

## A General History of Scots Law (20th Century)

Legal development during the 20th Century and the changes by judiciary and legislature have been extensive. Notable judges were Lord Dunedin, Lord Cooper of Culross, Lord MacMillan and Lord Reid. The most important decision in the development of the law of delict arose from the Scottish case of *Donoghue v Stevenson*, decided in 1932 in the House of Lords. This famous 'snail in the ginger beer bottle' case arose from Mrs. Donoghue consuming ginger beer which allegedly contained a decomposed snail. As a result of this polluted drink Mrs. Donoghue became unwell and sued the manufacturers. The court held that the manufacturer of food or drink owed a duty of care to the ultimate consumer where there was no opportunity for intermediate inspection. The decision in this case is a clear statement of principle from which most English-speaking jurisdictions can derive applicable or persuasive law.

Outstanding Academics of the 20th Century include Professor Rankine of Edinburgh University, author of *Leases and Land Ownership*, Professor Gloag of Glasgow University, author of a standard text on *Contract*, Professor T B Smith of the University of Edinburgh, author of *A Short Commentary on the Law of Scotland* and editor of *The Stair Memorial Encyclopaedia: The Laws of Scotland* and Professor Jack Halliday of the University of Glasgow, law reformer and author of *Conveyancing and Law Practice*.

Reforms of the 20th Century changed the statute book dramatically, especially after World War II. In the pre-war period there were important changes, notably the Conveyancing (Sc) Act 1924 which modernised much conveyancing law and practice, and the Marriage (Sc) Act 1939 which abandoned the old Canon Law forms of marriage by (1) *de presenti* consent and (2) *promittio subsequente copula*. These forms of marriage had been made illegal by the Catholic Church at the Council of Trent in 1563. The 1939 Act required marriage to be regular, i.e. before a clergyman or registrar. Irregular marriage on the basis of cohabitation is still possible.

The last 50 years have seen more change and at a faster rate assisted by the Law Reform Committee for Scotland and, since 1965, by the Scottish Law Commission, a statutory body which proposes systematic development and reform of the law.

Important recent changes include the Succession (Sc) Act 1964 which abandoned the feudal scheme of male-dominated primogeniture in succession to land in favour of a more socially acceptable system; the Social Work (Sc) Act 1968 which established Children's Panels in Scotland as an alternative method of dealing with questions of care and supervision; and, in the area of Family Law, the Divorce (Sc) Act 1976, the Matrimonial Homes (Family Protection) (Sc) Act 1989, the Family Law (Sc) Act 1985, the Law Reform (Parent and Child) (Sc) Act 1986 and the Children (Sc) Act 1995, all of which modernised the law relating to family affairs making it fairer and more responsive to changing social conditions.

In the law of contract, the Consumer Credit Act 1974 is the most significant statute of the modern era, having altered the Scots Common Law in many fields. Contract Law has undergone many recent changes and current proposals will deal with the problem of late payments. The Prescription (Sc) Act 1973 modernised the law of time bar and repealed many medieval statutes. The Consumer Protection (Sc) Act 1987 not only introduces new elements into Scots Law but is a clear example of the implementation of a European Community Directive.

Company Law was codified in 1948 and, after many amendments partly in response to the directives from the European Community, was re consolidated in the Companies Act 1985. There have been many reforms since then and the whole area of Competition Law has developed reflecting EU legislation. Partnership Law especially the issue of limited partnerships is soon to be reviewed.

Conveyancing was reformed by three major statutes in the 1970s. The Conveyancing and Feudal Reform (Sc) Act 1970 modernised heritable securities and created new ways of changing land conditions. The Land Tenure Reform (Sc) Act 1974 allowed for the redemption of feu duty and the Land Registration (Sc) Act 1979 provided for a new Land Register where titles to land are given a government-backed indemnity.

In 1949 a considerable reform of the system of Legal Aid was undertaken. The Legal Aid and Solicitors (Sc) Act 1949 updated the scheme for assistance for those not rich enough to undertake litigation privately (which had existed since 1424) and also established the Law Society of Scotland. The Legal Aid legislation was overhauled in 1986 and a non departmental public body - the Scottish Legal Aid Board - was established.

The Crime and Punishment (S) Act 1997 has extended the powers of the Scottish Legal Aid Board and provides for the introduction of the Public Defence Solicitors Office, on a trial basis, to provide an alternative scheme for the defence of accused persons.

## **DEVOLUTION**

One of the most important recent developments has been the passage of the Scotland Act 1998.

"There shall be a Scottish Parliament" are words taken from Section 1 of the Scotland Act 1998.

It is impossible to underestimate the effect which the establishment of the Parliament has had on Scots law, Scots lawyers and their clients.

The Scotland Act 1998 established a Parliament with a wide range of powers.

Devolution under the Scotland Act 1998 follows the scheme adopted under the Governance of Ireland Act 1920 rather than that proposed under the last venture in devolution for Scotland, the Scotland Act 1978. This means that The Scotland Act 1998 details the powers reserved to the Westminster Parliament rather than listing the powers of the Scottish Parliament. In other words, the Scottish Parliament is competent to legislate on any subject which is not reserved to Westminster.

The Parliament's powers include legislative competence in relation to health, education, industry, local government, social work and housing, economic development and transport, criminal and civil law and home affairs, environment, agriculture, forestry and fishing, sport and the arts.

These competencies are extremely important for Scots lawyers. In particular, Scottish Private law which includes the general principles of private law, private international law, the law of persons, the law of obligations, the law of property and the law of actions is within the competency of the Parliament. The Scots lawyer will therefore have to look to the Parliament in these important areas.

### **Scotland Act 1998 - Changes in Philosophy**

There are a number of changes of importance for lawyers, which spring directly from the nature of the Scotland Act 1998.

The first is that the Scottish Parliament is not a "sovereign legislature" in the sense that Constitutional lawyers have defined that term over the last 150 years. The provisions of sections 28 and 29 of the Act make this clear. The Parliament can only legislate in the areas of its competence and the Westminster Parliament always retains legislative power in relation to Scotland.

Section 29 is of particular importance. Subsection (1) provides that "An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament".

Subsection(2) helps to define that competence: therefore acts which would apply outwith Scotland, or relate to matters reserved to the UK Parliament, or would be incompatible with EU law or the ECHR or contravene certain other aspects of the Scotland Act are not law. This is an important change to the nature of legislation in Scotland.

Lawyers have always been taught that an Act of Parliament is the law and that there is no way of challenging that. However, Acts of the Scottish Parliament proceed on the vires set out in the Scotland Act and can be challenged.

The legal technique for dealing with such legislation will be well known to those working in Local Authorities or for Statutory Undertakings where questions of vires often arise but for many solicitors there will need to be a cultural shift.

When they open an Act of the Scottish Parliament they do not say "This is the law" instead they ask "Is this the law?"

That cultural change should not be underestimated and from it will flow the litigation which will define the parameters within which the Parliament will act. That litigation is anticipated in the Scotland Act which describes it as "devolution issues". Devolution issues are governed by section 98 and schedule 6 of the Act and cover issues such as whether an Act of the Parliament is within its powers, whether an act of the Scottish Ministers is within their functions, whether an act of the Executive (or a failure to act) is compatible with EU law or the ECHR and a catch-all clause relating broadly to devolved competence or not.

Devolution issues can arise in any court but the ultimate court for the determination of such issues is the little known Judicial Committee of the Privy Council. This court which hitherto has exercised jurisdiction as a final court of appeal from colonies, some Commonwealth countries and from certain UK professional tribunals is very

well placed to adjudicate on important constitutional issues. Its role as the final arbiter in devolution issues allows the judges a special place in the new constitution. Commentators may hesitate to say that the constitution is what the judges will say it will be, but it seems that the UK, at least in the context of devolved powers is moving to that position.

## **The Role of Solicitors as Advisers**

It is important for solicitors to be aware of what the Parliament is undertaking in terms of legislation and in terms of debate. Client's interests may be affected by these activities and the doctrines of openness, transparency and the dedication to consultation to which the Parliament is pledged ensure that representations made on behalf of clients are heard by the legislators and the civil servants.

Many firms have established parliamentary representation units or have entered into associations with public affairs companies. The demands of clients and the demands of the Parliament ensure the need for competent advice to be available. The 10,500 Scottish solicitors representing more than 5 million people and countless commercial enterprises are well placed to meet the challenges which this vibrant legal environment presents.

## **THE BRANCHES OF SCOTS LAW**

The principal division in Scots Law is that between public law, where the state in some way is involved, and private law where only private persons are involved.

### **Public Law**

In the public law the major topics are constitutional law, administrative law and criminal law and procedure. Constitutional law, a matter reserved to the UK Parliament the unwritten constitution of the UK, including the Queen in Parliament, Parliamentary procedure, constitutional conventions and cabinet government under the law. Some aspects of executive functions and local authorities are devolved. Administrative law deals with questions of public administration by the executive and administrative branches of government.

Almost all prosecution of criminal offences in Scotland is by the Crown in the person of the Lord Advocate or the Procurator fiscal. Criminal law and procedure falls into the public law category but is a devolved area (with some exceptions eg. Misuse of Drugs, Firearms). Private prosecution, though rare, is possible. The criminal law is substantially a customary law, statute intruding only in certain respects.

## **Human Rights**

The UK has imported into UK Law the European Convention on Human Rights by the Human Rights Act 1998. This important legislation enables British Citizens to raise issues relating to the compatibility of legislation in UK Courts.

## **Private Law**

Scots private law is the system of law affecting private individuals based on statute, judicial precedent, custom and institutional writings. Private law has been affected by the reception of English Law, but still reflects the civilian legal origins of Scots Law. The principal topics in private law are Persons, Obligations, Property, Actions and Private International Law.

## **THE LAW OF PERSONS**

The Law of Persons regulates those aspects of the personality or capacity of individuals and incorporations and provides the baseline for the superstructure of all other branches of Scots Private Law. 'Persons' are recognised as 'Children' those under 16 years and 'Adults' (persons older than 16). The law of persons identifies the following relationships: Parent and Child, Husband and Wife, Civil Partners and Guardian and Ward.

### **Parent and Child**

The status of children was formerly legitimate or illegitimate. The illegitimate child was subject to many legal disabilities or restrictions. Most of these restrictions have been removed by Act of Parliament and illegitimacy now no longer represents a serious legal disability. More Child centred legislation has recently been enacted.

Adoption was introduced by statute in 1924. Parents have statutory obligations in respect of their children which can be enforced by court action.

## **Husband and Wife**

Marriage is categorised as regular, i.e. by a clergyman or a registrar, or irregular, i.e. by cohabitation with habit and repute. Scots Law provides for presumptions as to the ownership of property between spouses. All the former disabilities which attached to women in marriage have been removed by statute. Scottish women frequently assume their husband's name on marriage, but this is only custom and is an alternative name.

Either spouse may sue or be sued; no liability attaches to a spouse by the mere fact of marriage. Being a spouse accords no special protection the criminal law - a husband can be tried for the rape of his wife. There are mutual obligations of aliment and adherence between a husband and wife.

The only ground of nullity of marriage is lack of consent or impotence. Divorce is also competent on the ground of irretrievable breakdown of marriage. Irretrievable breakdown of marriage may be established by evidence of: adultery, unreasonable behaviour, desertion for 2 years, separation for 2 years with consent to divorce or separation for 5 years without consent. In connection with a decree of divorce the court may make orders regulating residence or contact with children, capital payments, periodical allowance, aliment and division of property.

## **Civil Partners**

The Civil Partnership Act 2004 allows persons of the same sex to enter into registered partnerships. This will allow persons in a same sex relationship legal recognition as a Civil Partner, granting them equal treatment in a wide range of legal matters akin to married couples.

## **Guardian and Ward**

This Section is being rewritten as a result of the Adults with Incapacity (Sc) Act 2000.

## **Other Persons in Scots Law**

Partnerships (a partnership is a separate legal person from the individuals which form the partnership); a limited liability partnership is also possible in Scots law; and limited companies.

## **THE LAW OF OBLIGATIONS**

### **Contract Law**

This branch of the law of obligations permits the formulation of contracts by unilateral promise or bilateral agreement. There is no need for consideration in Scotland. There are rules for the constitution and proof of contracts. Contracts may be set aside for invalidity, error, fraud, force and fear, facility and circumvention or undue influence.

Where a breach of contract occurs the remedies include retention of title or price, court action for price, rescission, court action for damages for loss and specific implementation.

### **Delict**

Delict deals with those obligations which arise from the operation of law emanating from a general principle of liability, to the effect that a person is liable for loss caused to another by a failure in the duty of care, which may be either intentional or negligent. The law of delict is analogous to the English Law of Tort, but does not slavishly follow it. There are delicts known by particular names, eg assault, defamation or negligence, but these do not have the technical meaning which the English system attaches.

## **THE LAW OF PROPERTY**



The principal distinction in the Scots Law of Property is between heritage, especially land and buildings, and moveables, things physically moveable and moveable rights.

**Heritable Property** - The feudal system applied in Scotland until 28th November 2004 which was the appointed day for commencement under the Abolition of Feudal Tenure (S) Act 2000. Until that day all land in Scotland (except Udal land in Orkney and Shetland and Allodial Land owned by the Prince of Wales) was owned by the Crown which has granted rights in land to tenants in chief, who in turn have created sub-tenants, and so on to those who enjoy actual possession of the land. That person who held land had the dominium utile or useful ownership and held the land as a vassal from a superior who in turn held the estate from his or her superior and so on to the Crown. Each person holding an interest had the title circumscribed by the conditions of the grant under which the land is held. Real rights to land are constituted by recording the deed in the Land Register of Scotland.

**The Abolition of the Feudal Structure** - The Scottish Law Commission examined the prospect of the abolition of the feudal system for a number of years. The discussion paper "Abolition of the Feudal System" was published in July 1991 and a Report "Abolition of the Feudal System" was laid before Parliament in February 1999. The Abolition of Feudal Tenure etc. (Scotland) Act 2000 was passed on 9th June 2000. There are two aspects to the abolition of the system. The first is the structure of feudal tenure itself with the relationship between the superior and the vassal and the second is the aspect that relates to real burdens and conditions. Section 1 of the Bill provides that the feudal system of land tenure i.e. "the entire system whereby land is held by a vassal on perpetual tenure from a superior," was abolished as from the "appointed day", which was 28th November 2004. From that day vassals became the outright owners of the property; effectively therefore superiors and superiorities disappeared. The abolition of the Feudal system will not affect non-feudal burdens on land.

Section 52 of the Bill extended the abolition to the Crown so that on the "appointed day" the Crown's paramount feudal superiority disappeared.

**Moveable Property** - May be things which are physically moveable or incorporeal rights. Title or ownership of moveables passes only on delivery, subject to some exceptions such as sale of goods and hire purchase. Incorporeal rights (where the

moveable property is not a physical item) include rights in patents, trade marks, copyrights, designs and other forms of intellectual property. Rights in incorporeal moveables are transferred by assignation.

## **TRUSTS**

Trusts in Scotland have a different position in the law from their English counterparts. A trust arises where property is transferred from one person (the truster) to another (the trustee) to be held for the benefit of the truster or some third party. The Property transferred becomes the Trustee's absolute property subject to the conditions of the trust and the his or her fiduciary duty. There are many types of trusts and the fiduciary relationship appears in partnerships, curatories, executries and bankruptcy as well as in public trusts where the purposes are charitable works or educational pursuits.

## **SUCCESSION**

The Law of Succession covers the transfer of property upon the death of the owner. An important feature of the Scots Law in this area is that of the legal rights of the surviving spouse or children. These rights to shares of the moveable property of the deceased, are indefeasible debts owed by the deceased and apply in both testate and intestate circumstances. A surviving spouse is entitled to half of the moveable estate if there are no children and to one third if there are children. Similarly surviving children are entitled to half of the moveable estate if the deceased's spouse is already dead and to one third if that spouse is surviving.

Succession can be testate or intestate. Testate succession arises where the deceased left a will, which may appoint executors and make specific bequests. Intestate succession is where there is no will, in which case the law provides a framework of prior rights in favour of the spouse and legal rights in an effort to make up for the lack of expressed wishes.

## **BANKRUPTCY**

The Law of Bankruptcy deals with the situation where a debtor is unable to meet his or her debts through insolvency. In these cases the debtor's property is subject to a the court procedure called 'sequestration' and given to a trustee who administers the property for the bankrupt's creditors. This could mean selling the property and distributing a dividend.

## **PRIVATE INTERNATIONAL LAW**

Scots Law has an important body of private international law which provides rules for the resolution of international problems including choice of law and jurisdiction and the recognition of non-Scottish judgements.

## **SCOTS LAW SOURCES**

The sources of Scots Law are Legislation, Precedent, Institutional Texts and Custom.

### **European Communities Legislation**

As a constituent legal system of a Community member state, European Community law forms a source of law for Scotland. All Community treaties (eg the Coal and Steel Treaty, the Economic Community Treaty, the Euratom Treaty and the Single European Act) apply, as do the regulations, directives and decisions of the Council of Ministers, the Commission and the European Court of Justice.

### **Parliamentary Legislation**

The Statutes or Acts of the Parliament of Scotland to 1707 (in so far as not abrogated by desuetude), the Parliament of Great Britain (1707-1800) and of the United Kingdom (1801-present) as applicable, apply in Scotland. The Acts of the Scottish Parliament under the Scotland Act 1998 will also have the force of law. In addition to primary legislation, there is also subordinate or delegated legislation formed by Orders in Council, Ministerial Rules, Orders and Instruments and local authority bylaws. Acts of Sederunt and Acts of Adjournal which regulate court procedure are similarly a source of law.

## **Precedent**

Judicial precedent is a decision of a court comprising a principle or rule which can be applied in subsequent cases. Decisions of judges may contain statements of principle or of the rules of law which assume the status of a source of law second only to Acts of Parliament. In the absence of relevant statutory provision, judicial precedent prevails as a source of law.

The doctrine of precedent operates within the hierarchy of the courts and the following general principles apply:

1. Decisions made by the House of Lords in Scottish appeals bind the House itself, subject to limited exceptions, and all lower Scottish courts.
2. Decisions made by either division of the Inner House of the Court of Session bind each division and all lower courts.
3. Decisions of single judges, sheriffs principal and sheriffs are not binding.

The role of the Judicial Committee of the Privy Council in relation to devolution issues will result in that court being the ultimate court of appeal.

## **Institutional Texts**

Certain highly respected authors of law texts written principally in the 17th, 18th and 19th Centuries are accorded a special place as a source of law. The institutional writers are: Craig, *Jus Feudale* (1655); Stair, *The Institutions of the Law of Scotland* (1681); Erskine, *Institute of the Law of Scotland* (1773); Bell, *Commentaries on the Law of Scotland* (1800) and *Principles of the Law of Scotland* (1829); Mackenzie, *Laws and Customs of Scotland in Matters Criminal* (1678); Hume, *Commentaries on the Law of Scotland Respecting Crimes* (1797); and Alison, *Principles* (1832) and *Practice of the Criminal Law of Scotland* (1833).

## **Custom**

Custom or long-observed practice may be looked to as a source of law in default of any other source.

## **Equity**

The principles of natural justice and fairness have always formed a source of Scots Law and have been applied by the courts without distinction from the law. Therefore Scots Law has avoided the highly complex juristic construct of Equity which applies in England.

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