SCOTTISH LAW COMMISSION
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Court of Session Bill

Report on the Consolidation of Certain Enactments, and the Repeal of Other Enactments, relating to the Court of Session

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To: The Right Honourable the Lord Cameron of Lochbroom, QC,
Her Majesty's Advocate

The Court of Session Bill which is the subject of this Report has two objects:

(a) to consolidate various enactments relating to the Court of Session; and

(b) to repeal (without re-enactment) other enactments relating to the Court of Session on the ground that they are no longer of practical utility or are spent or unnecessary.

In order to facilitate a satisfactory consolidation, we are making the recommendations set out in Appendix 1 to this Report. All these recommendations are intended to remove anomalies.

The enactments which it is proposed to repeal without re-enactment are contained in Part III of Schedule 2 to the Bill and we recommend that effect be given to what is proposed. An explanatory note on the proposed repeals forms Appendix 2 to this Report.

Government departments and other bodies and interested persons have been consulted and they agree with our recommendations and proposed repeals.

(*Signed*) PETER MAXWELL
Chairman of the Scottish Law Commission.

1 March 1988

Appendix 1

Recommendations

1. Section 1 of the Court of Session Act 1819 provides that it shall be lawful for Her Majesty, upon a vacancy arising by the death or resignation of any judge sitting in either division of the Inner House, to order and direct by a warrant under Her Majesty's sign manual:

(a) that any judge sitting in the division where the vacancy has not occurred shall (if he wishes it) fill the vacancy;

(b) that, if an Inner House judge fills the vacancy arising through the death or resignation, the resulting vacancy shall be filled by the senior Lord Ordinary; and

(c) that, if no Inner House judge wishes to fill the vacancy arising through the death or resignation, the senior Lord Ordinary shall be entitled to fill the vacancy even although he was not originally appointed to sit in the division where the vacancy has occurred.

The right of a judge of a division of the Inner House to transfer to the other division has long been obsolete and there is no record of appointment by Royal Warrant of an Inner House judge, either by transfer from the other division or by promotion from the Outer House, since 1825.

The section in so far as it provides for the filling of an Inner House vacancy by the senior Lord Ordinary is still alive. It seems certain, however, that when the section was drafted, in referring to "a vacancy arising by the death or resignation of any of the judges sitting in the Inner House", it was not intended to include a reference to a vacancy arising by the death or resignation of the Lord President or the Lord Justice Clerk, and the section has certainly never been so interpreted.

The enactment is so far as it provides that the Lord Ordinary shall be entitled to fill the vacancy in the division of the Inner House although he was not originally appointed to sit in that division is of historical interest only. When the 1819 Act was enacted, the whole Court was divided into two divisions and the Lords Ordinary belonged to one or other of them. By section 1 of the Court of Session Act 1825, however, a permanent Outer House was created and the Outer House judges no longer belonged to one of the divisions.

We therefore recommend:

(a) that section 1 of the 1819 Act should not be re-enacted in so far as it relates to:

  (i) the right of a judge of a division of the Inner House to be transferred to the other division; and

  (ii) the issuing of a Royal Warrant; and

(b) that vacancies arising by reason of the death or resignation of the Lord President or the Lord Justice Clerk should be specifically excluded from the ambit of the re-enactment.

Effect is given to this recommendation in clause 2(6) and (7) of the Bill.

2. Section 16 of the Administration of Justice (Scotland) Act 1933 broadly speaking empowered the Court of Session to regulate its own procedure by act of sederunt and paragraph (j) of that section enabled it by act of sederunt "to modify, amend or repeal any enactments . . . relating to matters with respect to which an act of sederunt *is* made under this Act".

Between 1808 and 1933 the detailed procedure of the Court was regulated by statute and the purpose of section 16 seems to have been to make the Court master of its own procedure by enabling it by act of sederunt to prescribe procedure and to modify, amend or repeal any enactments which were inconsistent with that procedure. However, paragraph (j) of section 16 as drafted appears somewhat restricted in effect. It seems to enable the Court to modify, amend or repeal an enactment only in a case where it is prescribing new procedure with which the enactment is inconsistent, and not in a case where the enactment is simply inconsistent with existing procedure and no new procedure is being prescribed.

We do not think that the restriction contained in paragraph (j) was intentional as it is not in keeping with the general purpose of the section, and we believe that it is due to an error in the drafting. We therefore recommend that in the re-enactment of section 16(j) it should be made clear that the Court may modify, amend or repeal an existing procedural enactment in any case where the Court would have power to make an act of sederunt relating to that matter, whether or not the power is exercised. Effect is given to this recommendation in clause 5(m) of the Bill.

3. Section 21 of the Jury Trials (Scotland) Act 1815 *inter alia* fixed the number of jurors in a civil jury at twelve. That part of the section was repealed by the Statute Law Revision Act 1873. According to the sidenote of section 44 of the Court of Session Act 1868, juries are to consist of eight common and four special jurors (by the Juries Act 1949 the distinction between special and common jurors was abolished), but the body of that section makes no reference to the number of jurors. The practice of the Court has in fact continued to the present day of having twelve jurors (see MacLaren Court of Session Practice pages 604-5). We recommend that to accord with the continuing practice it should be expressly stated in the re-enactment of section 44 of the 1868 Act in the Bill that a civil jury shall number twelve. Effect is given to this recommendation in clause 13(1) of the Bill.

4. Section 21 of the Jury Trials (Scotland) Act 1815 *inter alia* provides that in challenging the selection of jurors any challenges for cause assigned shall be made before the four challenges allowed by that section without assigning any cause. The present practice is that challenges for cause assigned are not required to be made first and may in fact be made at any time during the balloting of the jury. We recommend that the re-enactment of section 21 of the 1815 Act should reflect this modern practice. Effect is given to this recommendation in clause 13(3) of the Bill.

5. Section 33 of the Jury Trials (Scotland) Act 1815 provides *inter alia* that "The chancellor or foreman of the jury shall be the juror chosen by the majority of the jurors after they shall be sworn, and in case of an equality of votes the juror first sworn shall have a double vote.".

In modern practice the jury do not choose a chancellor or foreman after they are sworn. Instead the judge at the end of his charge to the jury asks them to select someone to speak for them. It is also unknown in modern times for a jury to be directed that, in the event of an equality of votes in the selection of the foreman, the juror first sworn shall have a casting vote.

We therefore recommend:

(a) that the re-enactment of section 33 should provide that at the end of his charge to the jury the judge should direct the jury to select someone to speak for them; and

(b) that the part of the section giving a casting vote to the juror first sworn should be repealed without re-enactment.

Effect is given to this recommendation in clause 17(1) of the Bill.

6. Section 22 of the Exchequer Court (Scotland) Act 1856 provides in effect that in all exchequer causes the Lord Advocate shall sue and be sued on behalf of the Crown. Exceptions to this general rule, however, have been introduced by some enactments passed since 1856. For example, in cases stated under section 56 of the Taxes Management Act 1970 and under section 13 of the Stamp Act 1891, the Inland Revenue is designated as "the Commissioners of Inland Revenue" and not as the Lord Advocate acting on behalf of the Crown. We therefore recommend that in the re-enactment of section 22 some qualification is added to take account of these exceptions. Effect is given to this recommendation in clause 22 of the Bill.

7. The grounds on which an application for a new trial may be made being now contained in Rule 126 of the Rules of Court (see note on repeal on sections 6 and 7 of the Jury Trials (Scotland) Act 1815), it is strictly speaking unnecessary to put anything in the Bill about the grounds. Since, however, it is necessary to insert in the Bill certain detailed procedural provisions about applications for a new trial, it is submitted that this part of the Bill would be more coherent if the provisions of Rule 126 so far as relating to the grounds on which a motion for a new trial may be applied for were reiterated in the Bill. We therefore recommend that a short provision should be inserted reiterating the main provision of Rule 126 leaving the detailed procedure to that Rule. Effect is given to this recommendation in clause 29 of the Bill.

8. Section 61 of the Court of Session Act 1868 provides *inter alia* that "no verdict of a jury shall be discharged or set aside upon a motion for a new trial, unless in conformity with the opinion of a majority of the judges of the division". It is now virtually unknown for a whole division of 4 judges to hear a case - normally the court consists of 3 judges - and we therefore recommend that in the re-enactment of section 61 the reference to a majority of the judges of the division should be a reference to a majority of the judges hearing the motion for a new trial. Effect is given to this recommendation in clause 30(4) of the Bill.

9. Section 23 of the Court of Session Act 1825 provides in effect that where a difficult or important question of law comes before a division of the Inner House or the judges of a division are equally divided in opinion on any question, the division may order the cause to be reheard by the whole court. Section 35 of the Court of Session Act 1850 provides that, where a division is equally divided in opinion on any cause, it may order the cause to be reheard by it along with 3 judges of the other division. And section 60 of the Court of Session Act 1868 provides *inter alia* that in the case of a difficult or important question or where the judges of the division are equally divided in opinion on a question of law, the division may order the cause to be reheard by it along with such judges as are necessary to make up the number of 7. Finally, section 59 of the Court of Session Act 1868 provides that, in the event of the judges of a division being equally divided in opinion on a question of fact or upon a cause which in their opinion does not involve any legal principle of importance, the division may appoint the cause to be reheard by 5 judges.

The judges of the Court of Session (which has civil jurisdiction only) are also the judges of the highest court of criminal jurisdiction - the High Court of Justiciary. With the large rise in the amount of criminal cases in recent years, the number of judges has had to be increased steadily and at present the Court consists of 24 judges, one of whom is seconded full-time to the Scottish Law Commission. In any week probably about 10 of the judges are engaged in presiding over criminal trials. Convening the whole court for the rehearing of a case would therefore nowadays be quite unrealistic.

The purpose of the aforesaid enactments seems to us to have been to enable a previous decision of the Court of Session to be reversed or to break the deadlock where there was an equal division of opinion, by convening a larger court. With the great difficulty of finding sufficient judges available for a rehearing, it would greatly

help if the larger court comprised the smallest number of judges necessary to achieve that purpose. To that end, the court would need to comprise an odd number of judges, but if for instance the decision to be considered was the decision of a court of 3 judges, the purpose could, it seems to us, be equally well achieved by a rehearing by a court of 5 judges as by a court of 7 judges. Likewise a decision of 5 judges could be considered by a court of 7 judges, or of 7 judges by a court of 9 judges.

As has been explained in recommendation 8, it is virtually unknown nowadays for a whole division of 4 judges to hear a case, and therefore equal division of opinion is unlikely to arise. There seems no harm, however, in legislating for this unlikely situation and this again would be achieved by a rehearing by the smallest number of judges necessary to resolve the matter.

We therefore recommend that the aforesaid enactments should be re-enacted so as to provide that where a division before whom a cause is pending:

(a) considers the cause to be one of difficulty or importance; or

(b) is equally divided in opinion on the cause (whether on a question of law or fact),

it may appoint the cause to be reheard by such larger court as is necessary for the proper disposal of the cause.

Effect is given to this recommendation in clause 36 of the Bill.

10. Section 58 of the Parliamentary Elections Act 1868 along with section 2 of the Parliamentary Elections and Corrupt Practices Act 1879 and section 42 of the Corrupt and Illegal Practices Prevention Act 1883 provide, in relation to Scotland, for the selection of judges to be placed on the rota for the trial of election petitions.

Subsection (6) of section 58 of the 1868 Act provides *inter alia* that the judges to be placed on the rota shall be selected by a majority of the Court of Session judges and subsection (7) provides that, in the event of the judges being equally divided in their choice of a judge, the Lord President shall have a second or casting vote. Subsection (9) of that section provides for the filling of a vacancy on the rota because of death or illness of a judge or the inability of any judge to act for any reasonable cause. Finally, subsection (11) of that section enables an additional judge or judges to be placed on the rota where the trial of election petitions would otherwise be inconveniently delayed.

The provisions relating to England and Wales corresponding to the Scottish provisions of the 1868, 1879 and 1883 Acts were repealed and re-enacted with amendment in section 142 of the Supreme Court Act 1981. None of the provisions corresponding to the aforesaid provisions of section 58 of the 1868 Act were reproduced in section 142 of the 1981 Act. Instead that section provided for selection of the judges in such manner as may be provided by rules of court.

We likewise are of the opinion that it is unnecessary to reproduce these provisions of section 58 but we do not consider that it is necessary to make rules of court to regulate the manner of selection. We think that the manner of selection could be left to be dealt with administratively by the Lord President of the Court of Session. The Lord President has been consulted about this proposal and he is content with it.

We therefore recommend that the aforesaid provisions of section 58 of the Parliamentary Elections Act 1868 should not be re-enacted and that instead it should be provided that the manner of selection of the judges to be placed on the rota should be left to the administrative direction of the Lord President. Effect is given to this recommendation in clause 44 of the Bill.

11. Section 3(1) of the Administration of Justice (Scotland) Act 1933 abolished the Bill Chamber and in effect transferred its functions to the Lords Ordinary of the Court of Session. Section 3(2) of the Act provides:

"Notwithstanding anything in the foregoing subsection a solicitor shall have, as regards any cause which according to the law and practice existing immediately prior to the commencement of this Act required to be brought in the Bill Chamber, the like rights of audience and appearance as if the said subsection had not been enacted.".

The difficulty is to ascertain what were the rights of audience of solicitors in the Bill Chamber before 1933. According to Maclaren's Bill Chamber Practice, page 5:

"the business of the Bill Chamber may thus be divided into three parts, first purely Bill Chamber business such as (a) urgent common law business of the Court of Session arising during vacation and (b) suspensions, suspensions and interdicts, suspensions and liberations, sequestrations and applications for warrants and fiats authorising diligence dealt with either by the Lord Ordinary on the Bills or by the Clerk of the Bills and presented either in session or during vacation.

Second, business falling under the Distribution of Business Act 1857 and the Clerks of Session (Scotland) Regulation Act 1898 such as petitions for appointment of judicial factors; and

Third, business of the Court of Session which by various statutes may be dealt with in vacation, such as applications under the Companies (Consolidation) Act 1908.".

Maclaren's Court of Session Practice, however, at page 14 says "in the Bill Chamber an agent may plead as well as an advocate, but in practice this right is only exercised in vacation.".

Certain of the rules of court made under section 16(a) of the 1933 Act provide expressly for solicitors having a right of audience, but these appear to be confined to matters to be dealt with in chambers:

72(b)	(shortening or extending induciae in summons);
74(g)	(recall of arrestments or inhibitions before calling of the cause);
95(a)	(applications before calling of the cause for commission and diligence);
95A(a)	(applications before calling of the cause for an order under section 1 of the Administration of Justice (Scotland) Act 1972 in relation to documents in the cause);
140(d)	(applications before calling of cause for recall of arrestments *in rem*);
236(a)	(interim orders for suspension, and suspension and interdict, and suspension and liberation). The content of this rule is, of course, one of the matters previously dealt with in the Bill Chamber (see the above quoted passage from Maclaren's Bill Chamber Practice).

It is thought that, particularly in view of the above quoted passage from Maclaren's Court of Session Practice to the effect that in practice solicitors exercise a right of audience only in vacation, the re-enactment of section 3(2) of the 1933 Act should be confined to conferring such a right, leaving any further rights of audience to be dealt with, as they are at the moment, by rules of court.

Effect is given to this recommendation in clause 46 of the Bill.

12. Section 17 of the Court of Session Act 1813 provides, *inter alia*, that "the endorsation of the Clerk of the Bills officiating for the time on such bills usually called plack bills shall be sufficient without the subscription of the Lord Ordinary, except in cases where a doubt or difficulty shall occur to the Clerk of the Bills, which he shall report to the Lord Ordinary, whose subscription shall then be necessary.".

The expression "plack bill" is now unknown but the procedure described above is the same as applies at the present time when a creditor presents a document of debt to the Court of Session along with a Bill in the form of a petition craving warrant for the signeting of letters of inhibition. The effect of the inhibition if granted by the

Court is to restrain the debtor from contracting any debts, or granting any deeds whereby any land is alienated, to the prejudice of the creditor. The procedure is described in Green's Encyclopaedia (Vol. VIII, para. 420). The authority given in Green for the statement that the clerk may subscribe the bill except in cases of difficulty when he shall report the matter to the Lord Ordinary is the said section 17. Since the article in the Encyclopaedia was written, the Bill Chamber has been abolished and matters which were previously dealt with by the Bill Chamber and the Clerk of the Bills are now dealt with respectively by the Outer House and a clerk of court.

It is submitted that the procedure on applications to the court for letters of inhibition is the modern equivalent of the procedure relating to plack bills in the Bill Chamber described in the said section 17. We recommend that effect should be given to this submission as set out in clause 47 of the Bill.

13. Section 10 of the Court of Session Act 1808 along with section 24 of the Court of Session Act 1825 and part of section 60 of the Court of Session Act 1868 provide in effect that where a difficult or important question of law comes before a division of the Inner House or the judges of a division are equally divided in opinion on a question of law, the division may require the opinion on the matter of the whole court or 3 other judges named in the interlocutor of the division. It is unknown for this consultation procedure to be used in modern times and we therefore recommend that section 10 of the 1808 Act and section 24 of the 1825 Act, and section 60 of the 1868 Act in so far as it relates to consultation should be repealed and not re-enacted in the Bill.

14. Section 15 of the Jury Trials (Scotland) Act 1815 provides *inter alia* that the court of commissioners (the Lord Ordinary after the abolition of the jury court in 1830) may, as soon as issues have been directed, appoint a jury trial to take place during the spring or autumn vacation of the Court at such circuit town as the circumstances of the case may require. Section 46 of the Court of Session Act 1868 provides that where a case has been appointed to be tried at a circuit town and no special diet has been fixed for the trial, it shall be lawful for a judge presiding at the sittings of the Circuit Court of Justiciary in that town or any judge of the Court of Session to try the case either at the same time as those sittings or at their termination.

By section 40 of the Court of Session Act 1850 it is made clear that the place of trial is within the discretion of the Lord Ordinary, or in the case of objection to the place appointed by him, within the discretion of the Inner House, on a report to them by the Lord Ordinary. In *Welsh* v. *Rose & Robertson* 20 D 513, the Inner House, on the matter being reported to them under the said section 40, refused to allow a trial to take place at a circuit town on the ground that the policy of that section was to have trials before the Lord Ordinary.

There is no reported case of a civil jury trial being allowed at a circuit town where there were no criminal cases, and in *Malcolm* v. *Lloyd* 1885 12 R 843, the Court held that it was doubtful whether it was competent to hold a civil jury trial on circuit in the absence of criminal cases.

The last reported case of a civil jury trial being held on circuit is *Laing* v. *Hay* 1905 12 SLT 820 although even in that case the pursuer put forward the argument that to hold such trials on circuit was almost obsolete. And Thomson and Middleton, Manual of Court of Session Procedure published in 1937, states at page 103 that proceeding by way of civil jury trial on circuit "may be regarded as no longer competent.".

The provisions of section 40 of the 1850 Act mentioned above relating to the appointment of a time and place for the trial by the Lord Ordinary were superseded after 1933 by the Rules of Court. Under Rule 17 of the current Rules of Court the date of the trial is fixed by the Keeper of the Rolls of Court in consultation with the parties. There is no provision in the Rules for the appointment of the place of the trial as all trials now take place in the Court of Session in Edinburgh.

It is therefore submitted that section 15 of the 1815 Act and section 46 of the 1868 Act in providing for civil jury trials on circuit are obsolete. Section 27 of the Jury Trials (Scotland) Act 1819 and section 50 of the 1868 Act prescribe further procedure in respect of civil jury trials on circuit and for the same reasons are believed to be obsolete. We therefore recommend that all these enactments should be repealed and that none of them should be re-enacted in the Bill.

15. Section 28 of the Court of Session Act 1825 enumerates certain actions which shall be held as causes appropriate to be tried by jury. Among the causes enumerated in that section are:

1. actions on account of injury to moveables or to land where (in the case of land) the title is not in question;
2. actions of damages for breach of promise of marriage;
3. actions of damages for seduction;
4. actions on the responsibility of shipmasters and owners, carriers by land or water, innkeepers or stablers, for the safe custody and care of goods and commodities and in general all actions grounded on the principle of the edict *nautae caupones stabularii*;
5. actions for nuisance;
6. actions on policies of insurance, whether for maritime, fire or life insurance;
7. actions on charter parties and bills of lading;
8. actions for freight;
9. actions on contracts for the carriage of goods by land or water; and
10. actions for the wages of masters and mariners of ships or vessels.

Actions for breach of promise of marriage were abolished by section 1 of the Law Reform (Husband and Wife)(Scotland) Act 1984. The Lord President of the Court of Session has been consulted about the other categories of action listed above, and it appears from research carried out by the clerks of court that no such action has been sent to jury trial within living memory. Accordingly jury trial in such actions appears to be obsolete.

Section 28 also states that the causes there enumerated "whether originating in the Court of Session or the Court of Admiralty, shall be held as causes appropriate to the jury court.". The civil jurisdiction of the Court of Admiralty was transferred to the Court of Session by section 21 of the Court of Session Act 1830. A separate civil jury court was constituted by virtue of section 1 of the Jury Trials (Scotland) Act 1815, but by section 1 of the Court of Session Act 1830 trial by jury in civil cases became part of the ordinary administration of justice in the Court of Session and the separate jury court ceased to exist.

We therefore recommend that section 28 of the Court of Session 1825 so far as relating to:

(a) the ten types of action listed above, and

(b) the Court of Admiralty and jury court,

should be repealed and not re-enacted in the Bill.

16. Section 37 of the Court of Session Act 1830 provides, *inter alia*, that consistorial causes shall not be appropriate for trial by jury but that the court may direct that a consistorial cause, or any issue of fact connected therewith, shall be tried by jury.

McLaren in Court of Session Practice, at page 709, states that it is unknown in practice for the court to direct in pursuance of the said section 37 that a consistorial cause shall be tried by jury and that accordingly a Lord Ordinary, without a jury, hears the proof. Again, in *Walker* v. *Walker* 1871 (9M 1091) Lord President Inglis at page 1092 said "In our practice, cases of divorce are, I think, wisely left to the

determination of the court; without the assistance of a jury (for there is no example, so far as I am aware, of the court having exercised the power conferred on them by the 37th section of the Act of 1830, to send issues in fact in a case of divorce to be tried by a jury)". There have been no cases of trial by jury of a consistorial cause since the publication of McLaren's text book. The provision, therefore, in so far as it authorises trial by jury in consistorial causes appears to be obsolete. That being so, it is unnecessary to re-enact that consistorial causes shall not be appropriate for trial by jury as to enable them to be so appropriate would require express provision.

Section 37 also provides that in the swearing of witnesses in consistorial causes the same oath shall be administered that is in use in the other courts of justice in Scotland. Rule 154(2) of the Rules of Court provides that the provisions of the Rules shall apply to the procedure in consistorial causes and Rule 122A provides for the administration of the oath to witnesses, and the section is so far as it relates to the swearing of witnesses is therefore no longer necessary.

We therefore recommend that section 37 of the Court of Session Act 1830 should be repealed and not re-enacted in the Bill.

17. Section 58 of the Court of Session Act 1868 provides in effect that, when a motion for a new trial comes before a division of the Inner House, the trial judge, if not a member of that division, shall be called in to hear, and give his judgment on, the motion along with the judges of the division. Rule 126(c) of the Rules of Court which was introduced in 1965 made the calling in of the trial judge discretionary rather than mandatory and it is submitted that that rule superseded the mandatory nature of section 58. The trial judge has in fact never been called in to hear a motion for a new trial since 1965 and it is very unlikely that he ever would be. We therefore recommend that section 58 of the Court of Session Act 1868 should be repealed and not re-enacted in the Bill.

18. Section 61 of the Court of Session Act 1868 provides that "no verdict of a jury shall be discharged or set aside upon a motion for a new trial, unless in conformity with the opinion of a majority of the judges of the division, and in case of equal division judgment shall be given in conformity with the verdict, but this provision shall not apply to hearings upon bills of exceptions.".

In modern times it is a little difficult to know what is meant by the words "this provision shall not apply to hearings upon bills of exceptions" because, as is submitted in the note on the repeal of section 7 of the Jury Trials (Scotland) Act 1815 (See Appendix 2 page 18), procedure by way of bill of exceptions has been superseded by Rules 124 and 126 of the Rules of Court. To understand these words it is submitted that the correct course is to ascertain the grounds for a new trial which most closely correspond with the grounds upon which a bill of exceptions could be presented. Under section 7 of the 1815 Act it was competent to except at a jury trial to the opinion and direction of the presiding judge "either as to the competency of witnesses, the admissibility of evidence, or other matter of law arising at the trial", and under section 34 of the Court of Session Act 1868 "such exception may be made the ground of an application to set aside the verdict, either by motion for a new trial, or by bill of exceptions". It is submitted that the grounds contained in Rule 126 upon which a motion for a new trial may be presented which most closely correspond with the grounds mentioned in section 7 of the 1815 Act are misdirection by the judge, and the undue admission or rejection of evidence, and the ground of any other matter of law arising at the trial should be added as being included in the phrase contained in Rule 126 "or for such other cause as is essential to the justice of the case".

But why are hearings upon these legal grounds excluded from the ambit of section 61. The answer seems to lie in the fact that under the section the verdict is not to be set aside except in conformity with the opinion of a majority of "the judges of the division" who were held in *Bicket* v. *Wood* 20 R 874 to include the trial judge called in to hear the motion for a new trial. The effect of the section as a whole therefore was that the trial judge did not have a vote for the purpose of obtaining a majority where in effect the ground of the motion was that he had erred e.g. by

misdirection of the jury or undue admission or rejection of evidence but did have a vote where the motion was based on some other ground e.g. that the verdict was contrary to the evidence.

As explained in recommendation 17, however, the trial judge is now never called in to hear the motion for a new trial and it is therefore no longer necessary to exclude hearings upon bills of exceptions from the ambit of section 61. We therefore recommend that in section 61 the words "but this provision shall not apply to hearings upon bills of exceptions" should be repealed and not re-enacted in the Bill.

Appendix 2

COURT OF SESSION BILL

Explanatory note on enactments repealed without re-enactment

The enactments which are repealed without re-enactment are set out in Part III of the Schedule to the Bill. The great majority of these enactments fall into two categories. They have been superseded either by the historical development of the Court of Session or by rules of procedure contained in subsequent statutes or in recent times in successive editions of the Rules of Court. It might be helpful to say a word about each of these categories:

(a) **Historical development of the Court**

The court from its institution at the end of the 15th century sat as a unitary court until 1808 when the pressure of business resulting from the Industrial Revolution necessitated a reorganisation of the Court. By virtue of section 1 of the Court of Session Act 1808 the Court was divided into two divisions. By section 1 of the Court of Session Act 1825 the Court was further divided by the creation of a permanent Outer House comprising the seven junior judges of the Court while the Inner House remained divided into two divisions.

In 1815 a separate civil jury court was constituted by virtue of section 1 of the Jury Trials (Scotland) Act 1815, but by section 1 of the Court of Session Act 1830 trial by jury in civil cases became part of the ordinary administration of justice in the Court of Session and the separate jury court ceased to exist.

Also by the Act of 1830 the civil jurisdiction of the High Court of Admiralty and the jurisdiction of the Commissary Courts in consistorial cases were transferred to the Court of Session.

In 1856 the Scottish Court of Exchequer was abolished and its jurisdiction transferred to the Court of Session by the Exchequer Court (Scotland) Act of that year.

Finally, until 1933 there existed a court apart from the Court of Session known as the Bill Chamber which was presided over by the junior judge of the Outer House and which had jurisdiction in urgent and preliminary business and in vacation, recess and adjournment of the Court of Session exercised its *nobile officium*. The Bill Chamber was abolished by section 3 of the Administration of Justice (Scotland) Act 1933 and any cause which before then had to be brought before the Bill Chamber is now brought before the Court of Session.

Many references to the aforementioned institutions which have ceased to exist remain in the enactments with which the Bill is concerned and the opportunity has been taken in the Bill of repealing those references.

(b) **Rules of Court**

In a series of statutes passed between 1808 and 1933 and numbering about 30 Parliament prescribed in detail the procedure to be followed in the Court of

Session. Section 16 of the Administration of Justice (Scotland) Act 1933 gave the Court of Session power by Act of Sederunt to regulate and prescribe its own procedure and to modify or repeal any enactments relating to matters with respect to which such an Act of Sederunt had been made. By virtue of the powers in the said section 16 the Act of Sederunt (S.I. 1965/321) under which the current Rules of Court have been made declares that the provisions of any Act of Parliament or Act of Sederunt in so far as inconsistent with the Rules are repealed. The problem is that the procedural statutes passed last century merely in general terms repealed prior procedural enactments in so far as inconsistent with the later provisions and no Act of Sederunt made under the 1933 Act has stated expressly which actual statutory provisions have been repealed by the Rules of Court. All repeals have been left to inference and there thus remain on the Statute Book scattered over a wide range of statutes many procedural provisions which for one reason or another are no longer operative. The Bill expressly repeals those statutory provisions.

There follows a brief note of explanation for the repeal of each of the enactments specified in Part III of the Schedule.

1594 c.22	The Declinature Act 1594	The whole Act.
1681 c.79	The Declinature Act 1681	The whole Act so far as relating to the Court of Session.

The Declinature Acts of 1594 and 1681 taken together debar a judge from sitting in any cause where one of the parties is his father, brother or son or father-in-law, brother-in-law or son-in-law or where he is an uncle or nephew of one of the parties. Nowadays, where one of the parties was a relative or friend of the judge, arrangements would always be made for another judge to take the case. Moreover, the Acts are anachronistic. They only deal with the case where the related party is a male and not where for instance one of the parties is the judge's sister. The Lord President of the Court of Session has been consulted about these proposed repeals and has expressed no objection to the proposal.

1672 c.6	The Summons Execution Act 1672	The whole Act.

This Act provides in effect that an execution of a summons must bear expressly the names and designations of the pursuer and defender. Rule 77 of the Rules of Court 1965 provides that certificates of execution or intimation of a summons shall be written on the summons. The summons itself contains the names and designations of the parties. The Act is therefore superseded by Rule 77.

48 Geo. 3 c.151.	The Court of Session Act 1808.	Section 1. Section 4. Section 6. Section 10. Section 13. In section 15 the words "to which such Lords Ordinary belong". In section 17 the words "or any four of the judges thereof". Section 21.

Section 1 provides that the lords of session shall usually sit in two divisions. This is one of the enactments which is superseded by the historical development of the court as explained earlier in this Appendix. It is therefore obsolete.

Section 4 provides that the judges of each division shall sit in such rooms as His Majesty may appoint and confers on them powers of adjournment. This section is spent.

Section 6 provides that the judges in each division shall exercise the same powers as were previously exercised by the whole court. This section is spent.

The explanation for the repeal of section 10 is contained in recommendation 13.

Section 13 provides that where the House of Lords remits a cause to one of the divisions of the Court it may require it to take the opinion of the other division. This provision is obsolete being superseded by the historical development of the Court.

Section 15 has a references to Lords Ordinary belonging to a division. Section 4 of the Court of Session (No. 2) Act 1838 (c.118), however, provides that the lords ordinary shall not be attached exclusively to either division but shall be attached equally to both divisions. The said reference in section 15 has therefore been superseded.

Section 17 has a reference to any four judges of the division. This reference is obsolete being superseded by the historical development of the court.

Section 21 provides that vacancies on the bench are to be filled according to the then law and practice. This provision is obsolete.

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50 Geo. 3 c.112.	The Court of Session Act 1810.	Section 11. Section 13. Sections 18 to 25. Sections 28 to 30. Section 32 except the words from "three judges" to "inner house". Sections 33 to 38. Section 48. Sections 51 and 52. The Schedules.

Section 11 provides that in appeals to the House of Lords certified copies of proceedings may be received in evidence. This provision is now superseded by the Standing Orders of the House of Lords.

Section 13 abolished the office of extractor in the Court as constituted prior to that enactment and is spent.

Section 18 and the Schedule prescribed court fees. Court fees are now regulated by the Court of Session etc Fees Order 1984 (S.I. 1984 No. 256).

Section 19 provided that £200 per annum is to be paid out of the fee fund for defraying the expense of office rooms. This is obsolete, office accommodation now being the responsibility of the Department of the Environment.

Section 20 provided for the appointment of a collector of court dues. The office of collector was abolished by section 7 of the Courts of Law Fees (Scotland) Act 1868 (c.55).

Section 21 makes provision for fees payable on registration and on extracts of deeds recorded in the books of council and session. This was superseded by an act of sederunt dated 20 March 1956.

Sections 22 to 25 related to the functions of the collector of court dues and were superseded by the Public Offices Fees Act 1879 (c.58).

Section 28 provides that all causes not exceeding the value of £25 are to be brought before the inferior judges. This was superseded by section 7 of the Sheriff Courts (Scotland) Act 1907 (c.51).

Section 29 makes provision for the formation of a permanent Outer House of the Court of Session and is superseded by section 1 of the Court of Session Act 1825 (c.120).

Section 30 provides that judges in the Outer House shall administer oaths and examine witnesses and is of historical interest only.

In section 32 the words "and so soon as five junior ordinary judges shall officiate as permanent lords ordinary in the manner herein directed" are spent. Section 32 also provides that inner house judges shall be relieved from performing the duties of lords ordinary. This is not in accordance with modern practice when Inner House judges frequently sit in the Outer House.

Section 33 makes provision as to bills of advocation from interlocutory judgments of the Commissary Court. Advocation was replaced by appeal by section 65 of the Court of Session Act 1868 (c.100) and Commissary Courts were abolished by the Sheriff Courts (Scotland) Act 1876 (c.70).

Sections 34 and 35 relate to the Admiralty Court which was abolished by section 21 of the Court of Session Act 1830 (c.69).

Sections 36 and 37 prescribe the grounds on which bills of advocation may be allowed against judgments of inferior courts. Advocation was replaced by appeal by section 65 of the Court of Session Act 1868 and sections 36 and 37 were repealed so far as relating to appeals from sheriff courts by Schedule 2 to the Sheriff Courts (Scotland) Act 1907. The only inferior courts to which these sections applied after 1907 were the dean of guild court and the justice of the peace small debt court. The dean of guild court was abolished by section 227 of the Local Government (Scotland) Act 1973 and the justice of the peace small debt court by the District Courts (Scotland) Act 1975.

Section 38 prescribed the procedure on appeals and bills of suspensions from inferior courts. This procedure is superseded by the procedure in Rules 234-247 and 267-272 of the Rules of Court.

Section 48 and the Schedule prescribe the fees payable to the auditor of court. These are now prescribed by Part III of the Schedule to the Court of Session etc Fees Order 1984 (S.I. 1984 No. 256).

Sections 51 and 52 prescribe fees payable to solicitors. These are now prescribed by Rule 347 and an appended Table of Charges.

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53 Geo. 3 c.64.	The Court of Session Act 1813.	Section 1. Section 7. Section 14. Section 17 except the words from "the endorsation" to the end.

Section 1 provided that the three junior ordinary judges in the first division and the two junior ordinary judges of the second division shall officiate as permanent lords ordinary. This provision was superseded by section 1 of the Court of Session Act 1825 (c.120) which created a permanent Outer House comprising the seven junior judges of the Court.

Section 7 provided that four permanent lords ordinary shall sit in the outer house. This again was superseded by section 1 of the said Act of 1825.

Section 14 makes provision for the situation where either division is reduced below the quorum of three. This provision was superseded by section 12 of the Court of Session Act 1868 (c.100), and nowadays this problem would be dealt with as a matter of administration.

The words in section 17 which it is proposed not to re-enact consist of a preamble to the section and are of historical interest only.

55 Geo. 3 c.42.	The Jury Trials (Scotland) Act 1815.	Section 6 except the proviso. Section 7 except the words from "notwith-standing" to "when necessary". In section 8 the words "or judges" and "or by the judge admiral respectively". Section 9. Section 12. Sections 15 to 17. Section 19. In section 20 the words "by the clerk of the jury court" where they occur for the second time. In section 21 the words from the beginning to "Provided always that". In section 22 the words "or commissioner" wherever they occur. Section 23. Section 28. In section 29 the words after "be allowed". In section 33 the words from "to be afterwards" to the end. Section 39. Section 41.

Section 6 prescribed the grounds on which a new trial may be applied for and apart from the proviso is superseded by Rule 126 of the the Rules of Court.

Section 7 provides for exceptions being taken at the trial to the direction of the presiding judge on points of law and appeal to the Inner House and the House of Lords in respect of the direction. It also provides that, notwithstanding an exception being taken, the trial shall proceed and the jury shall return their verdict and assess damages where necessary. The procedure for excepting to the judge's direction is superseded by Rule 124 of the Rules of Court, and in any case of misdirection a party may apply for a new trial under Rule 126. Section 2 of the Administration of Justice (Scotland) Act 1972 (c.59) provides that an appeal shall lie to the House of Lords from any interlocutor of the Inner House granting or refusing a motion for a new trial and that the House of Lords shall have the same powers as the Inner House in relation to the motion. Section 7 is therefore completely superseded except so far as it provides for the continuation of the trial where an exception has been taken.

In section 8 the words "or judges" and "or by the judge admiral respectively" are obsolete as the Admiralty Court was abolished by the Court of Session Act 1830 (c.69).

Section 9 provides for review by the Court of Session and the House of Lords of a judgment of the jury court or judge admiral in point of law on the verdict of a jury. The jury court and Admiralty Court were abolished by the Court of Session Act 1830 and their jurisdiction transferred to the Court of Session.

Section 12 makes provision relating to defraying the expenses of attending the jury court. This is obsolete as the jury court was abolished by section 1 of the Court of Session Act 1830.

The explanation for the repeal of section 15 is contained in recommendation 14.

Sections 16 and 17 prescribe procedure in the jury court and are obsolete since the abolition of the jury court.

Section 19 provides that the House of Lords on an appeal to them may instruct the Court of Session to order a jury trial in respect of any matter arising in the appeal. This provision is in desuetude.

The words proposed to be repealed in section 20 relate to the jury court which was abolished by section 1 of the Court of Session Act 1830.

The part of section 21 which is not re-enacted lays down the procedure for balloting for the jury in the jury court, when a large number of cases were tried at one sitting of the court. The body of persons summoned to serve as jurors were kept in attendance until the last case had been dealt with and a person might serve as a juror on more than one case during the sitting. By section 1 of the Court of Session Act 1830, however, trial by jury in civil cases became part of the ordinary administration of justice in the Court of Session and the separate jury court ceased to exist. Jurors are summoned now for one case only. With the abolition of the jury court, therefore, that part of section 21 became obsolete.

In section 22 the words "or commissioner" wherever they occur are obsolete as they relate to the jury court which was abolished in 1830.

Section 23 provides for the jury being drawn in a case although the jury in another case have not found their verdict. This provision is now obsolete for the same reasons as section 21.

Section 28 provides that where a full jury cannot be made up from the list of jurors, other persons may be added to the list from which the jury may be drawn. This procedure is unknown in practice and is obsolete.

Section 29 empowers the Court to allow the jury to view the object to which the dispute relates. The part of the section which it is proposed should not be re-enacted prescribes very detailed procedure of how the view is to be carried out, including the selection of certain only of the jurors to make the view. Although viewing by the jury still takes place, the last reported case of the detailed procedure being followed was in 1826, and the procedure is now left to the discretion of the Court.

The words which it is proposed not to re-enact in section 33 provide that the verdict of the jury shall be endorsed and certified on the interlocutor of the Court directing the issue. These words are superseded by Rule 125(a) of the Rules of Court which provides that the verdict shall be engrossed on the issue or the closed record if the cause is tried without issue and shall in either case be dated and signed by the clerk of court who attends the trial.

Section 39 provides for administering of the oath to officers of the jury court and section 41 relates to where the jury court are to meet. Both provisions are obsolete since the abolition of the jury court.

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59 Geo. 3 c.35.	The Jury Trials (Scotland) Act 1819.	Sections 7 to 9. Sections 13 and 14. Section 17. Section 19. Sections 26 and 27. Section 35.

Sections 7, 8 and 9 all relate to the jury court and are obsolete since its abolition.

Section 13 relates to the taking of proof on commission. This is superseded by the Evidence (Scotland) Act 1866 (c.112) which provides that, except in certain special circumstances which the Act specifies, evidence in Court of Session causes which previously could be taken on commission shall be taken before the Lord Ordinary.

Section 14 relates to cases brought from inferior courts to the Court of Session and is superseded by section 40 of the Court of Session Act 1825 (c.120).

Section 17 makes provision for a bill of exceptions to the judgment of the jury court and is superseded by Rules 124 and 126 of the Rules of Court. It also relates to motions for new trials on a special verdict and to that extent is superseded by Rule 129.

Section 19 makes provision relating to applying the verdict of the jury and is superseded by Rule 125 of the Rules of Court.

Section 26 relates to procedure in the jury court and since the abolition of that court has been obsolete.

The explanation for the repeal of section 27 is contained in recommendation 14.

Section 35 makes special provision for the jury to view the object to which the dispute relates where the view is to take place in the counties of Sutherland, Caithness and Orkney. This provision is obsolete (see note on the partial repeal of section 29 of the Jury Trials (Scotland) Act 1815).

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59 Geo. 3 c.45.	The Court of Session Act 1819.	Section 1 except in so far as it enables the senior Lord Ordinary to fill a vacancy arising in the Inner House. Section 3. Section 6.

Section 1 relates to the filling of vacancies in the Inner House arising by the death or resignation of any of the judges sitting therein. The reasons for the limited re-enactment of the section are set out by the Scottish Law Commission in recommendation 1.

Section 3 is ancillary to the part of section 1 which is not re-enacted.

Section 6 provides that the Act is to be construed together with the Court of Session Acts of 1808, 1810 and 1813. As, however, the rest of the Act is re-enacted in the Consolidation Bill or repealed without re-enactment, section 6 is no longer necessary.

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1 & 2 Geo. 4 c.38.	The Court of Session Act 1821.	In section 1 the words "advocation and" and "either for the Lord Ordinary on the bills or". Section 3. Section 9. Sections 11 to 14. Section 18. Section 24. Sections 26 and 27. Sections 29 and 30.

In section 1 the words which it is proposed not to re-enact relate to advocation and the Lord Ordinary on the Bills. Advocation was abolished by section 65 of the Court of Session Act 1868 and the Bill Chamber by section 3(1) of the Administration of Justice (Scotland) Act 1933.

Section 3 relates to procedure in the Bill Chamber.

The offices referred to in section 9 no longer exist.

Sections 11 and 12 were superseded by the Registers of Sasines (Scotland) Act 1847.

Section 13 related to the Barons of Exchequer and is obsolete.

Section 14 is superseded by the Court of Session etc Fees Order 1984 (S.I. 1984 No. 256).

Section 18 made provision in relation to extracts of decrees of the Court and is superseded by the Court of Session (Extracts) Act 1916 and Rule 63 of the Rules of Court.

Section 24 made provision in relation to appeal to the House of Lords and is superseded by the Standing Orders of the House of Lords.

Section 26 provided for the keeper of various registers to be appointed by the lord clerk register and is superseded by the Writs Execution (Scotland) Act 1877, the Lord Clerk Register (Scotland) Act 1879, the Reorganisation of Offices (Scotland) Act 1928 and the Public Registers and Records (Scotland) Act 1948.

Section 27 made provision for the formation of indexes for certain registers. This provision is not mentioned in any text book and appears to be obsolete.

Sections 29 and 30 related to the collector of the fee fund. His office was abolished by section 7 of the Courts of Law Fees (Scotland) Act 1868.

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6 Geo. 4 c.22. The Jurors (Scotland) Act 1825. Sections 17 and 19.

Section 17 was repealed by Schedule 10 to the Criminal Procedure (Scotland) Act 1975 so far as relating to criminal trials, the inference being that it remained in force for civil trials. The language of section 17, however, with its reference to the accused throughout indicates that it has never applied to civil cases and it may therefore be repealed completely as no longer having any effect.

Section 19 as amended by the Criminal Procedure (Scotland) Act 1975 provides in effect that civil courts shall have power to excuse jurors from serving on trials, the grounds of such excuse being stated in open court. Since the abolition of jury trials in civil actions in the sheriff court by section 11 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, section 19 now relates to jury trials only in the Court of Session. Subsection (6) of section 1 of the 1980 Act provides that "the court before which a person is cited to attend for jury service may excuse that person from that jury service.", and paragraph (b) of that subsection provides that the subsection is without prejudice to section 19 of the 1825 Act.

There are two differences between section 19 of the 1825 Act and section 1(6) of the 1980 Act which might explain the "without prejudice" formula:

(a) section 19 unlike section 1(6) provides that the excuse must be stated in open court; and

(b) section 19 excuses from serving on a trial or trials whereas section 1(6) excuses from jury service.

So far as (a) is concerned, section 1(6) is wider than section 19, there being no restriction that the excuse must be stated in open court, and there therefore seems no need to retain section 19 for that purpose.

So far as (b) is concerned, it appears to have been assumed when section 1(6)(b) was enacted that jurors may be cited for jury service at a session of the court comprising several jury trials and that it was desirable to retain section 19 so that a juror could be excused from service in a particular trial (e.g. because of his relationship with one of the parties in that trial) while leaving him eligible for service in other trials in the session. While in criminal cases in the High Court of Justiciary a number of trials may be conducted at one session of the court and the jurors may be cited to attend in respect of the session, each civil jury trial is put down for hearing separately and jurors are cited to attend only for a particular trial.

There seems no good reason, therefore, to retain section 19 and it is thought that both that section and paragraph (b) of section 1(6) of the 1980 Act may safely be repealed.

6 Geo. 4 c.120.	The Court of Session Act 1825.	Section 5 except so far as relating to appeal to the House of Lords. Sections 11 and 12. In section 17 the words from the beginning to "in part; and". Section 20. In section 21 the words from the beginning to "expenses"; and". Section 22. Sections 24 to 26. In section 28 the words from "all actions on account of any injury to moveables" to "seduction", from "all actions on the responsibility" to "nuisance" and from "all actions on policies" to the end and that section so far as relating to the jury court and the Court of Admiralty. Section 33. Section 35. Section 40 so far as relating to proofs in inferior courts other than sheriff courts and in that section the words from "Provided however" to "repealed" and from "but it is" to the end. Section 44. Section 45. In section 46 the words from the beginning to "other division". Sections 47 and 48. Sections 51 and 52. In section 53 the words from the beginning to "sixty days; and" and the words "or cited". Section 54.

Section 5 prescribed the procedure to be followed where there are dilatory defences. Except so far as relating to appeal to the House of Lords, this procedure is superseded by the procedure in ordinary actions as set out in the Rules of Court.

Section 11 provides for the amendment of the pleas in law after the record has been closed and is superseded by Rule 92.

Section 12 makes provision for parties lodging condescendencies and answers on the facts and is superseded by Chapter II of the Rules of Court.

The words proposed to be repealed in sections 17 and 21 relate to the determination of the matter of expenses in the Outer House and Inner House respectively and provide that this shall be dealt with at the same time as the merits of the cause are determined. These provisions are not entirely in accord with modern practice and are in any event unnecessary. Nowadays the matter of expenses is disposed of at the time when judgment is given on the merits or at that time the question of expenses is reserved for determination later.

The words proposed to be repealed in section 20 and section 22 relate to the preparation of written cases by the parties instead of incidental matters being reported orally by the Lord Ordinary to the Inner House. The preparation of written cases was abolished by section 14 of the Court of Session Act 1850.

The explanation for the repeal of section 24 is contained in recommendation 13.

Sections 25 and 26 relate to appeals to the House of Lords and are superseded by the Standing Orders and Directions of the House of Lords.

The explanation for the repeals in section 28 is contained in recommendation 15.

Section 33 is applicable only to the jury court (see note on section 28).

Section 35 provides that it shall not be necessary for a party to an action to produce and exchange, in advance of the trial or proof, a list of witnesses proposed to be examined by him. In modern practice parties never do produce and exchange lists of witnesses in advance of trial or proof and the provision is therefore no longer necessary.

The only inferior courts referred to in section 40 other than the sheriff court are the dean of guild court and the justice of the peace small debt court. The dean of guild court was abolished by section 227 of the Local Government (Scotland) Act 1975 and the justice of the peace small debt court by the District Courts (Scotland) Act 1975. The specific words proposed to be repealed in section 40 relate to the jury court (see note on section 28) and appeal for jury trial from the sheriff court to the Court of Session and the section so far as relating to such an appeal was repealed by the Sheriff Courts (Scotland) Act 1907, Schedule 2.

Section 44 provides that where a judgment of an inferior court ordained a tenant to remove from lands or houses, the tenant could have the judgment reviewed only by suspension.

The Rules of Court 1936 as amended in 1948 and as now consolidated in Rule 267 of the Rules of Court 1965, however, provide that, notwithstanding any provision in any Act of Parliament to the contrary, the Rules so far as they relate to appeal shall apply with regard to all appeals from any interlocutory judgment or determination (including decrees of removing) pronounced by any inferior court other than the Land Court which may competently be submitted for review to the Court of Session, or to a judge thereof. This Rule appears to supersede the provisions of section 44 and provides a right of appeal against decrees of removing where previously review by suspension only was competent. This view is supported by Dobie, Sheriff Court Practice 418-9.

Section 45 relates to bills of advocation which have been abolished.

The words proposed to be repealed in section 46 related to the Bill Chamber which has been abolished.

The words proposed to be repealed in section 47 related to cautioners in bills of suspension and is superseded by Rule 238 of the Rules of Court.

Section 48 related to procedure in bills of suspension which is now regulated by Rules of Court.

The Act of Sederunt (Edictal Citations, Commissary Petitions and Petitions of Service) 1971 (S.I. 1971/1165) purported to supersede sections 51 and 52 "in so far as they prescribe procedure for and in connection with edictal citations, charges, publications, citations and services" but those sections do not make provision apart from such procedure and are therefore completely replaced by the act of sederunt.

In section 53 the words proposed to be repealed relate to the citation of defenders and are superseded by Rules 72, 74, 74A(2), 75 and 159 of the Rules of Court.

Section 54 provided for division of the functions of the lords commissioners for plantation of kirks and valuation of teinds between judicial and ministerial and discretionary business. By virtue of that section all actions for the valuation or sale of teinds or actions of proving the tenor of the same, all actions of suspension or reduction of localities, and all actions of declarator or reduction connected with teinds came within the jurisdiction of the Court of Session, while the jurisdiction of the lords commissioners in assigning or modifying competent stipends and in uniting or

disjoining parishes and in all other matters of a ministerial or discretionary nature was in no way altered.

The clerk of the teind court has been consulted about the provisions of section 54 and has replied as follows "Actions in the Teind Court over the past 25 years have been concerned only with the provisions of the Church of Scotland (Property and Endowments) Act 1925. The result of these proceedings is that in all but nine of the parishes in Scotland Teind Rolls have been prepared and finalised. Of the nine remaining parishes four have had actions initiated for the preparation of Teind Rolls and one other should be initiated shortly. The remaining four are not yet "standardised" in terms of the 1925 Act. Section 54 of the Act of 1825 (c.126) has not been involved and I see no reason to suppose that it should be. Sections 16 and 18 of the 1925 Act deal with the valuation and surrender of teinds and the sale of surplus teinds respectively. In my opinion, therefore, the said section 54 might well be repealed.".

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11 Geo. 4 & 1 Will 4 c.69	The Court of Session Act 1830.	Sections 1 to 3. Section 9. Section 11. Sections 15 and 16. Section 19. Section 29, so far as relating to the Court of Session, and the proviso. Section 35. Section 37. Section 40.

Sections 1 and 2 provided that trial by jury should become part of the administration of justice in the Court of Session and abolished the jury court. They are both spent.

Sections 3 and 9 relate to the arrangement of jury trials and are superseded by the Rules of Court.

Section 11 provides for civil jury trials to be taken before judges of the Court of Justiciary when on circuit. The explanation for its repeal is contained in recommendation 14.

Section 15 exempted certain causes from court dues and is superseded by the Court of Session etc Fees Order 1984 (S.I. 1984 No. 256).

Section 16 is spent.

Section 19 relates to civil jury trials on circuit. The explanation for its repeal is contained in recommendation 14.

Section 29 provides:

> "29. All inferior Admiralty jurisdiction, not dependent upon the High Court of Admiralty, shall continue as heretofore, but the judgments of such courts shall be subject to review solely in the courts of Session and Justiciary respectively:
>
> Provided always, that nothing herein contained shall extend or be construed to extend to lessen or take away any salary or allowance now payable to the sheriff substitute of the district of the town of Leith by the commissioners of police of the said town, but the same shall continue to be paid as heretofore."

According to Greens Encyclopaedia Volume I page 152, (published in 1926), all inferior Admiralty jurisdiction, not dependent in 1830 upon the High Court of Admiralty, was at that date in abeyance with the sole exception of the criminal jurisdiction of the burgh of Glasgow in the Firth of Clyde, confined to minor offences and exercised in the Court of the River Bailie. The first part of the provision is therefore still required so far as it allows for review by the Court of Justiciary of a

judgment of the Court of the River Bailie, but not otherwise. The proviso is obsolete and in any event has no relevance to the first part of the provision so far as it is still operative.

The consistorial jurisdiction of the commissary courts was transferred to the Court of Session by the Court of Session Act 1830 and section 35 provided that the judgments of the Lord Ordinary in these transferred causes and other consistorial causes commenced in the Court of Session would be subject to review in the same way as in other civil causes. This provision is spent.

The explanation for the repeal of section 37 is contained in recommendation 16.

Section 40 related to maritime and consistorial causes and is superseded by Rules 135-147, 154-170 and the Court of Session etc Fees Order 1984 (S.I. 1984 No. 256).

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2 & 3 Will. 4 c.5.	The Court of Session Act 1832.	The whole Act.

This Act provides for the carrying out of the business of the Court when interrupted by the death or necessary absence of any of the judges and was superseded by section 12 of the Court of Session Act 1868, and nowadays this problem would be dealt with as a matter of administration.

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7 Will. 4. & 1 Vict. c.14.	The Jury Trials (Scotland) Act 1837.	The whole Act.

This Act relates to the granting of a new trial by the Court of Session or House of Lords on the presentation of a bill of exceptions. The bill of exceptions has since been abolished.

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1 & 2 Vict. c.86.	The Court of Session (No. 1) Act 1838.	Section 4 except the words from "in all cases" to "interim possession". In section 5 the words from "by lodging" to the end. Section 6.

The words proposed to be repealed in sections 4 and 5, and section 6, relate to procedure in the suspension of inferior court decrees and are superseded by Rules 234 to 247 of the Rules of Court.

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1 & 2 Vict. c.118.	The Court of Session (No. 2) Act 1838.	Section 1. Section 4. Section 14. Section 17. Section 21. Section 24. Section 26. Sections 28 and 29. The Schedule.

Section 1 provides for the junior lord ordinary to act as one of the permanent lords ordinary and is now only of historical interest.

Section 4 provides that the lords ordinary shall be attached equally to both divisions and is now only of historical interest.

Section 14 transferred the duties of the keeper of the register of abbreviates of adjudications to the keeper of the register of hornings and inhibitions. Since 1948 the relevant registers have been kept by the Keeper of the Registers. Section 14 can therefore be repealed as spent.

Section 17 which relates to an annuity fund for court officials is also only of historical interest.

Section 21 provides for the conjoining of the offices of keeper of the minute book and keeper of the record of edictal citations and is superseded by section 8 of the Reorganisation of Offices (Scotland) Act 1928 and section 13 of the Public Records (Scotland) Act 1937.

Section 24 makes provision for a salary to be paid to the auditor of court and is superseded by sections 25 and 27(1) of the Administration of Justice (Scotland) Act 1933.

Section 26 relates to teind clerks and is superseded by Rules 12(b) and 13(c) of the Rules of Court.

Section 28 and the Schedule prescribe court dues and are superseded by the Court of Session etc Fees Order 1984 (S.I. 1984 No. 256).

Section 29 relates to summonses in admiralty causes and is superseded by Rule 135 of the Rules of Court.

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2 & 3 Vict. c.36. The Court of Session Act 1839. Section 1.

Section 1 provides that Court of Session judges shall perform the functions of the Court of Exchequer and was superseded by the Exchequer Court (Scotland) Act 1856.

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13 & 14 Vict. c.36.	The Court of Session Act 1850.	Section 5. Sections 7 and 8. Sections 17 to 20. Sections 22 and 23. Sections 26 and 27. In section 28 the words "without the the necessity of such special allowance". Section 29. Section 32. Section 36. Sections 39 to 41. Sections 44 to 53. Schedule (B).

Section 5 provides that a record shall be closed by an interlocutor of the Lord Ordinary and is superseded by Rule 91(1) of the Rules of Court.

Sections 7 and 8 relate to the procedure in actions of reduction and are superseded by Rules 171-174 of the Rules of Court.

Section 17 provides that no member of the College of Justice shall be entitled to institute proceedings which would not otherwise be competent and is unnecessary.

Section 18 provides that a summons shall bear the date of signeting only and is superseded by Rule 74 of the Rules of Court.

Section 19 related to the procedure in multiplepoindings and is superseded by Rules 175 to 185 of the Rules of Court.

Section 20 and Schedule (B) relate to the forms of execution of summonses etc. and are superseded by Rules 77 and 195 and forms 3 and 30 of the Rules of Court.

Section 22 makes provision in relation to edictal citations, charges, publications, citations and services and is superseded by the Act of Sederunt (Edictal Citations,

Commissary Petitions and Petitions of Service) 1971 (SI 1971/1165) (see note on repeal of sections 51 and 52 of the Court of Session Act 1825).

Section 23 prescribed the procedure of protestation for not calling a summons and is superseded by Rule 80 of the Rules of Court.

Section 26 provides that in consistorial causes witnesses who are abroad may be examined on commission and is superseded by section 2 of the Evidence (Scotland) Act 1866.

Section 27 is of historical interest only.

In section 28 the words proposed to be repealed are spent.

Section 29 provides that every decree for expenses shall include the expense of extracting it and is superseded by Rule 63(c) of the Rules of Court.

Section 32 relates to procedure in suspensions and is obsolete.

Section 36 relates to the procedure in jury causes and is superseded by Rules 114 to 130 of the Rules of Court.

Section 39 provides that issues in jury causes shall be approved by interlocutor and signed by a judge and is superseded by Rule 114 of the Rules of Court.

Section 40 provides that, when issues have been approved, the time and place of the trial shall be fixed and is superseded by Rule 17 of the Rules of Court.

Section 41 provides that the Lord Ordinary in the cause is to preside at the jury trial and is superseded by Rule 16 of the Rules of Court.

Section 44 provides that in jury trials one counsel for each party is to be heard after the evidence is closed. It is unnecessary.

Section 45 relates to bills of exceptions which have been abolished.

Sections 46 to 48 relate to proofs before the lord Ordinary and are superseded by sections 1 and 4 of the Evidence (Scotland) Act 1866.

Section 49 provides in effect that in causes which would otherwise have to be tried by jury, proof might be allowed on ccmmission except where the action is for libel or nuisance or is an action of damages. This was really replaced and rendered unnecessary by section 4 of the Evidence (Scotland) Act 1866 which allowed for a proof before the Lord Ordinary instead of a jury trial.

Section 50 makes provision for jury causes being referred to arbiters and is obsolete.

Section 53 relates to interpretation and is unnecessary.

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19 & 20 Vict. c.56.	The Exchequer Court (Scotland) Act 1856	Section 4. Section 13. In section 14 the words from "and such application" to "proper". Sections 15 and 16. Section 19. Sections 26 to 28. Section 44. Schedule G.

Section 4 provided that the clerks to the Lord Ordinary in Exchequer causes shall be clerks in all such causes in the Outer House and is superseded by section 24(1) of the Administration of Justice (Scotland) Act 1933.

Section 13 lays down procedure for the recovery by the Crown of rentcharges and penalties in the Court of Exchequer. The Inland Revenue have been consulted and have said that this procedure is not used by them today. They have no rentcharges and the recovery of revenue penalties is specifically provided for in Part III of the Finance Act 1960. The Customs and Excise have also been consulted and have said that the procedure is not required by them.

In section 14 the words proposed to be repealed have been superseded by ordinary court procedure.

Section 15 lays down a procedure of application by summary petition in exchequer causes for an order on a person ordaining him to do an act or perform a duty which he is refusing or neglecting to do or perform. Since the enactment of section 10 of that Act it has been competent to proceed in any exchequer cause by summons followed by the procedure of an ordinary action in the Court of Session. The procedure under section 15 is seldom used, and the normal practice in such circumstances would be to proceed by an action for payment or specific performance. The Inland Revenue have been consulted and for the stated reasons consider that section 15 should be repealed without re-enactment.

Section 16 prescribed a procedure for recovery of debts due to the Crown or Revenue by affidavit where the debtor is believed to have died insolvent. This procedure is never used. The Crown or Inland Revenue now proceed in such circumstances under section 11A of the Judicial Factors (Scotland) Act 1889 by having a judicial factor appointed for the administration of the deceased's estate. The Inland Revenue have been consulted about this section and they recommend that it should be repealed.

Section 19 provides:

> "The duties heretofore performed by or incumbent on the Court of Exchequer with regard to the nomination, appointment, or control of tutors dative shall be performed by the Court of Session acting as the Court of Exchequer in Scotland, upon applications for such nomination or appointment to be made to either of the divisions of the said Court by way of summary petition; and the procedure under such petitions may be, as nearly as may be, the same as under other summary petitions to the said Court, but may be regulated and varied from time to time in such way and manner as to the said Court may seem proper."

The procedure prescribed by this section is not used in practice, it being now superseded by the ordinary procedure of the Court of Session of petition to the Court for the appointment of a judicial factor *loco tutoris*.

Section 26 relates to the sittings of the Court in exchequer causes and is superseded by the administrative arrangements of the Court.

Section 27 provides that in exchequer causes certified copies of interlocutors are to be equivalent to extracts and is unnecessary because of the ordinary court procedure.

Section 28:

(a) provides that exchequer decrees shall be extracted "without abiding the expiration of the days of the minute book, which are hereby dispensed with"; and

(b) prescribes the form of such extracts.

So far as (a) is concerned, the Inland Revenue and H.M. Customs and Excise in practice do not take advantage of this accelerated procedure for the obtaining of extracts and, so far as (b) is concerned, the section is no longer necessary in view of the general power contained in section 16(b) of the Administration of Justice (Scotland) Act 1933 to prescribe the form of documents by act of sederunt.

Section 44 provides for the making of regulations to facilitate procedure in exchequer causes and is superseded by the powers conferred on the Rules Council by section 18 of the Administration of Justice (Scotland) Act 1933 to frame rules regarding matters relating to the Court.

Schedule G prescribes the form of warrant to be subjoined to extracts of exchequer decrees in favour of the Crown and is ancillary to section 28 which is repealed for the reasons stated above.

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20 & 21 Vict. c.18.	The Bill Chamber Procedure Act 1857.	The whole Act.

Section 5 makes provision in respect of money deposited in the Bill Chamber and since the Bill Chamber has been abolished is no longer required.

Section 6 provided for money deposited with former clerks of the bills to be paid over to the Treasury and is spent.

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20 & 21 Vict. c.56.	The Court of Session Act 1857.	Sections 5 and 6 so far as relating to applications and reports. Section 8.

Section 5 confers certain powers on the Lord Ordinary in the case of petitions, applications and reports coming before him, and section 6 relates to the review of any interlocutor pronounced by him upon any such petition, application or report. Except for special cases under section 63 of the Court of Session Act 1868 and exchequer causes (see section 6(3) of the Administration of Justice (Scotland) Act 1933) all causes initiated in the Court of Session are, by virtue of section 6(1) of the 1933 Act, now initiated either by summons or petition (exchequer causes may or may not be initiated by summons). Accordingly, sections 5 and 6 so far as relating to applications and reports appear to be superseded by section 6(1) of the 1933 Act.

Section 8 provides that "when an issue for the trial of any matter of fact, upon report of the Lord Ordinary, in terms of the Court of Session Act 1850, shall have been adjusted by either division of the Court, the Court shall remit the cause to the Lord Ordinary to be further proceeded in" and is obsolete.

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24 & 25 Vict. c.86.	The Conjugal Rights (Scotland) Amendment Act 1861.	Section 10. Section 13 except the proviso. Section 19.

Section 10 relates to the citation of the defender in consistorial actions and to the circumstances in which the summons is to be served on the children of the marriage and on the defender's next of kin. It is superseded by Rules 155 and 159 of the Rules of Court.

Section 13 relates to the taking of evidence in consistorial actions and, except so far as it deals with the taking of evidence on commission, is superseded by the Rules of Court.

Section 19 relates to interpretation and is unnecessary.

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29 & 30 Vict. c.112.	The Evidence (Scotland) Act 1866.	Section 1 except insofar as it authorises the taking of proof before the Lord Ordinary. In section 3 the words from "and where" to the end.

Section 1 insofar as it relates to the fixing of a diet of proof by the Lord Ordinary is superseded by Rule 17 which provides for the fixing of the diet adminstratively, and the section in so as it relates to the procedure in proofs is superseded by Rules

91 and 113 of the Rules of Court. The words proposed to be repealed in section 3 are unnecessary.

31 & 32 Vict. c.100.	The Court of Session Act 1868.	Section 10. Section 12. Section 13. Section 14 in so far as it relates to summonses and petitions. Sections 15 to 17. Sections 20 to 22. Sections 25 and 26. Sections 28 to 30. Section 32. Sections 34 and 35. Sections 37 and 38. Sections 40 and 41. Section 43. In section 44 the words from "and if" to the end. In section 45 the words from "or at" to "such trial". Section 46. In section 47 the words from "where the trial" to "town". Section 50. Sections 52 and 53. Sections 56 to 58. In section 60 the words from "the printed" to "or to direct that". In section 61 the words from "but this" to the end. Sections 65 to 71. In section 72 the words "although such law is not pleaded on the record" and that section except so far as relating to appeals from the sheriff. Section 73. Section 74 except so far as relating to transmission of sheriff court causes. Sections 76 to 90. In section 91 the words from "and such petitions" to the end. Section 92 except the last sentence. Section 93. Sections 95 to 99. Section 100(1). Section 101.

Section 10 makes provision for the sitting of the Court to hear appeals relating to the registration of persons for voting purposes and is superseded by Rule 284 of the Rules of Court.

Section 12 provides that, in the event of the indisposition or necessary absence of any judge, it shall be competent for the Lord President of the Court to nominate another judge to officiate in his room. This matter would nowadays be dealt with administratively and the section is therefore unnecessary.

Section 13 provides that summonses may be signed by any solicitor entitled to practise before the Court and is superseded by Rule 73 of the Rules of Court.

Section 14 prescribes the induciae for summonses and other writs and, insofar as it relates to summonses and petitions, is superseded by Rules 72 and 192 of the Rules of Court.

Section 15 lays down the procedure where a summons or other writ is lost or destroyed and is superseded by Rule 23 of the Rules of Court.

Section 16 provides that a certified copy may be used in place of the original in the service of a summons or other writ and is superseded by Rule 74(i) of the Rules of Court.

Section 17 provides that the Lord Advocate's concurrence is not required in certain actions and the provision is unnecessary.

Section 20 relates to the amendment of the summons or other pleading in undefended causes and is superseded by Rule 92(3) and (4) of the Rules of Court.

Section 21 provides that a party appearing in any action shall not be entitled to state an objection to the regularity of the execution of the summons and is superseded by Rule 82 of the Rules of Court.

Section 22 prescribed procedure for the calling of the summons and for obtaining decree in absence and is superseded by Rules 78, 80, 83(a), 89 and 171 to 173 of the Rules of Court.

Section 25 provides that neither party shall be entitled as a matter of right to ask for a revisal of his pleadings; but it shall be competent for the Lord Ordinary to allow or to order a revisal of the pleadings, upon just cause shown". This is now unknown in practice.

Section 26 prescribed procedure after revisal of pleadings and for the adjustment of pleadings and is superseded by Rules 90, 90A and 91 of the Rules of Court.

Section 28 relates to the review of interlocutors of the Lord Ordinary and is superseded by section 14(2) of the Administration of Justice (Scotland) Act 1933 and Rules 117 and 264 of the Rules of Court.

Section 29 relates to the power to amend the record and is superseded by Rule 92 of the Rules of Court.

Section 30 relates to pleadings in actions of multiplepoinding and is superseded by Rule 180 of the Rules of Court.

Section 32 provides that in proofs adjournment shall not be allowed except for special cause, the evidence shall be summed up by one counsel on each side at the conclusion of the examination of the witnesses and it shall not be necessary to print the evidence unless for the purposes of review. The provision about adjournment is unnecessary as adjournment is now left to the discretion of the Court. The provision about summing up the evidence is unnecessary, and the provision about printing the evidence is superseded by Rule 262(d) of the Rules of Court.

Section 34 relates to the noting of exceptions taken at jury trials and making them the ground of an application to set aside the verdict. The section is superseded by Rules 124 and 126 of the Rules of Court.

Section 35 relates to the form of bills of exception which, as explained in the note on the repeal of section 7 of the Jury Trials (Scotland) Act 1815, have been superseded by Rules 124 and 126 of the Rules of Court.

Section 37 provides for the evidence at jury trials being taken down in shorthand and is superseded by Rules 113 and 130 of the Rules of Court.

Section 38 provides that "It shall be lawful to substitute a special case signed by counsel for a special verdict, and thereupon to discharge the order for trial, or the jury, if one has been empannelled, without returning a verdict; and such special case shall have the like force and effect as a special verdict."

The special verdict procedure is still sometimes used (although infrequently) and provision about special verdicts is contained in Rules 128 and 129 of the Rules of Court. The special case procedure, however, is never used and there is no provision for it in the Rules of Court, and it appears to be obsolete.

Section 40 restricts the right of the pursuer in an action of damages to recover expenses where the damages recovered are less than £5. This provision is not mentioned in either Maclaren's or Maxwell's textbook on the Court of Session and is clearly outdated. Nowadays the Court always has a wide discretion in awarding expenses. The section is therefore both obsolete and unnecessary.

Section 41 provides that the deliverance of the judge in respect of the stamp on any document shall be subject to review and is superseded by Rule 264(f) of the Rules of Court.

Section 43 is spent.

In section 44 the words proposed to be repealed lay down detailed arrangements in the selection of a jury and are unnecessary.

The words proposed to be repealed in sections 45 and 47 and sections 46 and 50 relate to jury trials on circuit and the explanation for their repeal is contained in recommendation 14.

Section 52 provides that the effect of a reclaiming note shall be to submit to review all the prior interlocutors of the Lord Ordinary and is superseded by Rule 262(c) of the Rules of Court.

Section 53 prescribed the interlocutors of the Lord Ordinary which may be reclaimed against and the interlocutors of the sheriff and inferior courts against which an appeal may be taken. So far as the section relates to reclaiming it is superseded by Rule 264 of the Rules of Court and so far as relating to appeal from the sheriff it is superseded by sections 3(h) and 28 of the Sheriff Courts (Scotland) Act 1907. So far as relating to appeals from other inferior courts, see note on repeal of section 40 of the Court of Session Act 1825 in so far as it relates to such inferior courts.

Section 56 provides that after a case has been reclaimed it shall not be necessary to remit the case to the Lord Ordinary. This provision is unnecessary.

Section 57 provides that where an interim decree pronounced in the Outer House and implemented is subsequently recalled, the Inner House may order repayment of any money which has been paid in implement of that decree. The Inner House nowadays has wide powers to adjust the rights of parties, including monetary repayment, in the circumstances set out in the section and it is therefore unnecessary to re-enact it.

The explanation for the repeal of section 58 is contained in recommendation 17.

The explanation for the repeal of the words in sections 60 and 61 is contained in recommendations 13 and 18 respectively.

Sections 65 to 70, 73 and 79 make provision for appeals from inferior courts other than the sheriff and are no longer required (see note on repeal of section 40 of the Court of Session Act 1825).

Section 71 makes provision for appeals from inferior courts including the sheriff. It is superseded so far as relating to the sheriff by Rule 268(b) and (c) of the Rules of Court and is not required for other inferior courts for the reason given above.

Section 72 makes provision in relation to appeals from inferior courts including the sheriff and is not required for inferior courts (other than the sheriff) for the reason

given above. The law is not pleaded on record nowadays and the words "although such law is not pleaded on the record" are therefore obsolete.

Section 74 provides for transmission of inferior court causes (including those in the sheriff court) to the Court of Session on the ground of contingency and is not required for inferior courts (other than the sheriff) for the reasons given above.

Section 76 provides for substitution of appeal for advocation and is spent.

Section 77 provides that on an appeal to the Court of Session, a record may, where necessary, be made up in the Court of Session. This is superseded by Rule 269(b) of the Rules of Court.

Section 78 provides that in any enactment exclusion of review by advocation is to imply exclusion of review by appeal. This provision is spent.

Sections 81 to 88 prescribe procedure where the Court remits a cause to the accountant of court. This procedure is unknown to the accountant of court and other officials of the Court of Session and has not been used in living memory. It therefore seems to be obsolete.

Sections 89 and 90 relate to the Bill Chamber which was abolished by section 3(1) of the Administration of Justice (Scotland) Act 1933.

In section 91 the words proposed to be repealed provide that petitions for the restoration of possession of property and for specific performance of a statutory duty shall be presented to the Lord Ordinary. By virtue of section 6(3) of the Administration of Justice (Scotland) Act 1933 and Rule 190 of the Rules of Court such petitions now require to be presented to the Inner House.

The words proposed to be repealed in section 92 provide that

> "It shall be lawful for the Court to appoint not fewer than six agents, being agents practising in the Court of Session of not less than five years standing, and skilled in conveyancing to be judicial reporters, and who shall hold their office at the pleasure of the Court; and all remits which under the existing practice are made to agents practising in the Court of Session shall be made to such judicial reporters by rotation, or in such other way as may be considered most advisable for the despatch of the business entrusted to such reporters, who shall be remunerated by fees according to a scale to be fixed by the Court, and which the Court may alter from time to time."

At the present day a panel of judicial reporters is not kept, and the Court now remits a case within its own power to an individual as an occasion arises. That part of section 92 therefore appears to be obsolete.

Section 93 relates to procedure in time of vacation and is superseded by Rules 78(b) and 83(a) of the Rules of Court.

Section 95 relates to the procedure to awaken a cause and is superseded by Rule 105 of the Rules of Court.

Section 96 relates to the procedure to have a cause transferred against a party or parties and is superseded by Rule 106 of the Rules of Court.

Section 97 relates to a combined procedure to awaken and transfer a cause and is superseded by Rules 105 and 106.

Section 98 relates to the procedure to have a cause which is before the Inner House transferred against a party or parties and is superseded by Rule 106.

Section 99 provides that it shall not be competent to object to the production of a document after the record has been closed on the ground that it was in the possession

of the person producing it when the record was closed. The section is superseded by Rules 78(d) and 83(c).

Section 100(1) relates to the service of the summons in a consistorial cause and is superseded by Rule 159.

Section 101 lays down procedure for cognition of the insane by brieve and inquest. According to Maclaren's Court of Session Practice at page 766 this procedure is not often used, it being the usual practice in the case of an insane person to petition the court for the appointment of a *curator bonis* to his estate. Rules 200 to 206 of the Rules of Court 1948 replaced the more detailed procedure of section 101 but as the procedure for cognition of the insane is now never used it was thought unnecessary to repeat these Rules when the Rules of Court were re-enacted in 1965.

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31 & 32 Vict. c.125.	The Parliamentary Elections Act 1868.	Section 1.

Section 1 is the short title and, with the only remaining section of the Act being re-enacted in clause 44 of the Bill, is unnecessary.

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42 & 43 Vict. c.75.	The Parliamentary Elections and Corrupt Practices Act 1879.	Section 1.

Section 1 is the short title and, with the only remaining section of the Act being re-enacted in clause 44 of the Bill, is unnecessary.

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46 & 47 Vict. c.51.	The Corrupt and Illegal Practices Prevention Act 1883.	Section 65.

Section 65 is the short title and, with the only remaining section of the Act being re-enacted in clause 44 of the Bill, is unnecessary.

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52 & 53 Vict. c.54.	The Clerks of Session (Scotland) Regulation Act 1889.	Sections 6 and 7. Section 9. Section 12.

Sections 6 and 7 relate to the keeper of the Minute Book and Record of Edictal Citations and are superseded by section 8 of the Reorganisation of Offices (Scotland) Act 1928, section 24(1) of the Administration of Justice (Scotland) Act 1933 and section 13 of the Public Records (Scotland) Act 1937.

Section 9 relates to the fees payable in maritime and consistorial causes. The words down to the proviso are spent and the proviso is superseded by the Court of Session etc Fees Order 1984 (S.I. 1984 No. 256).

Section 12 provides that law agents shall be eligible for appointment as clerks of court. In modern times there would be no reason to debar a person from appointment on the ground that he was a law agent and the section is therefore unnecessary.

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10 Edw. 7 & 1 Geo. 5 c.31.	The Jury Trials (Amendments) (Scotland) Act 1910.	Sections 3 and 4.

Section 3 empowers the Court to make Acts of Sederunt for the purposes of the Act and is superseded by the power conferred by section 16(c) of the Administration of Justice (Scotland) Act 1933.

Section 4 is the short title and is unnecessary.

18 & 19 Geo. 5. c.34.	The Reorganisation of Offices (Scotland) Act 1928.	Sections 8 and 9.

These sections are both spent.

23 & 24 Geo. 5 c.41.	The Administration of Justice (Scotland) Act 1933.	Section 2(2). Section 3(1). Section 4 except so far as it relates to the regulation of the powers of the vacation judge by act of sederunt. Section 5. In section 6, subsections (1) to (3) and (5) and (6). Section 9. In section 10, subsections (2) to (5). Section 11(3). Section 13. Section 14 so far as relating to procedure. Section 15 except so far as relating to power to prescribe form of extract of decree. In section 18(3), proviso (i). Section 30. In section 40, the definition of "consistorial cause".

Section 2(2) is spent.

Section 3(1) which abolished the Bill Chamber is spent.

Section 4 has already been repealed, except the part of subsection (3) which sets out the powers of the vacation judge. These powers are set out in detail and the subsection concludes by stating that the vacation judge may "do any other thing which he may, by act of sederunt, be authorised to do". In pursuance of these concluding words Rule 1 of the Rules of Court has been made setting out a comprehensive list of the vacation judge's powers and that Rule completely supersedes the detailed powers contained in section 4(3).

Section 5 makes provision in respect of which division of the Inner House or which Lord Ordinary shall hear any cause pending before the Inner House or Outer House respectively. This provision appears to be unnecessary.

Section 6(1) provides for causes inititated in the Court being initiated in the Outer House by summons or petition and is superseded by Rule 69.

Section 6(2) makes provision in relation to the form of summonses and defences and petitions and answers thereto and is superseded by Rules 70, 83(b),84(b), 191 and 196(b).

Section 6(3) provides that special cases and certain listed petitions shall be presented to the Inner House and is superseded by Rules 190 and 280.

Section 6(5) prescribes the procedure in actions of damages arising out of collisions between vessels at sea and is superseded by Rules 144 and 145.

Section 6(6) is spent.

Section 9 is spent.

Subsections (2) to (5) of section 10 prescribe procedure in summary trials and are superseded by Rule 231.

Section 11(3) is spent.

Section 13 provides for the summoning by the Court of assessors in trials and proofs to assist it and is superseded by Rules 38 and 44.

In section 14 the words proposed to be repealed prescribe the procedure when reclaiming against an interlocutor of the Lord Ordinary and are superseded by Rule 262.

In section 15 the words proposed to be repealed are spent or unnecessary.

In section 18 the words proposed to be repealed are spent.

Section 30 is spent.

In section 40 the definition of consistorial cause is applicable only to the causes to be assigned to the consistorial roll by act of sederunt under section 17(i) of the Act and is unnecessary.

12, 13 & 14 Geo. 6 c.10.	The Administration of Justice (Scotland) Act 1948.	In section 1 the words from "when" to "thirteen". Section 5.

In section 1 the words proposed to be repealed provide in effect that there are no restrictions on the filling of vacancies among the judges of the Court of Session when the number of judges in office is less than thirteen. Section 1 of the Administration of Justice Act 1968 (c.5) fixed the maximum number of judges at nineteen but also empowered Her Majesty by Order in Council to increase the maximum number of judges and by virtue of the most recent Order in Council (S.I. 1986/2233) the present maximum number is twenty-four. It is submitted that it is quite unrealistic to suppose that the number of judges could ever drop below thirteen and that it is therefore unnecessary to re-enact the words proposed to be repealed.

Section 5 is the short title and is unnecessary.

1968 c.5.	The Administration of Justice Act 1968.	Section 2.

Section 2 provides the short title of the Act, and the rest of the Act so far as relating to Scotland having been re-enacted in the Consolidation Bill, section 2 is no longer necessary.

1980 c.55.	The Law Reform (Miscellaneous Provisions) (Scotland) Act 1980.	Section 1(6) (b).

See note on repeal of section 19 of the Jurors (Scotland) Act 1825.

1983 c.12.	The Divorce Jurisdiction, Court Fees and Legal Aid (Scotland) Act 1983.	In Schedule 1, paragraph 5.

Paragraph 5 of Schedule 1 amended section 10 of the Conjugal Rights (Scotland) Amendment Act 1861 which it is proposed to repeal (see notes on repeals page 29).

1985 c.6.	The Companies Act 1985	In section 425(5) the words from "in pursuance" to "1933".

The words proposed to be repealed in section 425(5) define the vacation judge as one acting as such in pursuance of section 4 of the Administration of Justice (Scotland)

Act 1933. The part of section 4 referred to in the subsection was incorporated into the Rules of Court, and repealed, by act of sederunt (S.I. 1987/2160).

1986 c.45.	The Insolvency Act 1986	In section 120(2) the words from "in pursuance" to the end. In section 162(2) the words from "in pursuance" to "1933".

The explanation for the repeals in sections 120(2) and 162(2) is the same as for the repeal in section 425(5) of the Companies Act 1985.

1986 c.55	The Family Law Act 1986	In Schedule 1, paragraph 1.

Paragraph 1 of Schedule 1 amended section 9 of the Conjugal Rights (Scotland) Amendment Act 1861 (c.86) but has not yet been brought into operation. Paragraph 2 of Schedule 1 to the Law Reform (Parent and Child)(Scotland) Act 1986 (c.9) substituted a new section 9 of the 1861 Act which incorporated the amendment made by paragraph 1 of Schedule 1 to the Family Law Act 1986. The new section 9 is now in force and the amendment made by the Family Law Act is therefore superseded.

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