Blog: Computer evidence in the Sheriff Court

Published 8 May 2018

***Michael Upton**, advocate at **The Hastie Stable**, writes on computer evidence in the Sheriff Court.*

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In civil proceedings in the Sheriff Court, documents produced by a computer are inadmissible - absent compliance with specific rules of court about computer evidence. A laptop or desktop word-processor is a computer for this purpose. So this covers most documents which you have ever seen or for the foreseeable future will ever see in a Sheriff Court.

Specifically, if you wish to rely on a statement contained in a document produced by a computer, then - before the record closes - you have to send every other party a copy of it with a notice:-

(a) that you intend to rely on it,

(b) that the statement is in a document produced by a computer, and

(c) that any other party may give a counter-notice.

We'll come to the counter-notice. But before that, note that this covers not only productions, affidavits and witness statements, but apparently also, for instance, writs, defences, adjustments, amendments, answers and rule-22 notes. The rules apply to all "statements contained in a document produced by a computer". Due notice can presumably be given either before the end of the adjustment period or before any amendment is allowed, on the view that both involve closing the record. (Where does that leave a document first made after the record has already closed, such as a rule-22 note?)

The recipient then has 21 days to send his counter-notice. The counter-notice can require you to furnish him with all of any of, inter alia, the following information: the names, occupations, business addresses and even places of residence of persons responsible for (i) the operation of the computer's printer; (ii) the management of the activities for which the computer was used; (iii) the supply of information to the computer; and (iv) the operation of the computer itself. You have 21 days to respond.

If you don't comply by providing that information (as far as reasonably possible), then unless the counter-notice is withdrawn, you "shall not be entitled to rely upon the statement in the document." End of story.

This is all in the Act of Sederunt (Computer Evidence in the Sheriff Court) 1969 (1969 No. 1643)1

The reader might think it too bizarre to be believed, until he reflects that this is the world which gave us the General Data Protection Regulation. Were you of a frivolous disposition you might think that the Computer Evidence in the Sheriff Court Rules should be better known as the Bring Civil Proceedings to a Juddering Halt Rules.

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That would be on the view that they seem to be tailor-made for the practitioner who, bereft of any supporting facts or law, is desperately casting about for a spanner to throw into his opponent's works.

The Act of Sederunt ("CESC") was enacted in the same week of November 1969 that saw 'The Sun' go tabloid, and the first broadcast of 'The Clangers'. But however clearly we may remember 1969, CESC seems to have established itself in the collective consciousness less firmly than those pillars of British culture. For example, I cannot find it even mentioned in any published judgment. Thrusting a copy under colleagues' noses and asking "Have you ever heard of this?" provokes universal head-shaking.

CESC's very obscurity prompts a suspicion. Is it still in force? After all, the fact that we all (well, 99% of us) seem to ignore it, might be a clue. The plot thickens when we see that to make it, the Lords of Council and Session invoked powers under section 34 of the Administration of Justice (Scotland) Act 1933 and section 15(6) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 - and section 15(6) of the 1968 Act has been repealed.

In brief summary, sections 13 to 15 of the 1968 Act provided that a computer-made document should be admissible (even if it was not already), but only on proof of its provenance and, broadly, how the computer had come to produce it. The certificate of a person with relevant responsibilities could be sufficient evidence of such matters: section 13(4). A party giving notice under CESC could also lodge and intimate a section-13(4) certificate (paras. 1 & 2). Section 15 enacted as primary legislation much the same requirements that CESC specifies for the Sheriff Court. CESC tailors their application to Sheriff-Court procedure. A CESC counter-notice was originally designed as a means of enquiry into whether the conditions of section 13 had been met and the reliability of the process(es) which had produced document.

Sections 13 to 15 were repealed by the Civil Evidence (Scotland) Act 1988, including the rule-making powers of the Court of Session in section 15(6) which CESC invokes. We might conclude that CESC has not been law since then. That is because after Ernest Watson rode his bicycle on the pavement of Unthank Road at Norwich on 26th July 1915, and was prosecuted under an 1879 by-law against cycling on Norwich pavements made under an Act of Parliament which had in the meantime been repealed, the King's Bench Division held that (absent express savings) the express repeal of an Act impliedly repeals subordinate legislation made under it, so Mr. Watson had done no wrong, or at least no legal wrong (Watson v. Winch, [1916] 1 K.B. 688).

But it is not as simple as that. Section 17(2) of the Interpretation Act 1978 provides that where an enabling power is repealed but re-enacted (with or without modification) subordinate legislation made thereunder is unaffected, provided that it could have been made under the re-enacted provision. The 1988 Act replaced the rule-making powers of the Court of Session in the 1968 Act with new powers, by amending the Sheriff Courts (Scotland) Act 1971 which, though not specifically concerned with the products of computers, seem entirely wide enough for CESC to have been made under them. And in any event, CESC was not made solely under the 1968 Act, but also under section 34 of the Administration of Justice (Scotland) Act 1933, which was replaced by the general powers of section 32 of the 1971 Act. The 1971 powers, both as replacing the 1933-Act powers and as (by the 1988 amendment) replacing the 1968-Act powers, have themselves now been replaced by section 104 of the Courts Reform (Scotland) Act 2014, which is again wide enough to preserve CESC under the general savings provisions of section 17(2) of the 1978 Act. Conclusion: CESC is still good law.

You need not have read that here first. If you are the sort of insomniac who reads the Parliament House Book for personal edification, you will know that it still publishes CESC - and its publishers are fairly reliable when it comes to identifying what is still in force. The Current Law Statute Citators list no revoking measure. On-line publishers such as Westlaw and Justis offer no suggestion that CESC has been revoked. In 1990, parallel rules in the Court of Session were expressly revoked (Act

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of Sederunt (Rules of the Court of Session Amendment No.1 (S.I. 1990 No. 705), but neither I nor the Advocates' Library's staff have been able to find any equivalent revocation of CESC.

There is even the most meagre evidence of its being treated as current law. Surely neither you nor I, reader, have ever been so bereft of any supporting facts or law, that, casting about for a spanner to throw into an opponent's works, we have objected to evidence on the ground of non-compliance with CESC. However, I have, err, a friend who did so before a Commercial Sheriff, to find that the objection prompted no riposte that the CESC is a dead letter. If space permitted, we could discuss how the Sheriff dealt with the objection on its merits (such as they were), but you would have to buy my friend a coffee first.

The practical conclusion is that CESC is law, and in the Sheriff Court you cannot "rely on a statement contained in a document produced by a computer" without going through its hoops, if your opponent is so unsporting as to make you - unless of course the Sheriff is persuaded to exercise his general dispensing power, on a plea that you had never heard of CESC, of which I have just deprived you.

It is tempting to seek other ways around this law. After all, technology has rather moved on since the Clangers. In 1969 we thought of a computer as a thing with reels of tape and flashing bulbs that filled a room. Surely CESC does not apply to our slim word-processors?

Well, the GDPR does, and so it seems does CESC. What does it mean by "a computer"? In the 1968 Act, section 13(6) defined it as "any device for storing and processing information". Subordinate legislation is of course to be construed consistently with the Act which enabled it. But that definition was repealed in 1988. The effect of repeal is "to obliterate it as completely from the records of the parliament as if it had never passed" - Tindal C.J. in Kay v. Goodwin, (1830) 6 Bing. 576 at p. 582. Esto CESC is in force, how then should we understand its references to computers? On one view, by using ordinary or dictionary definitions. On another, by using the 1968 definition, which certainly governed CESC from 1969 to 1988, for pace Chief Justice Tindal, we have either still to use it, or else conclude that the Act of Sederunt's meaning has changed since it was first enacted. But either way, if you practise in the Sheriff Court and you use a desktop or laptop word-processor (or you have a client who does), then it seems you need to learn about CESC. That is, if the GDPR leaves time hanging heavy on your hands.

Alternatively, life could be simplified, or at least clarified, by revoking the legislation. (I mean CESC, of course.)

I extend my thanks to Morag Ferguson and Louise Moyes at the Advocates' Library for their typically unstinting assistance. Responsibility for any errors is mine.