Scots Law

by Lois Sparling

Scotland was a separate country with its own legal system at the time of union with England and Wales in 1707. Union meant that Scotland now had the same legislature and ultimate court of appeal as England and Wales (and Ireland), but it kept its own laws and legal system. Acts of Parliament introduced new laws and could change existing laws in Scotland but did not replace or even much modify Scots Law. This is important because Canadians delving into Scottish family history resources are familiar with English law and, perhaps, the civil code of Quebec. Scots law is different. In some instances, the differences between English and Scots law are no more than different terms for the same thing. For example, Scottish advocates are equivalent to English barristers. Generally, however, Scots law is different in concept, not just in terminology.

Scots law is based on ancient Roman law but includes elements of common law. This means that a lot of Scots law has the same basis as Continental European countries like France and Germany. However, unlike other civil law countries, Scots law is not set out in a single unified code. In addition, aspect of Scots law originated in the Middle Ages, much like English common law. These Medieval sources are from Norman feudalism and local custom.

Family history researchers are not likely interested in studying law for its own sake. You just want to know where to look in law-related records for information about your ancestral families and to understand what those records say about your families. I will therefore attempt to curb my enthusiasm for this fascinating and quite exotic field.

What you need to know

1. Scots law is a separate and distinct legal system.

2. Scots law is different from Canadian law, both in Quebec and in the rest of Canada. What we are used to is based on English law.

3. The feudal system with respect to land ownership continued in force in Scotland until 28 November 2004.
4. Scotland has Quebec style Notaries Public who take oaths and record transactions. The records of Notaries Public are, therefore, another source of legal records about individuals.

5. Scotland adopted the Gregorian calendar in 1600, i.e., long before England and her colonies.

6. Our Scottish ancestors could register deeds, including land transactions, marriage settlements and contracts, with many, many different courts.

7. Scottish legal records and documents were written in Latin until relatively recently. The researcher may also encounter the Scots language. (Note: Scots is a language similar to English, not a type of Gaelic.)

8. Scots law recognized marriages with no church service or public ceremony of any kind. Until 1938, all that was required was mutual consent and consummation. Girls could marry at age 12. Boys could marry at age 14. Parental consent was not required for a valid marriage. The minimum age for marriage was raised to age 16 in 1929. These were called irregular marriages but they were legally recognized, much to the chagrin of the pious. For the civil registration of such marriages, either a written declaration by the couple or the oral evidence of two witnesses was required.

9. Illegitimate children became legitimate upon the subsequent marriage of their parents provided that the parents were free to marry at the time of the child's birth.

10. Until 1760 the church courts presided over cases involving marriage, legitimacy, defamation, testaments, discipline of clergy and some other matters of debt and contract. They could grant annulments of marriages, separations "a mensa et thoro" and divorces.

11. The Commissary Court in Edinburgh granted divorces from 1563 to 1830 when jurisdiction to grant divorces was assumed by the Court of Session.

12. The records of the courts of equity are an excellent resource for family history research before the 19th century in many countries such as England, Canada, the U.S.A. - but not Scotland. There has never been a separate law of equity and, therefore, no courts of equity in Scotland.

13. The area of law called "torts" in English and Canadian law is called "delict" in Scots law. Examples of early torts/delicts are civil claims of assault, trespass and defamation.

14. The inheritance of land (immoveable property) was fixed by law until 1868. The eldest surviving son inherited all the land (primogeniture). If there were no surviving sons, the daughters inherited the land in equal shares. If there were no surviving children, the spouse inherited all the land. Where there were children, the widow was entitled to 1/3 of the land for her lifetime. The inheritance of other property (moveable property) was also subject to strict rules. One had to leave at least 1/3 of his or her moveable estate to his or her spouse, and at least 1/3 to his or her children. If there was no surviving spouse, at least one half of the moveable estate had to be left to the children. Scots could make valid testaments directing who would inherit their moveable property as long as these rules were obeyed.

Note that immoveable property in Scots law is the equivalent of real estate in English law. The term used in English law for moveable property is personal property. The widow's right to the use of 1/3 of the land for her lifetime is called "life rent". A "relict" is a widow. A "defunct" is the deceased. An "heir portioner" is a daughter inheriting a portion of the land. If the deceased/defunct left a testament the Court is dealing with a "testament testamentary". If there was no testament, it is a "testament dative".

15. Until 1560, church courts called commissary courts, handled the in heritance of moveable property. The commissary courts became secular in 1560. In 1824, jurisdiction over inheritance was assumed by the sheriff's courts.

16. Until 2004, Scots law retained feudal property law concepts arising from the concept of the personal relationship of lord and vassal. The Crown grant was the "feu". A subgrant or subtenancy was a "sub feu". The deed of grant of land was the "feu charter" or "feu disposition". Annual payments for the land were 'feu duties". Payments to deviate from perpetual conditions on the grant of land were also called feu duties. Perpetual conditions on the sales of land caused the problems which led Scotland to finally abandon its feudal based land ownership system.

17. Under feudalism, Inheritance of land by a tenant of the Crown was a matter of importance to the state. The Court of Chancery issued a "brieve" instructing the sheriff to form a jury and conduct an inquest on the question of who was entitled to inherit the land. The decision of the jury was the retour and was registered with the Court of Chancery in the Services of Heirs.

18. Transfers of land required a public ceremony of "sasine and infeftment" until modern times. A Notary Public attended the ceremony and recorded it in his protocol book. The transfer was also registered in a Register of Sasines in one of the many courts where deeds could be registered. In 1804, the courts allowed to register deeds were restricted to the Court of Session, the sheriff's courts and the Royal Burgh courts.

19. Certain areas in Scotland called regalities and stewarties were subject to the Lord's court rather than the general courts of the sheriff, Court of Justiciar and Courts of Session. Lords' courts could also register deeds and services of heirs until they were abolished in 1747.

20. Early Scottish courts included:

Sheriff's courts with criminal and civil jurisdiction;

Burgh courts (bailies) with civil and petty criminal jurisdiction;

Dean of Guild courts which dealt with building and public safety;

The Court of Exchequer which heard revenue cases 1708 - 1856;

Church courts which lost part of their jurisdiction to the secular commissary courts in 1560 and continued as the kirk session, presbytery, and the Synod;
Commissary Courts which heard both inheritance matters and actions in debt until 1823;

Regality and Barony courts of certain local landowners who held a franchise from the Crown (abolished 1747);

The King's Justiciar handled civil as well as criminal cases until the 16th century. The High Court of Justiciary was formed in 1672.

Courts of the local justices of the peace;

Lyon Court, also known as the Court of the Lord Lyon formed in 1672 and still deals with matters of heraldry and the right to coats of arms.

21. The current courts of Scotland are:

Magistrate's Courts and District Courts which hear minor criminal matters;

Sheriff's Courts which hear both civil and criminal cases;

The High Court of Justiciary which hears the most serious criminal cases and appeals in criminal cases from lower courts;

The Court of Session which is the highest civil court; The Court of Session has an Outer House which holds trials and the inner House which hears appeals.

The final court of appeal is the House of Lords in London.