CHAPTER FIVE

THE JURISDICTION OF THE SESSION

Introduction

The changes which caused the development of the Session resulted in the College of Justice inheriting and newly embodying a powerful institutional authority. The ordinary judicial role of the Council had been permanently ceded to the Session through statute in 1532. The Session continued to draw its authority from and function within the framework of conciliar governance, but was insulated from the *curia regis* after 1532 by the institution of the College of Justice. How the institutional authority of the Session was reflected in its jurisdiction by this time forms the subject of the rest of this book.

First, we should investigate the legal disputes which normally fell within that jurisdiction. What was the business of the court? Neilson and Paton stated in their introduction to *Acts of the Lords of Council 1496–1501* that:

> the jurisdiction of the Council is perhaps more significantly indicated by the few exclusions than it is either by direct grants by Parliament or by the actual cases heard… It will be enough to note particularly the absence of any commission whatever for cases of crime, the exclusion of cases belonging to ecclesiastical courts, and the reservation to the judge ordinary of questions touching heritable right.[1]

For the Council to be exercising this kind of general jurisdiction was a novel and relatively recent development, when compared with its role up to the first half of the fifteenth century. Nevertheless, some constraints still inhibited its authority.

Neilson and Paton were analysing the position at the end of the fifteenth century, but the only significant qualification needed in order to apply their remarks to the period around 1532 is in relation to fee and heritage, i.e. heritable title to landed property. The argument of this book is that fee and heritage appears to have been within the remit of

[1] *Acts of the Lords of Council 1496–1501*, ed. G. Neilson and H.M. Paton (Edinburgh, 1918) [hereafter *ADC* ii], p. xlv.

the Lords by the time of the foundation of the College of Justice. This claim entails rejection of existing interpretations of how the jurisdiction of the Session had developed by 1532 and will be discussed in the next two chapters. In this chapter the civil jurisdiction of the Session will be surveyed more generally, illustrating in detail the "practick" of the court and what disputes it adjudicated upon. Following the discussion of the procedure of advocation in the previous chapter, the emerging relationship of the Session with other courts by way of a supervisory jurisdiction will be examined in some depth. Three further areas within the jurisdiction of the Session were so significant that they will be treated in greater depth still in separate chapters to follow. First, questions of limitations upon the civil jurisdiction of the Lords will be treated in chapter 6 in a discussion of fee and heritage actions. Secondly, questions of the expansion of the Lords' jurisdiction to encompass fee and heritage through the novel exploitation of remedies will be discussed in chapter 7 in relation to the reduction of infeftments. Thirdly, the involvement of the Session in dispute settlement generally, but especially in alternative methods of dispute resolution such as arbitration, will be treated in chapters 8 and 9.

Academic discussion of the Session in the early sixteenth century has been mainly concerned with institutional organisation or limitations on jurisdiction. For this reason the judicial business of the court—the field of its general civil jurisdiction—has never received the kind of detailed scrutiny which will be offered in this chapter, though an invaluable earlier discussion is contained in Dr Athol Murray's analysis of the "practick" of the court in the 1540s in his discussion of Sinclair's "Practicks", supplemented by Professor Dolezalek's subsequent treatment.[2] Aspects of the case-load of the court for one year at the very end of the century have also been assessed by Dr Winifred Coutts.[3] Some treatment is offered indirectly in Dr Finlay's study of the early legal profession, but mostly in relation to procedure.[4] Though not concerned with the Session, Professor Dickinson's treatment of the business of the Sheriff

[2] A.L. Murray, "Sinclair's Practicks", in *Law Making and Law Makers in British History*, ed. A. Harding (London, 1980), pp. 90–104; G. Dolezalek, "The Court of Session as a Ius Commune Court—Witnessed by 'Sinclair's Practicks', 1540–1549", in *Miscellany Four*, ed. H.L. MacQueen, Stair Society 49 (Edinburgh, 2002), pp. 51–84.

[3] Winifred Coutts, *The Business of the College of Justice in 1600*, Stair Society 50 (Edinburgh, 2003).

[4] John Finlay, *Men of Law in Pre-Reformation Scotland* (East Linton, 2000).