

EXPLANATORY NOTES

Digital Assets (Scotland) Act 2026 (asp 12)

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These notes relate to the Digital Assets (Scotland) Act 2026 (asp 12)
which received Royal Assent on 16 April 2026

DIGITAL ASSETS (SCOTLAND) ACT 2026

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Digital Assets (Scotland) Act 2026. They do not form part of the Act and have not been endorsed by the Parliament.

2. These notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section, or a part of a section, does not seem to require any explanation or comment, none is given.

OVERVIEW OF THE ACT AND GENERAL NOTES

Overview

3. The Act addresses Scots law's application to certain digital things as objects of property. It is structured as follows:

- section 1 describes the digital things with which the Act is concerned, labelling them "digital assets"
- sections 2 to 4 deal with the law's treatment of digital assets
- section 5 defines what the preceding sections mean by "control" of a digital asset
- section 6 states that what sections 2 to 4 of the Act say about the law's treatment of digital assets will cede to rules in other enactments
- sections 7 to 10 are formal provisions of the kind found at the end of all Acts

Interpretation of the Act

4. The Act falls to be interpreted in accordance with the Interpretation and Legislative Reform (Scotland) Act 2010.

Crown application

5. Section 20 of the Interpretation and Legislative Reform (Scotland) Act 2010 provides that the Crown will be bound by an Act of the Scottish Parliament or Scottish statutory instrument unless the provision expressly exempts it. The Act applies to the Crown in the same way as it applies to everyone else.

Background on the law of property

6. In Scots law, property (things) are classified in two different ways. In the first place, all things are either corporeal or incorporeal. In the second place, all things are either heritable or moveable. Corporeal things are physically tangible (like a book or a car). Incorporeal things are generally rights and have no physical presence (such as a right arising from a contract). The distinction between heritable things and moveable things is more complex but, for present purposes, the criterion for distinguishing between the two is whether the property consists of rights in or over land. If it does relate to rights in or over land, then it is heritable (i.e. immoveable) property. Anything else (with a couple of discrete exceptions such as pensions and annuities) is moveable property.

7. Occasionally, new "things" come into being that, for one reason or another, might not seem to sit comfortably in the existing classification of things as property in law. Digital technologies may be considered to cast up many new kinds of thing. These putative new "things" range from traditional files (like images and documents) to more complex blockchain-based things like cryptocurrencies and non-fungible tokens (NFTs). Whether and how these "things" are to be treated in law as property is a matter of policy, although if the system of property law as we know it is to retain its coherence only things that have certain fundamental characteristics can be recognised as property.

References in these notes to particular technologies etc.

8. In order to explain the Act, in places these notes describe how the Act's provisions work by reference to particular existing technologies (such as Bitcoin and Ethereum). It is hoped that grounding the explanation of the high-level legal principles set out by the Act in well-known, real-world examples in this way will be helpful to readers. It is, however, important to be clear that whether and how the Act's provisions operate as a matter of law in relation to any given technology can only be decided by a court. Therefore, while these notes discuss (for example) how the definition of "digital asset" could be applied to comprehend a bitcoin on the basis of the authors' understanding of how Bitcoin operates, it should not be inferred that the courts necessarily will, and for all time, recognise a bitcoin as being a "digital asset" within the meaning of section 1.

Glossary of technological terms

9. The following is a limited glossary of technological terms used in these notes. It is not intended to be a comprehensive explanation of digital technologies. Readers will find online many free explanations of the technologies mentioned in these notes describing them at different levels of technical depth.

Term	Meaning
Bitcoin (with capital 'B')	The Bitcoin network or system, the first major public, permissionless crypto-token system that uses blockchain technology to securely manage the issuing of, and transactions with, its cryptocurrency (i.e. bitcoin).
bitcoin (with lowercase 'b')	The native cryptocurrency manifested by the Bitcoin network or system.

Term	Meaning
blockchain	A type of distributed ledger technology in which changes to the ledger (transactions) are recorded in data structures called blocks. Each block is chronologically linked (chained) to the preceding block cryptographically which makes the ledger resistant to tampering because the computers on the network comprising the blockchain use a consensus mechanism to ensure each block is correctly linked to the one before.
cryptocurrency	A token manifested by a distributed ledger technology which is treated as a medium of exchange and a store of value.
distributed ledger technology	A way of connecting computers (referred to as nodes) so that each maintains a shared and synchronised set of records (referred to as a ledger).
ether	The native cryptocurrency manifested by the Ethereum system.
Ethereum	The Ethereum system is a public, permissionless blockchain system.
Ethereum Virtual Machine (EVM)	A computation engine running on the computers (nodes) that comprise an EVM-compatible blockchain (of which Ethereum is only one example) which is used to execute smart contracts.
non-fungible token (NFT)	Fungibility describes people's willingness to treat things of a similar kind as interchangeable (for example, a pound coin is highly fungible because people are generally willing to swap one pound coin for another, whereas portrait paintings are typically non-fungible because someone attached to a particular painting of a particular person will usually not be willing to swap it for anything else that also happens to be a painting). A non-fungible token is a token manifested by distributed ledger technology which is not generally regarded as fungible; for example, bitcoins like pound coins are highly fungible and so could be characterised as a fungible token, whereas a Bored Ape (see paragraphs 21 and 13 below), like a portrait painting, is not fungible and so would be characterised as a non-fungible token.

Term	Meaning
private key	An alphanumeric code that is used as a password allowing the user to carry out transactions within a blockchain system in relation to tokens manifested by that system and which are associated by the system with the public address to which the private key corresponds.
public address	A cryptographic code that is mathematically derived from a private key in a way that renders it impossible (with current technology) to reverse the process so as to derive the private key from the public address. This means that a public address can be shared openly, allowing digital assets to be received at that address by the holder of the private key.
satoshi	The smallest unit of bitcoin (as pennies are to pounds, but it takes 100,000,000 satoshis to make up 1 bitcoin).
smart contract	A self-executing computer program that is stored on a blockchain and automates actions on the blockchain when conditions written into the program are met.

THE ACT'S PROVISIONS

Section 1 – Meaning of digital asset

Purpose of section 1

1. Section 1 is a definitional provision. It sets out what is meant in the Act's other provisions where they refer to a digital asset.

2. As a matter of ordinary language, the term "digital asset" could be said to encompass all manner of things which are digital (such as text files on a computer, photos on someone's phone or data stored in a highly sophisticated and cryptographically protected distributed ledger system). Section 1 limits what counts as a "digital asset" for the Act's purposes to a subset of the things that could generally be described as assets that are digital.

A thing arising from an electronic system

3. The first point made by the definition in section 1 is that a "digital asset", for the Act's purposes, is a thing that arises from an electronic system. This means that the "thing" that is the digital asset is not merely some configuration of electrons on a network at a given point in time. Rather, the digital asset is the conceptual thing which humans believe that electronic network manifests (for example a bitcoin or a non-fungible token). To borrow the language of the Law Commission for England and Wales in its 2023 report on digital assets, the sort of "thing" that the Act means by digital assets are:

> "notional quantity units, arising from a composite of technical form, technical function and social participation/recognition, that the market and the legal system treat as a thing, and to which society has chosen to attach legal consequences."[1]

4. It is not the digital asset per se that is electronic (or digital) in nature. The thing that must be electronic in nature is the system that gives rise to the thing.

Made rivalrous by an electronic system

5. It is not the case, however, that every electronic or digital system (even if it can be said to give rise to notional things) can give rise to a digital asset within the meaning of section 1. The second point made by the definition is that for something to be a digital asset as defined the electronic system giving rise to it must make it rivalrous.

6. What is meant by a system making an asset rivalrous is set out in section 1(2). At a high level, what is meant is that the system has to solve the "double-spend problem". A difficulty with treating digitally stored information, such as a text file or a jpeg image, as an object of property rights is that the file is just information and therefore infinitely replicable. If person A gives person B a copy of a jpeg photograph of a coin, person A's original jpeg of the coin is not destroyed. Person A and person B both end up with identical jpegs of the coin and this replication of the data can carry on infinitely. This is unlike the position if person A had given person B a physical coin. In that case, person A's spending the coin by giving it to person B would mean person A no longer had it and so could not spend it again. A physical coin can therefore be said to be rivalrous. In order for the Act to recognise a notional digital coin as a "digital asset", the electronic system giving rise to it must ensure that the digital coin, like its physical counterpart, cannot be spent and spent again infinitely by the same person. Thus section 1(2) states that the system must, by reference to an immutable record of transactions, ensure that a person's use of the notional thing within the electronic system in a certain way results in the person losing the ability to use it again in the same way (just as person A's using a physical coin by giving it to person B prevents person A from then giving the same coin to person C).

7. Solving this "double-spend problem" is one of the key breakthroughs of blockchain technologies. It is what makes the fungible and non-fungible tokens they manifest fit to be the subjects of property rights. But it is important to note that section 1(2) is not necessarily only describing tokens arising from blockchain-based systems, nor will every token built on blockchain technology necessarily be a digital asset within the meaning of the Act. Section 1(2) is technology neutral in that it describes the result that a technological system must achieve if it is to give rise to digital assets for the Act's purposes; whether a given system of whatever kind achieves the required result is a matter of fact and any dispute over it will ultimately be for the courts to determine.

8. Section 1(2) requires that the system use an immutable record of transactions in order to render the notional things that it manifests rivalrous. The significance of this insistence on the immutability of the system's record is that it distinguishes systems in which no actor has the technical ability to tamper with the record (which is the case with, for example, a blockchain system where each block is cryptographically linked to the one before) from more conventional systems that may create a complete record of transactions but can, at least in principle, be altered by the person in control of the system. For example, a cloud services company might

[1] Law Commission, *Digital assets: Final report* (Law Com No 412, 2023) para 4.20.

provide a system that allows its users to create documents, which are stored on the company's servers, and to manage viewing and editing permissions for those documents. The company's servers might keep a comprehensive record of every operation (or transaction) that users have performed in relation to the documents. Supposing, for the sake of argument, that the recorded data for each document could be said to make the documents notional things that have their basis in the electronic system, and further supposing that the company's record of operations on the documents is used by the system to control who can carry out further operations on a given document, without the stipulation about the record having to be immutable those documents could potentially be thought to fall within section 1's definition of digital assets. The documents will not be digital assets for the Act's purposes however if, as is usual with such services, the company's record of operations in relation to the documents is not secured in a way that prevents the company from making alterations to the historical record. To be recognised as such under section 1, a digital asset cannot arise from an electronic system if its record of transactions is mutable.

9. In describing how an electronic system has to solve the double-spend problem, section 1(2) refers to transacting in relation to a digital asset "in a certain way" being the cause of the transactor losing the ability to use the asset again in the same way. Some electronic systems allow for the digital assets to which they give rise to be transacted with in only one way. There is, for example, nothing that can be done with a bitcoin within the Bitcoin system besides transferring it. However, for other types of digital asset there may be multiple ways in which they can be used within the system, some of which may not result in the user losing some or all of the ability to use the asset again in the same way. For example, a governance token might allow a user to cast a vote through a smart contract on some decision facing an organisation. Using the token in the system to cast the vote may not destroy the token; the user may be able to use the token again to vote through other smart contracts on other decisions facing the organisation. If, however, the user can also transfer the governance token to another user in the system so that the transferor can no longer use it then, notwithstanding that there is one way of using the token in the system that does not result in the user losing the ability to use it again (i.e. using it to cast a vote), it can nevertheless qualify as a digital asset for the Act's purposes because there is at least one other way of using it in the system (i.e. transferring it to someone else) that does have that effect.

Illustrations of things being made rivalrous by electronic systems

Example 1: UTXO-based blockchain systems (e.g. Bitcoin)

10. The application of section 1(2) in relation to UTXO-based systems (such as Bitcoin) merits some further elaboration. In such systems, what is recorded permanently in the blockchain's ledger are unspent transaction outputs (these are referred to as UTXOs). In the case of the Bitcoin system, a UTXO represents a certain quantity of bitcoin (denominated in the smaller unit called satoshi). The blockchain records a UTXO as being at a certain public address, which means that a person with the cryptographically linked private key for that public address can use the UTXO, and by implication the satoshi it represents, as a transaction input. If person A has a UTXO representing 5 satoshi and wishes to transfer 5 satoshi to person B, person A uses that UTXO as a transaction input and the transaction's output is a new UTXO recorded in the ledger as representing 5 satoshi at a public address linked to person B's private key. As person A's UTXO is now recorded as having been used as a transaction input, it cannot be used as a transaction input again. In the language of section 1(2), it can be said that by having carried out the transaction in relation to the notional things that are the 5 satoshi, person A has lost the ability to transact with them again.

11. Suppose, on the other hand, that person A wanted to transfer 5 satoshi to person C but only had the private key to a live UTXO worth 10 satoshi. The 10-satoshi UTXO is used as the transaction input, and therefore becomes unusable again, and the transaction outputs are two new UTXOs recorded to the ledger: one, worth 5 satoshi, recorded as being at a public address linked to person C's private key, and the other (also worth 5 satoshi, representing person A's "change") recorded as being at a public address linked to person A's private key. In this scenario, by carrying out a transaction in relation to the notional things that are the 10 satoshi, one could take the view that person A has only lost the ability to carry out a further transaction in relation to 5 of them, having received in change from the transaction a new live UTXO worth 5 satoshi. It might be thought that this means it cannot be said that this transaction has, in section 1(2)'s terms, resulted in person A losing the ability to carry out the same transaction again with 5 of the satoshi used in carrying out the first transaction. That thought supposes that one has to view the 5 satoshi returned as change from the transaction as 5 of the same 10 satoshi used as the transaction input. One need not take that view. The alternative view is that the 5 satoshi returned in change are distinct from the ones used as the transaction inputs, just as if someone pays with a £10 note in a shop and gets a £5 note back in change, the £5 note is a distinct thing from the £10 note. Even if, however, one does take the view that the 5 satoshi returned to person A as a transaction's output are 5 of the same satoshi as were used as the transaction's input, the fact that there are some ways of transacting with satoshi within the Bitcoin system that can be said not to result in the transactor losing the ability to transact with them again does not mean that the Bitcoin system as a whole fails to render satoshi (or the bitcoin they comprise) rivalrous as there are other ways of structuring a transaction within the system that more obviously would have that result.

Example 2: Non-fungible tokens (NFTs)

12. In the context of digital assets, an NFT differs from a fungible token (such as a bitcoin) in that whereas one bitcoin will generally be accepted as entirely interchangeable with another, system participants tend to see each NFT as a unique thing. For example, Bored Ape Yacht Club (or Bored Apes) are a popular form of NFT. Each Bored Ape is a unique cartoon ape, so those who buy them will typically not regard one as the same as any other.

13. A smart contract running on the Ethereum system handles the recording on the blockchain of which account owns a given Bored Ape by mapping the current owner's address to the token ID of the Bored Ape. When one user wishes to transfer a Bored Ape to another, a transaction is carried out on the Ethereum Virtual Machine using a function of the smart contract's rules, which creates a transaction record on the blockchain as part of the smart contract's state that records that the mapping of the owner's address has been updated to point to the address of the transferee's account. In the language of section 1(2), the system has updated its immutable ledger to ensure that the transferee is now recognised by the system as the owner of the Bored Ape and the transferor is not and, because the transferor is now not recognised as the owner, the transferor cannot carry out another transaction of the same kind (i.e. a transfer) in relation to that Bored Ape.

Must exist independently from the legal system

14. The third point made by section 1 is that for a notional thing to be a digital asset for the Act's purposes it must exist independently from the legal system. The purpose of this stipulation is to distinguish digital assets from other forms of incorporeal property, such as legal rights and their correlative obligations. A debt obligation, for example, cannot be said to exist independently from the legal system because it is inherently an obligation that exists

because the legal system recognises its existence. If the legal system stopped recognising the debt's existence, the debt would effectively cease to exist. It is a notional thing created purely by the legal system. In contrast, the existence of digital things like cryptocurrencies and NFTs is not dependent on their recognition by the legal system. Accordingly, it may be that this point, that a thing must be independent from the legal system in order to be a digital asset, is implicit in the prior proposition that to be a digital asset the thing must arise from an electronic system. Cryptocurrencies and NFTs can exist, and indeed have existed, as notional things on the basis of their manifestation by electronic systems regardless of whether or not their existence is recognised by any legal system.

15. It may be that some digital assets become tokenised as representations of legal rights, which is to say that it may come to be accepted that transferring a certain kind of digital asset will be treated as an effective proxy for transferring the legal right that is "stapled" to it. Tokenisation of digital assets is a new form of an old idea in the law. Traditional negotiable instruments use pieces of paper as proxies for debt obligations. The fact that a class of notional things arising from electronic systems has been tokenised to represent legal rights does not mean that those things can no longer be said to exist independently from the legal system, just as a piece of paper being used as a negotiable instrument would still exist as a piece of paper even if the law stopped recognising it as a token representing a legal right. For the avoidance of doubt, the Act has nothing to say about whether and how digital assets can be tokenised.

Electronic trade documents are not digital assets

16. Section 1(3) excludes from being a digital asset for the Act's purposes an electronic trade document within the meaning of section 2 of the Electronic Trade Documents Act 2023. That Act provides that a trade document (such as a bill of exchange or a bill of lading) in electronic form which satisfies the criteria set out in its section 2 is capable of possession. In providing for the possessability of electronic trade documents, as defined, the Electronic Trade Documents Act enables them to have the same legal recognition and functionality as their paper counterparts. While an electronic trade document could be, or could at least give rise to, a digital asset as defined by section 1, since the Electronic Trade Documents Act has created a bespoke legal regime for them, they are excluded from being digital assets for the purposes of the Digital Assets Act.

Section 2 – Nature of digital assets in Scots law

17. Section 2 provides that digital assets are incorporeal moveables for the purposes of Scots law. The section further states expressly the natural implication of that, which is that the law is generally to apply to them on that basis. However, the latter point is qualified in two ways.

18. First, the law is to apply to digital assets on the basis of their being incorporeal moveables only insofar as that is consistent with their nature. This underscores that in developing the law's treatment of this new type of thing the courts can depart from the general principle that the law is to treat them like other incorporeal moveables if the courts find that unworkable or inappropriate in any particular regard as a result of their novel features.

19. Second, by virtue of section 6, the law's application to digital assets on the basis of their being incorporeal moveables is subject to anything different said in another enactment. As explained in paragraph 51 below, section 4 is an example of an enactment that provides for digital assets to be treated differently from other kinds of incorporeal moveable.

Section 3 – Presumption of ownership

20. Section 3 creates a rebuttable presumption that the person who has control of a digital asset owns it. Section 5 defines what it means for someone to have control of a digital asset. Section 3 is amongst the provisions qualified by section 6.

21. The presumption created by section 3 is analogous to the one that applies in relation to corporeal things, whereby the person with possession of a thing is presumed to be its owner. It is of course only a presumption that the possessor is the owner. A person may be in possession of a thing that the person does not own for legitimate reasons (for example because it has been lent by its owner) or illegitimate ones (for example because it has been stolen from its owner).

22. A person who is not in possession of a corporeal thing and wants to assert ownership of it must show that possession was given up or lost in a way consistent with an intention on the person's part to retain ownership. For example, person A, claiming to be the owner, may be able to show that she only lent the thing to person B who is now in possession of the thing. Or person A may be able to show that she lost it without intending to abandon it, or that it was stolen by person B.

23. As with corporeal things, it is possible to imagine scenarios in which control over a digital asset (which acts as a proxy for possession) is separated from legal ownership of the asset. For example, having control of a digital asset will in many cases turn on having a private key that is required in order to carry out transactions in relation to the asset. In practice, people will often keep their private keys with a third party which provides software for the purpose of keeping them secure and initiating transactions using them. The fact that a third party rather than the owner holds the private key, and therefore has control over the digital asset within the meaning of section 5, does not necessarily make the third party the legal owner of the asset just as a bank that places someone's jewels in its vault to keep them secure does not become the jewels' owner. In such a case, the true owner may be able to show that, under an agreement, the third party held the private key on his behalf and was neither given it, nor took it, with either side intending legal ownership in the asset to pass as a result. (This is a simplified discussion of the concept of intermediated holding arrangements offered merely to illustrate how control and ownership of a digital asset might become separated, for a fuller analysis of the subject technically as well as legally, albeit in the context of the law of England and Wales, readers are referred to the 2023 report on digital assets by the Law Commission of England and Wales.[2])

Section 4 – Acquisition of ownership

Purpose of section 4

24. Section 4 deals with how legal ownership of digital assets is acquired. It creates two broad rules about this:

- First, the Scots common law rules about the acquisition of ownership of corporeal moveables apply in relation to digital assets (with necessary modifications).

[2] Law Commission (n 1) ch 7.

- Second, a limited exception to the usual rule for the transfer of most corporeal moveables, which will allow someone who acquires a digital asset in good faith and for value to become its owner despite the person who transferred it not being the owner.

25. Section 4 is amongst the provisions qualified by section 6.

Ownership of digital assets is acquired like ownership of corporeal moveables

26. Subsection (1) of section 4 provides that, for the purposes of Scots common law rules on acquiring ownership of things, digital assets are to be treated as though they were corporeal moveables. This represents a break with the general position established by section 2 which is that digital assets are incorporeal moveables as a matter of law.

27. Merely stating that the law is to treat digital assets like corporeal moveables when it comes to transferring ownership in them would present a problem to the extent that possession of a thing is relevant to the law's treatment of how ownership transfers. Digital assets are unlike corporeal moveables because they are not corporeal (i.e. tangible). They therefore cannot be physically possessed. Accordingly, subsection (1) goes on to provide that having "control" of a digital asset is to be treated, for this purpose, as equivalent to having physical possession of a corporeal thing. Section 5 defines what it means for someone to have control of a digital asset.

28. It is worth emphasising that section 4(1) makes "control" (as defined by section 5) the equivalent to physical possession, as opposed to making it equivalent to possession. In Scots law, possession has both a physical and a mental component. For a person to become the owner of a corporeal moveable through a change in physical possession, the taking of physical possession must be accompanied by an intention to hold it as one's own property (*animus domini*). The owner of a physical thing may give it into the hands of a custodian for safe keeping, or a hirer so that the hirer can use it for the hirer's own purposes. In those circumstances, physical possession of the thing is transferred, but it does not result in the new possessor becoming the thing's owner because (leaving other factors to one side) she lacks the requisite intention to hold it as her own property. Just as there are many circumstances in which gaining physical possession of a thing as a matter of fact will not give rise to ownership of the thing as a matter of law, so too there will be many circumstances in which obtaining control over a digital asset will not cause a person to become its owner in law. In order to have taken possession of a digital asset in the sense required to become its owner, the person who has acquired control of it must intend to hold it as the person's own property.

29. It should be emphasised that subsection (1) of section 4 is exclusively concerned with applying in relation to digital assets the common law rules on the transfer of ownership, it does not affect enacted (which is to say, legislative) rules. As is typical in legislation, subsection (1) uses the phrase "rule of law" to mean law that is not enacted (Acts, and subordinate legislation made under them, are the principal forms of enacted law). Subsection (4) explicitly confirms that "rule of law" has that meaning. The upshot is that section 4 will not cause any legislation concerning the transfer of ownership in things (such as the Sale of Goods Act 1979) to apply in relation to digital assets as though they were corporeal moveables. For the purposes of enactments, digital assets will be treated as incorporeal moveables in accordance with section 2 (see paragraphs 18 and 19 above for caveats to that general position).

30. At common law, ownership of a corporeal moveable can be acquired either:

- by original acquisition (which is to say, loosely, being the first person to take and lay claim to the thing, although it can also occur where the law extinguishes a previous owner's title), or
- by derivative acquisition (which is to say by the thing's previous owner transferring ownership of it).

31. Both forms of acquisition may be relevant to digital assets.

32. Newly minted crypto-coins (such as bitcoins) are created by the protocol and may be assigned to users by the protocol as rewards for on-system activity such as "mining". (In the context of blockchains, "mining" refers to providing the processing power on the blockchain's network required to solve the cryptographic puzzles that the system uses to validate and verify state changes in the blockchain.) This would be an example of original acquisition in the context of a digital asset.

33. Derivative acquisition in the context of digital assets is, as it is in the context of truly corporeal things, a matter of one person's ownership of the thing transferring to another. In broad terms (and leaving to one side transfers following death and involuntary transfers in the transferor's lifetime), for the law to recognise ownership of a corporeal thing to have been transferred, there must be both an intention on the part of the parties that ownership should pass and delivery of the thing.

34. There are many subtleties belied by the superficially simple statement above about how ownership of corporeal moveables transfers. Amongst them, is the requirement for the transferor to be legally competent to give ownership and the transferee competent to receive it. It may be, for example, that an individual lacks capacity to transfer an asset due to age (see section 1(1)(b) of the Age of Legal Capacity (Scotland) Act 1991) or due to an incapacity within the meaning of section 1 of the Adults with Incapacity (Scotland) Act 2000. Even where both parties have the necessary competencies, and intend ownership to pass, matters may not be entirely straightforward. For example, a lack of consensus between the parties about to whom the ownership is being passed can render a purported transfer void[3] (meaning the law will treat it as having never taken place), whereas a transfer tainted by one party's fraud may be merely voidable (meaning it is valid unless and until a party with title has it reduced in court).[4] Moreover, the law has long recognised many more ways of effecting delivery of a thing than the straightforward physical act of the transferor handing the thing over to the transferee that the word "delivery" tends to connote. As a leading text on the law's treatment of corporeal moveables observes "Scots law has developed a distinctive classification [of modes of delivery] based upon the categories of actual, symbolical and constructive."[5] There is also the possibility that a thing can be co-owned by multiple legal or natural persons (see paragraphs 49 and 50 below).

35. Section 4(1), by providing that for the purposes of acquiring ownership of them digital assets are to be treated like corporeal moveables, attracts all of the subtlety of analysis that the common law has accreted over centuries in handling corporeal moveables and its capacity to continue to adapt to novel fact patterns.

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[3] See for example *Morrisson v Robertson* 1908 SC 332.
[4] See for example *MacLeod v Kerr* 1965 SC 253.
[5] DL Carey Miller with David Irvine, *Corporeal Moveables in Scots Law* (2nd edn, W. Green & Son Ltd 2005) para 8.15.

Protection for innocent acquirers

36. There is a legal principle in Scots law known, in consequence of its Roman law origins, by the Latin brocard *nemo dat quod non habet* (no-one can give what he does not have) or, in another formulation, *nemo plus juris ad alium transferre potest quam ipse haberet* (no-one can give a greater right than he himself has). In the context of the transfer of ownership, this basically means that if you do not own a thing you cannot validly transfer ownership of it to someone else. The law does admit some exceptions to this principle (see for example section 29 of the Bills of Exchange Act 1882). The purpose of the exceptions is to protect innocent acquirers. While an exception to the principle means the innocent acquirer can become the true legal owner of the thing, the wrongfully dispossessed previous owner will have a remedy (potentially both civilly and criminally) against the person who took and transferred the thing despite not being its owner.

37. Subsection (2) of section 4 creates such an exception to the *nemo dat quod non habet* principle for digital assets. It means that if person A, despite not owning a digital asset, purports to sell it to person B, provided that person B has entered into the agreement to buy in good faith (that is, without knowing that person A is not the true owner) and pays value for it (which, loosely, means a fair price), then the fact that person A was not the asset's owner, does not prevent person B from acquiring valid title (ownership) of the asset as a result of the sale.

38. There would, in this event, be legal remedies available to person C (the owner of the asset prior to its transfer to person B) on account of having been deprived of the asset. But those remedies would lie against person A, and they would not include reducing (voiding) person B's ownership of the asset. Person C would only be legally entitled to recover the asset from person B if person C could prove that person B did not take it from person A in good faith (for example because person B knew that person A had taken the asset nefariously) or that person B had not paid value for it. If person C were able to show either or both of those things, then person B's acquisition of the asset would not come within subsection (2) — the *nemo dat quod non habet* principle would therefore apply and person B's title to the asset would be void.

39. Subsection (3) of section 4 makes further provision about the position of innocent acquirers of digital assets, but in this case merely confirms the common law position. It addresses the scenario in which the person transferring a digital asset has good title as its owner at the point of transfer but holds it on a voidable title. As Professor Kenneth Reid explains "A voidable title is a subsistent title — like an absolutely good title — but it is a subsistent title subject to the possibility of future challenge."[6] As mentioned in paragraph 34 above, fraud on the part of a party to a transaction is a way in which someone might end up with a voidable title. Since a voidable title is a good title unless and until it is successfully challenged, the owner of an asset holding on a voidable title can transfer ownership of the asset to another. The question which subsection (3) addresses is whether the title that the transferee receives is tainted by the same defect as the transferor's title so that it could be voided on the same basis. The subsection confirms that where the transferee took the asset from the transferor in good faith and for value, the transferee's title as owner of the asset is not tainted by the defect that afflicted the transferor's title.

[6] The Laws of Scotland: Stair Memorial Encyclopaedia, 'Property (Reissue)', para 1078.

Section 5 – Meaning of control

Purpose of section 5

40. Section 5 explains what "control" in relation to a digital asset means, which is an important concept elsewhere in the Act as it is central to acquiring, and determining who has, ownership of digital assets.

The limits of section 5

41. Subsection (1) simply underscores that section 5 deals with the meaning of control for the Act's own purposes only. Other enactments may have different definitions for their own purposes.

Meaning of control

42. Subsection (2) sets out what is meant by "control" of a digital asset.

43. While some types of digital asset will only be capable of being "used" within the system giving rise to them in one way (Bitcoin, for example, really only allows for the transfer of bitcoin), other types of digital asset will be capable of being "used" within the system manifesting them in different ways. Through having the ability to use the same asset in different ways, different people will be able to claim to have different levels of control over it. For example, an NFT image can be "used", in the sense of being viewed, by anyone. Being able to "use" an NFT in that way would scarcely constitute having any control over it at all. But in other cases people whom system participants would not regard as being the "owner" of a digital asset can have the ability to use the asset in ways that do express significant control over it. In some systems, it is even possible for people to allow others to perform state-changing transactions in relation to their digital assets. The term "NFT renting" refers to someone being given temporary access to an NFT, and in some situations the smart contract giving rise to the NFT will allow the renter to carry out state-changing transactions in relation to the rented NFT. For example, a game's smart contract might allow one user to rent an in-game item like a sword, which is an NFT, to another user. One way that this might be implemented is that the smart contract maps a new property for the sword so as to record that the renter is entitled to use it in the game until a specified time. During the rental period, the renter might perform actions with the sword within the game that cause the smart contract to record state changes to the sword, for example reducing its "durability" property to the point that the game treats the sword as broken so that it can no longer be used in the game by either the hirer or the owner. Having the ability to effect a state change of any description in relation to a digital asset would therefore be an over-broad test for control when applied in relation to some systems.

44. To allow for the wide spectrum of uses to which some digital assets can be put, subsection (2) provides that the person who is to be treated as having control of a digital asset is, in effect, the person (or indeed persons) with the paramount or most potent level of control over it within the system that gives rise to the asset.

45. In the case of many, and probably most, digital assets having paramount control of the asset means having the ability to transfer the representation of the asset within the system giving rise to it from one person to another. This is referred to in section 5 as the ability to initiate a transfer transaction.

46. In defining a transfer transaction, subsection (3) describes the consequence of such a transaction being that the transferee gains control over either the asset or some quantity of that type of asset. The reference to gaining control over a quantity of the asset, as opposed to the asset itself, allows for the possibility that what a transferee is perceived to receive is not exactly the same asset as the transferor parted with (for a short discussion of this point, in the context of a bitcoin transaction, see paragraph 11 above, and for a fuller discussion see the exploration of the "persistent thing analysis" versus the "extinction/creation analysis" in the Law Commission's 2023 report on digital assets[7]).

47. It is at least conceivable that some systems might not allow users to transfer the digital manifestations of things amongst themselves within the system. To accommodate this possibility, section 5 provides that in the case of a digital asset arising from such a system, the person with control of the asset is the person with the ability to initiate a divestiture transaction in relation to it. This, in effect, means a transaction that results in nobody being able to "use" the asset within the system ever again. If a system does not even allow a divestiture transaction (as so defined) in relation to a digital thing, that thing cannot be a "digital asset" for the Act's purposes anyway as the thing would not be rendered rivalrous by the system according to the terms of section 1(2), which requires that the system allows a person to transact in relation to a thing in a way that results in the person losing the ability to do so again.

48. Subsection (2) refers to a person being able to "initiate" transactions. It may be that person A cannot, alone, cause an end-to-end transaction within the system to be effected without person B "co-signing" it (which is to say that both person A's private key and person B's is required for the transaction to be carried out). But so long as person A can initiate the transaction within the system, person A can be recognised as having control of the asset being transacted with for the Act's purposes. Conversely, if person B has the ability to "co-sign" a transaction in relation to the asset but lacks the ability within the system to initiate a transaction in relation to it, person B will not be recognised as having control over the asset. This sort of tiered signing arrangement is analogous to arrangements found in traditional banking and corporate-authorisation settings.

49. It is possible for more than one person to have control (as defined) of the same digital asset, just as more than one person can have physical possession of the same object. The bare fact of having control of a digital asset will mean that each of those persons will be presumed to own it by virtue of section 3. It does not, however, necessarily follow that each of those persons is a co-owner of the asset. As noted in paragraph 28 above, for the purposes of acquiring legal ownership of a digital asset, "control" of the asset plays a role equivalent to that which physical possession can for the purposes of acquiring legal ownership of a physical object. The bare fact of having taken physical possession of an object is insufficient to make someone its owner. Possession, of the form required to acquire ownership of a thing, also requires an intention to hold the object as one's own property. Discussing the position in relation to physical objects, Dr Craig Anderson explains:

> "… where an item is pushed through a letter box into a private house, there would be enough control [for the occupiers of the house to be said to have physical possession of the item] …. If there are multiple occupiers of the house, any of them may in fact possess, and the question will turn on the facts of the case …. Where the item is in a common area, each occupier is likely to appear to have a sufficient relationship to the

[7] Law Commission (n 1) paras 6.21–.38.

property to satisfy the physical requirements of possession, in which case the outcome of the question will turn on *animus* [i.e. which (if any) of the occupants have the requisite state of mind to be regarded as having taken possession]."[8]

50. Altering slightly the facts of the scenario posited in paragraph 48 above, suppose that when a digital asset "arrives" at a given public address, a transfer transaction can be initiated in relation to it by either person A or person B using their respective private keys. Like the occupiers of the house where an item is lying in a common area having dropped through the letter box, persons A and B can both be said to have control of the asset. Whether that means either or both of them have possession of it, in the sense required to give rise to ownership, turns on their intentions. If they do both have possession, the upshot may be that they own the asset as common property, although as alluded to in paragraphs 33 and 34 above, there are other conditions that must be met for ownership to transfer beyond the delivery which, in this scenario, would be effected by the transfer of possession.

Section 6 – Sections 2 to 4 subject to other enactments

51. Section 6 underscores that the substantive provisions of the Act (sections 2, 3 and 4) are subject to contrary or qualifying rules in other enactments. For example, the general rule laid down by section 2, that digital assets are to be regarded as incorporeal moveables, cedes to the specific rule in section 4 (which is a separate enactment) that for the purposes of rules of law concerned with the acquisition of ownership, digital assets are to be treated like corporeal (rather than incorporeal) moveables.

52. In the main, section 6 merely emphasises that the ordinary conventions of statutory interpretation which are applied to resolve tensions between apparently inconsistent legislative rules operate; namely that earlier enacted laws cede to ones enacted later and general rules cede to specific ones. The statement that the Act's provisions are subject to other enactments "whenever passed or made" does somewhat abridge the usual convention that an earlier enactment cedes to a later one, as it indicates that a provision of the Act will give way even to an earlier enactment with which it cannot be reconciled.

53. The word "enactment" is defined in schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010. The reference there to an enactment being "passed" relates to Acts of the Scottish Parliament and Acts of the UK Parliament, which become law as a result of Bills being passed by the legislature and their receiving Royal Assent, while the reference to an enactment being "made" relates to subordinate legislation (such as regulations contained in a Scottish statutory instrument), which typically become law when signed by the person with authority to make the subordinate legislation (for example, a government minister).

Section 7 – Ancillary provision

54. Section 7 empowers the Scottish Ministers to make, by regulations, various types of ancillary provision for the purposes of, in connection with, or to give full effect to the Act or any provision made under the Act.

[8] Dr Craig Anderson, *Possession of Corporeal Moveables in Scots Law* (Edinburgh Legal Education Trust, 2015) para 3-37.

55. The power is stated to include the power to modify any enactment (including the Act). The word "enactment" is defined in schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010 and includes primary legislation (e.g. Acts of the Scottish and the UK Parliament). The statement that the power can be used to modify any enactment therefore overcomes the general presumption that a power to make subordinate legislation cannot be exercised to modify primary legislation.

56. Section 7 is to be read alongside section 8.

Section 8 – Regulation-making powers

57. Section 8 makes further provision about the regulation-making powers conferred on the Scottish Ministers by sections 7 (ancillary provision) and 9 (commencement).

58. Subsection (1) makes clear that those powers can be used to make different provision for different purposes. For example, the power conferred by section 9 can be used to appoint different days for the coming into force of different provisions of the Act.

59. Subsection (2) sets out that regulations under section 7 that amend the text of an Act are subject to parliamentary scrutiny under the affirmative procedure (as defined by section 29 of the Interpretation and Legislative Reform (Scotland) Act 2010). Otherwise, they are subject to the negative procedure (as defined by section 28 of that Act).

Section 9 – Commencement

60. Section 9 deals with when the provisions of the Act will come into force (i.e. take effect).

61. It provides for sections 7 to 10 to came into force automatically on the day after the Bill became an Act by receiving Royal Assent (i.e. those sections came into force on 17 April 2026, being the day after Royal Assent which was given on 16 April). The process by which a Bill becomes an Act is set out in section 28 of the Scotland Act 1998.

62. For the Act's other provisions, it confers on the Scottish Ministers a power to appoint the day on which they come into force by regulations. Those regulations will have to be laid before the Scottish Parliament in accordance with section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010. The power conferred by section 9(2) is to be read alongside section 8.

Section 10 – Short title

63. Section 10 provides for the Act to be known as the Digital Assets (Scotland) Act 2026.

PARLIAMENTARY HISTORY

64. The following is a list of the proceedings in the Scottish Parliament on the Bill for the Act and significant documents connected to the Bill published by the Parliament during the Bill's parliamentary passage.

Proceedings and reports	**Reference**
Bill as introduced	SP Bill 75 Digital Assets (Scotland) Bill [as introduced] Session 6 (2025)
Explanatory Notes	SP Bill 75 Digital Assets (Scotland) Bill [explanatory notes] Session 6 (2025)
Policy Memorandum	SP Bill 75 Digital Assets (Scotland) Bill [policy memorandum] Session 6 (2025)
Financial Memorandum	SP Bill 75 Digital Assets (Scotland) Bill [financial memorandum] Session 6 (2025)
Delegated Powers Memorandum	SP Bill 75 Digital Assets (Scotland) Bill [delegated powers memorandum] Session 6 (2025)
Stage 1	
Delegated Powers and Law Reform Committee report	Delegated Powers and Law Reform Committee 81st report, 2025, Delegated Powers in the Digital Assets (Scotland) Bill at Stage 1 (SPP 901)
Economy and Fair Work Committee, 26 November 2025	SP OR Economy and Fair Work Committee 26 November 2025
Economy and Fair Work Committee, 3 December 2025	SP OR Economy and Fair Work Committee 3 December 2025
Economy and Fair Work Committee, 10 December 2025	SP OR Economy and Fair Work Committee 10 December 2025
Economy and Fair Work Committee, 17 December 2025	SP OR Economy and Fair Work Committee 17 December 2025
Economy and Fair Work Committee, 14 January 2026	SP OR Economy and Fair Work Committee 14 January 2026
Economy and Fair Work Committee report	Economy and Fair Work Committee 1st report, 2026, Stage 1 Report on the Digital Assets (Scotland) Bill (SPP 961)
Chamber, 22 January 2026	SP OR 22 January 2026
Stage 2	
Marshalled List of Amendments for Stage 2	SP Bill 75 Digital Assets (Scotland) Bill [marshalled list of amendments for stage 2] Session 6 (2026)
Groupings of Amendments for Stage 2	SP Bill 75 Digital Assets (Scotland) Bill [groupings of amendments for stage 2] Session 6 (2026)
Economy and Fair Work Committee, 18 February 2026	SP OR Economy and Fair Work Committee 18 February 2026
Bill as amended at Stage 2	SP Bill 75A Digital Assets (Scotland) Bill [as amended at Stage 2] Session 6 (2026)
Revised Explanatory Notes	SP Bill 75A Digital Assets (Scotland) Bill [revised explanatory notes] Session 6 (2026)
Stage 3	
Marshalled List of Amendments for Stage 3	SP Bill 75A Digital Assets (Scotland) Bill [marshalled list of amendments for stage 3] Session 6 (2026)

Proceedings and reports	**Reference**
Groupings of Amendments for Stage 3	SP Bill 75A Digital Assets (Scotland) Bill [groupings of amendments for stage 3] Session 6 (2026)
Chamber, 5 March 2026	SP OR 5 March 2026
Bill as passed	SP Bill 75B Digital Assets (Scotland) Bill [as passed] Session 6 (2026)
Post passage	
Royal Assent, 16 April 2026	2026 asp 12

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