A General History of Scots Law (19th Century)

The great 19th Century reorganisation of the English court system, the Juridicature Act 1873, included a provision for the removal of the Scots appellate jurisdiction which was not implemented. The Appellate Jurisdictions Act 1876 allowed for the appointment of Scottish Lords of Appeal in Ordinary. There was also an appeal in criminal matters to the House of Lords but that appeal was abolished in the late 19th Century.

With only insignificant exceptions, the Heritable Jurisdictions Act 1747 abolished the heritable jurisdictions of Feudal Lords in Scotland. This Act breached the Treaty of Union which expressly preserved the feudal right to hold court. The Heritable Jurisdictions Act 1747 left a judicial vacuum and, as so often happened in Scots legal history, an existing institution evolved to fill the space - the sheriff. Many sheriffs were hereditary office holders with a qualified depute actually holding court. When the hereditary office ceased, the sheriff depute filled the role of sheriff. The sheriff depute (from 1828, the sheriff) appointed sheriffs substitute who held office under him. In 1787 sheriffs substitute became salaried and in 1877 the sheriff substitute became a Crown appointee.

The Court of Session began to change too in the 19th Century. In 1808 there was the creation of two divisions in the Inner House, the First Division presided over by the Lord President and the Second by the Lord Justice Clerk. Other changes included an increase in the number of judges under the Administration of Justice (Sc) Act 1848.

The Court of Session Act 1850 allowed substantial procedural change by way of Rules of Court which still are made by Act of Sederunt.

Throughout the 19th Century the Court of Session absorbed the jurisdictions of many courts, including the civil jurisdiction of the Court of Admiralty in 1830. The Commissary Court jurisdiction in status cases was transferred in 1836, the inferior commissary jurisdiction (succession cases) having been given to the Sheriff Court in 1823, and the Teind Court (dealing with tithes and stipends) was established in 1708 and formalised in 1839.

The Enlightenment

The development of Scots Law in the period after 1707 was the great achievement of Scottish lawyers. It coincided with the Scottish Enlightenment - intellectual activity on a grand scale embracing almost every aspect of human life and much of modern civilisation. This climate ensured the position of Scots Law as a university-taught discipline, the increase of Scots Law Writers, and the appointment of exceptional judges.

Although Scotland had boasted three medieval universities, St. Andrews (1413), Glasgow (1451) and Aberdeen (1496), the teaching of law before the 18th Century did not have a very distinguished history. Scots who wanted to study Civil or Canon Law at this period went to universities in Italy, France, Germany or the Netherlands. The English universities in Oxford and Cambridge (which taught civil law) were closed to Scots. St. Andrews had the teaching of Civil and Canon Law as one of its objects but not much seems to have been achieved there; indeed it appears no law teaching occurred there at all. Glasgow university, founded in 1451 by Pope Nicholas V as a Studium Generale for the study of arts and Canon and Civil Laws, was active in the early years but law teaching failed during the early 16th Century. In Aberdeen Canon law teaching was advanced but after the Reformation the School then went into decline.

Despite the manifesto in First Book of Discipline, effective law teaching was not available in Scotland after the Reformation. Students went abroad, particularly to Leyden or Utrecht in Holland. However in 1714 the teaching of Scots Law was recommenced at Glasgow with the appointment of William Forbes as first Professor of Law. Forbes taught from 1714-45 and was followed by Sheriff William Crosse (1745-50). Hercules Lindsay succeeded Crosse, having already taught at Glasgow as assistant to Forbes. After Lindsay, John Millar, a great Enlightenment figure, assumed the chair. He lectured from 1761-1801 and had a wide international reputation.

In Edinburgh private tuition by advocates was the original method of teaching (there was talk of an 'Inn of Court' in 16th Century Edinburgh). The university teaching of law only began in the 18th Century. Three chairs were established: in 1707 the Chair of Public Law and the Law of Nations, in 1709 Civil Law and in 1722 Scots Law. The

first Professor of Scots Law was Alexander Bayne of Rires (1722-37), who was followed by John Erskine of Carnock (1737-65).

Legal Writers

The tradition of writing legal texts was firmly established by the 18th Century. Prior to then, James Dalrymple, 1st Viscount Stair, had set the mould in his Institutions of the Law of Scotland (1681). Stair managed to follow the European tradition and contribute to the preservation of Scots Law. He drew on the few written sources, including Scots Statutes, the writings of Skene, the Practicks of Balfour and Spottiswoode, the jus feudale of Craig, and wove these sources with those of the civilians and canonists of the Continent - particularly the Dutch jurists of the Natural Law School. However the achievement of Stair was the creation of systematic and logical presentation of the principles of Scots law.
Stair provided a model for other writers. Mackenzie of Rosehaugh produced his Institutions of the Law of Scotland in 1684. The 18th Century saw institutional books. Forbes wrote his Institutes in 1722, Bankton produced An Institute of the Laws of Scotland in 1751-3. John Erskine of Carnock also produced institutional writings in the Principles of the Law of Scotland, designed to update Mackenzie, and An Institute of the Law of Scotland, a much more extensive work.

Reform of the Law

The judiciary of the 18th Century included Duncan Forbes of Culloden and Henry Home, Lord Kames.
The 19th Century saw efforts to create a democracy in the United Kingdom and to provide reform in the law. There was an increase in the number of statutes and increased influence from the House of Lords. The Reform Act 1884 provided more Scots MPs in Parliament. The Secretary of State for Scotland was created in 1885. The Burgh Police (Sccotland) Acts 1892 and 1903 and the Town Councils (Scotland) Act 1900 enhanced local authority legislation.
Legal writers during the 19th Century responded to legislative and case law changes. David Hume, Professor of Scots Law at Edinburgh (1786-1822) wrote Commentaries on the Law of Scotland Respecting Crimes, and a volume of

Decisions. George Joseph Bell, Professor of Scots Law at Edinburgh (1822-43), wrote the Commentaries on the Law of Scotland and on the Principles of Mercantile Jurisprudence and Principles of the Law of Scotland.

In the later 19th Century, Lord President Inglis decided many significant cases and other judges produced standard texts, e.g. Lord McLaren's Wills and Succession and Court of Session Practice, and Lord Fraser's trilogy, Husband and Wife, Parent and Child and Master and Servant.

There was a welter of statutory changes during the 19th Century, including the Limited Liability Act 1855, the Joint Stock Companies Act 1856 and Companies Act 1862.

The Partnership Acts 1865 and 1890 provided a statutory framework for the pursuit of commercial activities. The Bills of Exchange Act 1882 permitted the widespread use of bills or cheques and encouraged commercial development. The Merchant Shipping Acts 1862 and 1894 reflected the UK's premier position in the 19th Century trading system.

Employment Law was developed by the Truck Act 1831 followed by the Trade Union Act 1871 amended in 1876, the Employers and Workmen Act 1875, and the Employers' Liability Act 1880. The Truck Act 1896 and the Workmen's Compensation 1897 presaged further legislation in the field.

Other areas of law affected by this reforming zeal included bankruptcy with the Bankruptcy Act 1856; the law of sale with the Sales of Goods Act 1893, the law of husband and wife with the Conjugal Rights (Sc) Amendment Act 1861; the Married Women's Policies of Assurance (Sc) Act 1880 and the married Woman's Property (Sc) Act 1881; crofting law with the Crofter's Holdings (Sc) Act 1886, and conveyancing with the Conveyancing (Sc) Act 1874; and the Heritable Securities (Sc) Act 1894. Criminal procedure was reviewed by the Criminal Procedure Act 1887.