1. – Introduction

It is comparatively recently that the history of Scottish civil procedure has begun to receive sustained scholarly attention, though this has mostly concentrated upon the medieval period. The purpose of this article is to extend existing scholarship by discussing in a preliminary manner some aspects of civil procedure in the sixteenth century, in what was an important transitional period between medieval and early modern procedural models in Scotland. The Scottish example may provide an interesting comparison with other European jurisdictions in this regard. However, there is also an underlying question of more general relevance, namely how should the relationship between Romano-canonical procedure as a supra-national source of procedural law and the development of a native and localised style of court or ‘practick’ be conceptualised? It is necessary to address this question in order to elaborate the wider framework within which the content of Scottish procedural law can be evaluated.

The early sixteenth century provides an apt period within which to examine these issues. The period 1426–1532 was one of experiment and reform in the central administration of justice in Scotland. It also witnessed a fundamental re-
orientation of the legal system away from procedure by brieve (writ) and inquest and towards Romano-canonical and summary procedure. A central feature in these developments was a growing resort to central justice, an important factor in which seems to have been dissatisfaction with the effectiveness of local courts, procedure and remedies. Court actions were structured around a series of jurisdictions rooted principally in the locality, united under the overall jurisdiction of Parliament. The procedure for most legal action until the fifteenth century required initiation of actions in these local courts. The fifteenth century seems to have witnessed a preference by litigants for central justice at first instance rather than merely as a residual final court of appeal, and in response Parliament did gradually give way to the smaller, more flexible King’s Council as the primary central judicial forum. A possible implication of this is that central justice was regarded as more effective. The period culminated in 1532 with the establishment of a new institution, the College of Justice, into which was channelled the judicial business of the King’s Council3.

2. – Influences on sixteenth-century procedural law in the Court of Session

The sixteenth century marked a fundamental new departure for Scots law in developing a permanent central court4. What civil procedure did it use? The Court of Session grew out of the King’s Council following innovations and developments in its role in the fifteenth and early sixteenth centuries. The role of churchmen trained in canon law in running royal government, and therefore taking leading roles on the medieval Council, seems to help explain why in judicial matters the Council may have been inclined to adopt a form of Romano-canonical procedure to expedite the determination of legal complaints5. Of course, Romano-canonical procedure was also applied in Scotland routinely in its ecclesiastical courts. However, although the procedure of the Session possessed significant, recognisable Romano-canonical features, the ius commune was not the only substantial

3. The King’s Council was referred to as ‘the Session’ when sitting for judicial business, and was also known simply as the College of Justice after 1532, and by some time after 1532 as the Court of Session. It was constituted by Lords of Council and Session in both its pre-1532 and post-1532 forms, the main difference in composition after 1532 being that Lords of Council had to be specifically nominated to office as Lords of Session, and admitted as such by the court. Its judges were nevertheless Lords of Council. At particular times, therefore, the Session, the King’s Council, the Lords of Council, the Lords of Session or the College of Justice could be synonymous terms.


5. For example, William Elphinstone (1431–1514), Official of the diocese of Glasgow (1471–78); Official of Lothian and Commissary General of the archdiocese of St Andrews (1478–83); member of parliamentary judicial committees and of King’s Council (from 1478); Bishop of Aberdeen (1483–1514); Chancellor (1488). See L.J. Macfarlane, William Elphinstone and the Kingdom of Scotland, Aberdeen 1985, especially chapters 2 (‘The Canon Lawyer at Work 1471–1488’) and 3 (‘Auditor of Causes 1478–1488’).