 Rules of statutory interpretation

In interpreting the words of a statute the courts have developed a number of well-established general principles.

#### 7.1.1 The literal and golden rules

#### Key term

The **literal and golden rules** means that words should be given their plain, ordinary, literal or grammatical meaning (rather than what the judge thinks they mean) unless this would give rise to manifest absurdity or inconsistency with the rest of the statute.

Normally a word should be construed in the same literal sense wherever it appears throughout the statute.



## Illustration 1

In *Whitely v Chapell 1868* a statute aimed at preventing electoral malpractice made it an offence to impersonate 'any person entitled to vote' at an election. The accused was acquitted because he impersonated a dead person, who was clearly not entitled to vote.

### 7.1.2 The mischief rule

#### Key term

Under the **mischief rule** a judge considers what mischief the Act was intended to prevent. Where a statute is designed to remedy a weakness in the law, the correct interpretation is the one that which achieves it.

These rules were used until relatively recently. The **Law Commissioners** recommended that judges interpret statute using the **general purposes** behind it and the intentions of Parliament. This is known as **Purposive interpretation**.

### 7.1.3 The purposive rule

#### Key term

Under this approach to statutory interpretation, the words of a statute are interpreted not only in their ordinary, literal and grammatical sense, but also with reference to the context and purpose of the legislation, ie what is the legislation trying to achieve?



## Illustration 2

This shows how the court took account of the mischief or weakness which the statute was explicitly intended to remedy.

*Gardiner v Sevenoaks RDC 1950*

*The facts:* The purpose of an Act was to provide for the safe storage of film wherever it might be stored on 'premises'. The claimant argued that 'premises' did not include a cave and so the Act had no application to his case.

*Decision:* The purpose of the Act was to protect the safety of persons working in all places where film was stored. If film was stored in a cave, the word 'premises' included the cave.

The key to the purposive approach is that the judge construes the statute in such a way as to **be consistent with the purpose of the statute** as he understands it, even if the wording of the statute could be applied literally without leading to manifest absurdity.

### Human Rights Act 1998

UK courts are now required to interpret UK legislation in a way compatible with the convention so far as it is possible to do so. This is an example of **purposive** interpretation.

### 7.1.4 The contextual rule

#### Key term

The **contextual rule** means that a word should be construed in its context: it is permissible to look at the statute as a whole to discover the meaning of a word in it.

The courts have been paying more attention to what Parliament intended in recent times. This is in order that the courts apply the law for the purpose for which it is enacted by Parliament. A more purposive approach is also being taken because so many international and EU regulations come to be interpreted by the courts.

## 7.2 General rules of interpretation

### 7.2.1 The *ejusdem generis* rule

Statutes often list a number of specific things and end the list with more general words. In that case the general words are to be limited in their meaning to other things of the same kind as the specific items which precede them.



#### Illustration 3

*Evans v Cross 1938*

*The facts:* E was charged with driving his car in such a way as to 'ignore a traffic sign', having crossed to the wrong side of a white line. 'Traffic sign' was defined in the Act as 'all signals, warning signposts, direction posts, signs or other devices'.

*Decision:* 'Other device' must be limited in its meaning to a category of such signs. A painted line was quite different from that category.

### 7.2.2 *Expressio unius est exclusio alterius*

To express one thing is by implication to exclude anything else.

### 7.2.3 Words must be understood in their context

A word draws meaning from the other words around it. If a statute mentioned 'children's books, children's toys and clothes' it would be reasonable to assume that 'clothes' meant children's clothes.

### 7.2.4 *In pari materia*

If the statute forms part of a series which deals with similar subject matter, the court may look to the interpretation of previous statutes on the assumption that Parliament intended the same thing.

## 7.3 Presumptions of statutory interpretation

Unless the statute contains express words to the contrary it is assumed that the following presumptions of statutory interpretation apply, each of which may be rebutted by contrary evidence.

- **A statute does not alter the existing common law.** If a statute is capable of two interpretations, one involving alteration of the common law and the other one not, the latter interpretation is to be preferred.
- **If a statute deprives a person of his property**, say by nationalisation, he is to be compensated for its value.
- **A statute is not intended to deprive a person of his liberty.** If it does so, clear words must be used. This is relevant in legislation covering, for example, mental health and immigration.
- **A statute does not have retrospective effect** to a date earlier than its becoming law.
- **A statute does not bind the Crown.** In certain areas, the Crown's potential liability is great and this is therefore an extremely important presumption.
- **A statute has effect only in the UK.** However a statute does not run counter to international law and should be interpreted so as to give effect to international obligations.
- **A statute cannot impose criminal liability** without proof of guilty intention. Many statutes rebut this presumption by imposing strict liability, say for dangerous driving under the Road Traffic Act.
- **A statute does not repeal other statutes.**
- Any point on which the statute leaves a gap or omission is outside the scope of the statute.

## 7.4 Other assistance in interpretation

The Interpretation Act 1987 defines certain terms frequently found in legislation. The Act also states that, unless a specific intention to the contrary exists, the use in a statute of masculine gender terminology also includes the feminine, and vice versa. Similarly, words in the singular include plurals, and vice versa.

**Intrinsic aids** to statutory interpretation consist of the following.

- (a) The **long title** of an Act, which may give guidance as to the Act's general objective.
- (b) The **preamble** of an Act often directs the judge as to its intentions and objects.
- (c) **Interpretation sections** to Acts. Particularly long, complicated and wide-ranging Acts often contain self-explanations; for instance, s 207 of the Financial Services Act 1986 defines 'authorised persons' and 'recognised investment exchanges' for its purposes.
- (d) **Sidenotes**. Statutes often have summary notes in the margin.

### Key terms

**Intrinsic aids** are those words contained in the Queen's Printer's copy of the statute. **Extrinsic aids** are those found elsewhere.

**Extrinsic aids** include the following.

- (a) Reports of official committees such as the Law Commission or the Law Reform Committee,
- (b) Hansard, the official journal of UK Parliamentary debates. This follows a decision of the House of Lords in *Pepper v Hart 1992* where the House of Lords decided that it is acceptable to look at the original speech which first introduced a bill to ascertain its meaning.

# Chapter Roundup

- Decisions made in the courts are **case law**, which is judge-made law based on the underlying principle of consistency. Once a legal or equitable principle is decided by an appropriate court it is a **judicial precedent**.
- There are major series of **law reports** on general law bound as annual volumes.
- In order that judicial precedent provides consistency in law, the **ratio decidendi** must be identified. The material facts must be the same. The status of the court which set the precedent must be such as to bind the present court. Rationes decidendi are the reasons for the decision being made – they alone are binding. **Obiter dicta** are comments made by the deciding judge in passing and are persuasive only.
- **Persuasive precedents** are not necessarily followed in later cases.
- A precedent which should be binding can be avoided on the grounds of **different facts**, **obscure ratio decidendi**, **faulty process**, being in **conflict** with fundamental legal principles, and **being too wide**.
- Institutional writings may be consulted as a **last resort**.  
**Institutional writings** are the legal writings of certain legal scholars which may have legal status in the absence of other provisions.
- **Custom** underlies many old laws but is unlikely to create new laws.
- A remedy on the **basis of fairness** may be given when the law as it stands does not.
- UK statute law takes the form of **Acts of Parliament**.
- UK statute law may also take the form of **delegated legislation**, such as **statutory instruments** and **bye-laws**.
- It is important that courts are equipped to **interpret** statutes in order to apply them in the real world.

# Quick Quiz

1 **Fill in the blanks** in the statements below, using the words in the box.

- In order that (1) ..... provides (2) ..... in the law, a precedent must be carefully examined before it can be applied to a particular (3) ..... It must be a proposition of (4) ..... The (5) ..... must be identified. The (6) ..... must be the same.
- The (7) ..... of the court which set the precedent must be such as to (8) ..... the present court.

- |                   |                      |
|-------------------|----------------------|
| • bind            | • judicial precedent |
| • case            | • status             |
| • ratio decidendi | • law                |
| • material facts  | • consistency        |

2 What is the final step before Royal Assent in the life of a Bill in the UK Parliament in Westminster?

3 *Obiter dicta* form part of the *ratio decidendi*.

- True  
 False

4 Which of these decisions binds the Sheriff Court?

- Decisions of the Sheriff Court  
 Decisions of the Court Session (Outer House)  
 Decisions of the Court of Session (Inner House)  
 Decisions of the Supreme Court

5 In 20X5, Mr Justice Jeffries, a Court of Session (Outer House) judge, is deciding a case which has similar material facts to one decided by the Court of Session (Inner House) in 18X5. He can decline to be bound by this decision by showing that

- A The status of the previous court is not such as can bind them  
B The decision was taken too long ago to be of any relevance  
C The decision does not accord with the rules of a statute passed in 19X0  
D The *obiter dicta* are obscure

6 Overruling a decision of a lower court affects the outcome of that earlier decision.

- True  
 False

7 The rule that a statute should be interpreted with reference to its context and aims is known as the ..... rule.

## Answers to Quick Quiz

- 1 (1) judicial precedent (2) consistency (3) case (4) law (5) ratio decidendi (6) material facts (7) status (8) bind
- 2 The third reading (final approval stage)
- 3 False
- 4 Decisions of the Court of Session (Inner House) and Supreme Court
- 5 C. Statute takes priority over case law.
- 6 False
- 7 Purposive rule



# Formation of contract I

# 3

## Chapter approach

There are **two key differences** between the law of contract in England and Scotland. The first is that the **law of contract in Scotland does not recognise the English concept of consideration**. You should therefore disregard any mention of consideration in your Study Text. The second is that the laws relating to **form of a contract are different in Scotland** to England. In Scotland, there is a **Requirements of Writing (Scotland) Act 1995**, which you must be aware of.

Chapter 3 is therefore relevant to your studies for Corporate and Business Law (Scotland) subject to the points made below. You should read through the Chapter in the Study Text bearing these points in mind.

In Section 2.5, please read Scottish Law for English Law. In Section 3, you should disregard the element of consideration in a contract. In Scotland, a contract has two essential elements, **agreement** and **intention**.

You should disregard Section 4 in the Chapter, and work through the following notes instead.

Scottish law recognises **unilateral obligations**, sometimes referred to as **gratuitous promises**. This means that Scottish law will enforce someone's promise, even if it is unilateral, that is, there is no mutual obligation from the person that they have made a promise to.

### EXAMPLES

An **employment contract** is an example of a **bilateral contract**. The employee promises to do work for the employer, who promises to pay them for it.

A **gift to a charity** is an example of a **unilateral contract**. The donor promises to give a gift to a charity, which does not have to do anything in return for that gift.

# 1 Form of a contract

As a general rule, a **contract may be made in any form**. It may be written, oral, or inferred from the conduct of the parties.

## Example

A customer in a self-service shop may take their selected goods to the cash desk, pay for them and walk out without a word.

However, the **Requirements of Writing (Scotland) Act 1995** provides that **some contracts have to be in writing to be enforceable**.

## 1.1 Types of contract requiring writing

The following types of contract **must be in writing** to be enforceable:

- Contract for the creation, transfer, variation or extinction of an **interest in land**
- A **gratuitous unilateral contract** (excluding those undertaken in the course of business)
- A **trust** whereby a person declares themselves to be the **sole trustee of his own property**

### 1.1.1 Validity

In order to be valid, such documents must be **signed by the granter**.

However, in order to be valid without extra evidence being produced, the document must not only be signed by the granter, but by a **witness** to attest to the fact that the signature is genuine.

An alternative procedure to obtaining the **signature of a witness** is to obtain a certificate from a court that the document was validly executed.

If the written contract or **gratuitous unilateral agreement** contains a clause stating that it contains the full terms of the agreement, then this is conclusive and no other evidence is considered. If it does not contain such a clause, the court may consider other extrinsic sources of evidence as to the contract terms:

*Contract (Scotland) Act 1997*

## 1.2 *Rei interventus*

The provisions of *rei interventus* mean that a contract or unilateral promise which should have been signed can be enforced even where there is no signature, if there have been what are termed **significant actings**.

The person who made the **informal contract** or **promise** will be unable to withdraw, in spite of the informality, if:

- The other party has acted in reliance on the promise and will be prejudiced if it is not enforced.
- The person making the promise knows of these actings and agreed to them.
- The actions involved were material, so that prejudice would result to the second party if the first party were allowed to withdraw.

# 4

## Formation of contract II

### Chapter approach

Chapter 4 in the Study Text deals with the English concept of **consideration**. Scottish law does not have any such concept – it enforces **gratuitous promises**. The syllabus and study guide for Corporate and Business Law (Scotland) therefore make no mention of consideration.

The only parts of Chapter 4 that are relevant to your exam are Section 4 on **intention to create legal relations** (which completes the third element of a Scottish contract), and Section 5 on **privity of contract** and **third party rights**.



# Content of contracts

# 5

## Chapter approach

The matters discussed in this Chapter apply equally to English and Scottish law with some **minor terminological** differences only.

You should therefore work through this Chapter in the Study Text, bearing in mind the points below.

English law makes a distinction between **terms of a contract** that are **conditions** and terms of a contract that are **warranties**.

Scottish law makes a similar distinction between terms of a contract which go to its heart (conditions) and those which are subsidiary to the purpose of the contract (warranties) but it does not use the terms conditions and warranties. Rather, it uses the terms **material** (for terms which go to the heart of the contract) and **non-material** (for subsidiary terms).

When reading through this chapter of the Study Text, please substitute the word material for condition and non-material for warranty.



# 6

## Breach of contract and remedies

### Chapter approach

The provisions relating to **discharge of contract** are the same in English and Scottish law, so this chapter in the Study Text is relevant to your studies.

You should therefore read through the chapter, bearing in mind the following points.

**Remember** that Scottish law refers to **material and non-material terms** in contracts rather than **conditions and warranties**.

There are also some differences in terminology in relation to the remedies for breach of contract:

- **'Specific performance'** is referred to as **'specific implement'**.
- **'Injunction'** is referred to as **'interdict'**.





# Chapter

## 7 The law of torts and professional negligence

## 8–9 Employment law

### Chapter approach

The Scottish law of Delict is almost identical to the English law of torts and therefore you should work through all of Chapter 7 in your Study Text.

Delict is a word which comes from the same word family as delinquent and therefore, like tort, is concerned with wrongs.

As with tort, delict requires the establishment of fault (or culpa). The pursuer must prove on the balance of probabilities the defender's actions caused them to suffer loss, injury or damage. A duty of care, the standard of care, reasonable foreseeability of harm, causation, remoteness of damage and the defences of contributory negligence and volenti are identical to the English law and share the same cases. You should read delict where the Study Text mentions tort.

Professional negligence is also directly linked to English law – Caparo being the leading case.

One difference that should be noted is due to the Prescription and Limitation (Scotland) Act 1973. Under this statute most claims under delict must be brought within five years of the event which causes the damage. Personal injury claims must be brought inside three years.

Employment law is the same in England and Scotland. This is because it is largely based on statute law passed as a result of EU directives which are therefore equally applicable in England and Scotland.

You should read through all these Chapters as they appear in the Study Text.



# Chapter

## 10–14 The formation and constitution of business organisations

### Chapter approach

The law applying to partnerships in Scotland is slightly different from that in England, although it is governed by the same Act, the Partnership Act 1890.

Most of this Chapter is equally applicable in England and Scotland, however, so you should read through the chapter, bearing in mind the points made about Scottish partnerships below.

Agents normally receive payment or other rewards for acting on behalf of a principle. However, as we saw in contract, it is possible under Scottish law to make agreements that are unsupported by consideration – gratuitous agreements.

When reading Chapter 10 you should bear in mind, that under Scottish law, gratuitous agency exists. This is an arrangement where the agent (or more properly known as mandatory) acts on an unpaid basis. A mandatory still owes a duty of care to the principle and cannot claim the fact that he was not paid as a defence to negligence.

In *Copland v Brogan (1916)* the Inner Court of Session held that a taxi driver who did a favour for a school teacher and lost some of the teacher's cash was liable for the loss. He should have looked after the money as if it were his own.

Chapter 11 in the Study Text refers to a partnership as being an entity that does not have a legal existence separate to its members.

However, s 4 of the Partnership Act 1890 makes a distinction between **English** and **Scottish partnerships** by stating that a **Scottish partnership is a legal person distinct from the partners** of whom it is composed. This means Scottish partnerships are able to enter into contracts in the name of the firm, own property and take legal action separately from the individual partners.

In practical terms, a Scottish partnership is in the same position as an English partnership because despite the separate legal personality of the firm, the partners are still jointly and severally liable for the debts of the partnership, in the same way as an English partnership and as outlined in the Study Text.

Regarding retirement of partners, it should be noted that retiring partners should place a notice of their retirement in the *Edinburgh Gazette* to ensure they have no liability to outsiders and third parties after their retirement.

The Limited Liability Partnership Act 2000 applies in Scotland.

Company law is largely the same in England and Scotland. This is because it is governed by the provisions of the Companies Act 2006 which apply to the UK as a whole.

You should read through all these Chapters as they appear in the Study Text.



# Chapter

## 15–17 Capital and the financing of companies

## 18–20 Management, administration and the regulation of companies

## 21 Insolvency law

## 22 Corporate fraudulent and criminal behaviour

## Chapter approach

English law is very similar to Scottish law, however there is some difference in terminology regarding property and legal charges, so you should note the following but read through the three chapters in the Study Text.

In Scotland, it is possible to obtain a **fixed charge** over **land and buildings** (known as **heritable property** in Scotland) or over moveable property. Moveable property falls into two categories; corporeal (for example, goods) or incorporeal (for example shares or insurance policies). The charge over corporeal moveable property is created by **pledge**, and the charge over incorporeal moveable property is created by **assignation in security**. The lender would be entered on the register of members, with rights over the assets, but the borrower remains the true beneficial owner.

In England, when a bank obtains a floating charge, it would be referred to as an equitable debenture with a floating charge. In Scotland, it is likely that this would be referred to as a **bond and a floating charge**.

Company law is largely the same in England and Scotland. This is because it is governed by the provisions of the Companies Act 2006 which apply to the UK as a whole.

You should read through all these Chapters as they appear in the Study Text.

This chapter refers to the Insolvency and Enterprise Acts, which apply in both England and Scotland. There are some differences in terminology between English and Scottish insolvency law. The main difference being in England, the court will appoint the Official Receiver in a compulsory liquidation, in Scotland, the official is known as an **Interim Liquidator**.

English statutes covered in this chapter also have effect in Scotland. You should therefore study this chapter in full.

