

*These notes refer to the Scotland Act 1998 (c.46)
which received Royal Assent on 19th November 1998*

SCOTLAND ACT 1998

EXPLANATORY NOTES

SCHEDULES

SCHEDULE 8, Paragraph 32: Criminal Procedure (Scotland) Act 1995

Purpose and Effect

This paragraph inserts a new section 288A into the Criminal Procedure (Scotland) Act 1995 to enable the Advocate General for Scotland to refer a devolution issue which may arise in criminal proceedings to the High Court of Justiciary for their opinion.

The paragraph also inserts a new section 288B into the 1995 Act. The new section makes provision for the implementation by the High Court of Justiciary of any determination by the Judicial Committee of the Privy Council following an appeal on a devolution issue from the High Court.

General

The procedures for dealing with devolution issues in Schedule 6 have implications for civil and criminal proceedings in Scotland. Where a devolution issue arises in the course of proceedings, under the provisions of paragraphs 5 and 6 of Part I of Schedule 6 to the Act the Advocate General is required to be given an opportunity of taking part in the proceedings but only so far as they relate to the devolution issue.

The Advocate General has no existing rights of appeal. In the context of criminal proceedings, the provision made by this amendment is necessary to give the Advocate General for Scotland the right to appeal against the determination of a trial judge upon a devolution issue. So far as the accused is concerned, where he is convicted, he can simply appeal against conviction or sentence in terms of sections 106 or 175 of the Criminal Procedure (Scotland) Act 1995. So far as the Lord Advocate is concerned, if the devolution issue has arisen in solemn proceedings, as the devolution issue will be a point of law, the Lord Advocate will be able to refer the issue to the High Court for their opinion under section 123 of the 1995 Act whether the accused has been acquitted or convicted. If the devolution issue has arisen in summary proceedings, under section 175(3) of the 1995 Act the Lord Advocate will be able to appeal to the High Court on a point of law against an acquittal or against a sentence passed on conviction. In addition, he will be able to appeal by way of suspension under section 191 of the 1995 Act.

The provision made by new section 288A ensures that where the Advocate General wishes to appeal against the decision of the trial court on a devolution issue then, whether the accused is tried on indictment or summarily and whether he is acquitted or convicted, the Advocate General may make a reference to the High Court for their opinion on the devolution issue in a similar way to that in which the Lord Advocate can make a reference under section 123 of the 1995 Act. The new section is in similar terms to section 123 of the 1995 Act.

Parliamentary Consideration

<i>Stage</i>	<i>Date</i>	<i>Column</i>
LC	8-Oct-98	653

Details of Provisions

Paragraph 27 inserts new sections 288A and 288B into the 1995 Act. Subsection 288A(1) and 288A(2) provide that where the Advocate General has been a party to criminal proceedings in Scotland during which a devolution issue has been raised, she may refer that issue to the High Court after the criminal proceedings have concluded. Subsection 288A(2) also provides that notice of the appeal and the date of the hearing must be notified to the person acquitted or convicted in the case and his solicitor.

Subsection 288A (3) provides that the individual can elect to appear personally at the hearing or be represented by counsel.

Subsection 288A (4) provides that where the individual does not indicate that he will be represented then the court may appoint an *amicus curiae* (counsel to assist the court). This will help ensure that the relevant legal arguments are led before the court.

Subsection 288A(5) provides that counsel's costs will be paid by the Advocate General out of money provided by Parliament.

Subsection 288A(6) provides that the opinion of the court on the devolution issue shall not affect the acquittal or conviction.

Subsection 288A(7) makes it clear that "devolution issue" has the same meaning as in Schedule 6 to the Act. The meaning of "devolution issue" is set out in paragraphs 1 and 2 of Schedule 6.

Section 288B makes provision for the implementation by the High Court of Justiciary of any determination by the Judicial Committee of the Privy Council following an appeal on a devolution issue from the High Court. Under Schedule 6, paragraph 13 of the Bill, provision is made for an appeal against the determination of a devolution issue by the High Court of Justiciary to the Judicial Committee of the Privy Council. This deals with devolution issues raised in criminal proceedings.

The matter will be remitted to the High Court which is empowered to deal with the case as it would as if it were determining it as a fresh appeal. This would enable the High Court to decide in the light of the Judicial Committee's decision whether a conviction should be upheld or quashed and, if appropriate, a retrial ordered, and so on. The new section also makes it clear that the Judicial Committee's determination does not affect any earlier acquittal in the proceedings.

In the case of the criminal law the role of the Judicial Committee will be limited to determining devolution issues as a matter of law but it will be for the High Court to give effect to the determination in a particular case. In order to do this it needs all the powers it would have when sitting as an appeal court and this is what the amendment provides.

In addition it ensures that where there has previously been an acquittal or a quashing of a conviction, these would not be affected by a Judicial Committee determination.