

A General History of Scots Law (15th - 18th Centuries)

15TH CENTURY

Real progress in judicial matters got underway in the reign of James I. In 1426 an Act was passed prescribing that the Chancellor and discreet persons from the Estates should hear 'causes and complaints'. This court sat until 1470. Judicial matters were dealt with after 1478 by direct approach to the Council and in 1491 the Chancellor began sitting with Lords of Session (or Council) three times a year.

16TH CENTURY

The principal development of the early 16th Century was the foundation of the College of Justice in 1532. After a costly war James V needed to replenish his finances. Pope Paul III needed loyalty and such was the statecraft of the times that James approached the Pope for funds. The Pope granted a tithe on the Church in Scotland in 1531. One of the conditions of which was that the King would establish a college of justice. In 1535 the Bull was issued establishing the court (which had been set up in 1532), and in 1541 Parliament ratified the Papal Declaration.

By 1560 (only 28 years after the College of Justice's institution) the Reformation in Scotland was in full swing. Papal jurisdiction was abolished in that year, but the Canon Law, except in so far as expressly departed from, remained in force. The local courts of the diocesan officials and commissaries were not abolished, and limped on in face of growing opposition, anti-Catholic sentiment, and the emergent judicial structure of the Church of Scotland.

The Church of Scotland established the courts of kirk sessions, presbyteries, synods and the General Assembly. The Court of Session and the new ecclesiastical courts operated the Canon Law jurisdiction until the establishment of the (secular) Commissary Court in 1563. The central commissary court in Edinburgh took on the newly introduced jurisdiction over divorce (reformed theology allowed divorce at Common Law for adultery and, by an Act of Parliament in 1573, for desertion), marriage and legitimacy. The inferior commissaries at local level dealt with the confirmation of wills.

The College of Justice at its foundation dealt with underdeveloped civil and criminal law. There was little legal literature. Scots Acts and the books of the Old Law as well as Civil and Canon law texts were about all to which the litigant could refer. It was only after the establishment of the court that this situation improved, with judges (eg Balfour and Spottiswoode) noting their decisions in books of practicks.

17th CENTURY

After the Union of the Crowns in 1603 the Justice Ayres by which royal burghs were governed were re-established and, following the English model, Justices of the Peace were given more powers. But religious questions dominated the politics of the day and the policy pursued by Charles I led to a growing opposition to the royal authority. Civil unrest festered and in 1638 the National Covenant was signed in Greyfriars' Churchyard.

After the Civil War the Commonwealth united Scotland, Ireland and England. Cromwell had already appointed seven commissioners to dispense justice in 1650 following the dissolution of the Scots Parliament and the Court of Session. The Restoration saw the Privy Council emerge as the instrument of royal authority and the Court of Session was re-established. A major development was the foundation of the High Court of Justiciary as the supreme criminal court in 1672. It comprised the Justice General, Justice Clerk and five commissioners of justiciary. The court sat in Edinburgh and single judges also moved round the country on circuit, recalling the ayres from which the court was derived.

The Lord Justice Generalship was a powerful office developing from the medieval justiciar. For a time it was hereditary but it reverted to the Crown in the early 17th Century.

An important development in the early 17th Century was the Registration Act 1617 which provided for the recording of all deeds transferring land ownership, instruments of sasine within 60 days of the sasine, and also established particular shrieval registers. The Registration Act (1681) brought burghal tenure into the scheme of recording by the establishment of Burgh Registers. There is therefore an unbroken history of land transactions in Scotland stretching back to the early part of the 17th Century.

Parliament also passed statutes on a large range of topics. These included the Courts Act 1672, the Bankruptcy Act 1621, statutes on prescription in 1617 and 1619, and acts dealing with entail or tailzie (1685). Later in the century legislation covered guarantees (1693), tutors and curators (1696), blank bonds and trusts (1696), and to prevent wrongful imprisonment and delays in trials (1701).

18TH CENTURY AND THE TREATY OF UNION

Although the kingdoms had shared a monarch since 1603 their political, legal and social systems remained distinct. Earlier attempts to negotiate a union met with no success. However in 1706 negotiations took place in London leading to agreement on the succession to the throne, free trade, tax, the judicial system and Parliamentary representation. The Articles of Union were ratified by both the Scots and English Parliaments in early 1707 and became operative on 1 May 1707. In October 1707 the first Parliament of Great Britain convened at Westminster.

The Treaty of Union preserved the Scottish Legal System. Article XIX provided 'that the Court of Session or College of Justice do after the Union and notwithstanding thereof remain in all time coming within Scotland, and that the Court of Justiciary do also after the Union ... remain in all time coming.'

Articles allowed for the preservation of subordinate jurisdictions (Arts XIX and XX). The Articles provided that no cause in Scotland should 'be cognisable by the Courts of Chancery, Queen's Bench, Common Pleas or any other Court in Westminster Hall'. Article XVIII provided for the preservation of Scots Law 'and that all other laws in use within the Kingdom of Scotland do ... remain in the same force as before'. These however could be altered by the Parliament of Great Britain in an unrestrained manner where the laws concerned 'public right, policy and civil government', but where private right was concerned only alterations for the 'evident utility of the subjects within Scotland' were permitted.

The immediate post-Union period was not a particularly happy one.

In 1707 the Scottish Privy Council, despite protest, was abolished. In 1711 James Greenshields, an Anglican priest who was imprisoned for using the Anglican liturgy, was liberated upon appealing the decision of the Court of Session to the House of

Lords. It was a decision of fundamental importance to the development of law in the United Kingdom from 1711 to the present day.