

# **An Institute of the Law of Scotland**

## OLD STUDIES IN SCOTS LAW

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OLD STUDIES IN SCOTS LAW

VOLUME 5

# An Institute of the Law of Scotland

*First Edition*

JOHN ERSKINE

*Together with*

**Translation and Explanation of the Principal Technical  
Terms and Phrases used in Mr Erskine's Institute  
of the Law of Scotland (2nd edition, 1829) by  
Peter Halkerston**

*With an introduction by*

KENNETH G C REID

Professor of Scots Law, University of Edinburgh

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*John Erskine*

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John Erskine, Esq.  
of Cardross. Advocate



# INTRODUCTION

## Erskine's early career

Only a bare outline of Erskine's life is known. For a contemporary's account we must make do with the few brief pages, written long after Erskine's death, by John Ramsay, 41 years Erskine's junior and the owner of Ochertyre in the neighbourhood of Erskine's own estate of Cardross.<sup>1</sup> "I was well acquainted with him in his latter years", Ramsay writes. "Indeed, many happy days have I spent either under his roof or that of those who were dearest to him."<sup>2</sup> Later, of course, Erskine was to be the subject of biographical notes in such nineteenth-century works as Chambers' *Biographical Dictionary of Eminent Scotsmen*,<sup>3</sup> and he has been similarly noticed in modern times.<sup>4</sup> All these accounts, however, are short, as they must be unless or until significant new material is uncovered; and while the editor of the 1871 edition of the *Institute*, Badenach Nicolson, may be correct to say that Erskine's life "was so uneventful that it may be summed up in a single sentence",<sup>5</sup> it is possible that one explanation for this apparently dull life is lack of evidence.

John Erskine was born on 4 November 1695, the year of Viscount Stair's death.<sup>6</sup> The birth took place at Stirling Castle, of which his father, Lieutenant-Colonel John Erskine of Carnock, was the governor. The Erskines were a distinguished landed family, linked to the Earls of Mar,<sup>7</sup> and there was an estate at Carnock near Dunfermline, which was to pass to Erskine, as the

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<sup>1</sup> John Ramsay, *Scotland and Scotsmen in the Eighteenth Century* vol I (ed A Allardyce, 1888; repr with introduction by D J Brown, 1996). In his introduction (vi) Brown concludes that Ramsay wrote between 1785 and 1810. Ramsay was neither an advocate nor a Writer to the Signet but spent time around Parliament House: see John Finlay, *The Community of the College of Justice: Edinburgh and the Court of Session, 1687–1808* (2012) 153.

<sup>2</sup> Ramsay, *Scotland and Scotsmen* (n 1) 144.

<sup>3</sup> R Chambers, *A Biographical Dictionary of Eminent Scotsmen* (1835, and subsequent editions) vol II.

<sup>4</sup> James Marshall, "John Erskine of Carnock" (1896) 3 SLT (News) 171 and 179; D M Walker, *Scottish Jurists* (1985) 204–06; W W McBryde, "Introduction" to a reprint of the 1871 edition of Erskine's *An Institute of the Law of Scotland* (1989); J W Cairns, "Erskine, John, of Carnock (1695–1768)", *Oxford Dictionary of National Biography* (2004).

<sup>5</sup> J B Nicolson, "Prefatory Note" to Erskine's *An Institute of the Law of Scotland* (1871) v.

<sup>6</sup> Stair died shortly after Erskine's birth, on 25 November 1695. George Joseph Bell in turn was born in 1770, two years' after Erskine's death.

<sup>7</sup> For details, see Walker, *Scottish Jurists* (n 4) 204–05.

oldest surviving son, on the death of his father in 1743. Ramsay's suggestion that the father's affairs were by then "much embarrassed" seems open to question,<sup>8</sup> for within three years of his death Erskine had acquired the estate of Cardross, near Port of Menteith, a substantial property which extended to the eastern part of the Lake of Menteith and included Inchmahome Island with its ruined priory.<sup>9</sup> Carnock was retained and, like his father before him, Erskine was usually known as "Erskine of Carnock";<sup>10</sup> but it was Cardross, suitably improved, which now became his home.<sup>11</sup> Erskine had married Margaret Melville in 1719 and, following her early death, he married in 1729 Anne Stirling, who was to survive him.<sup>12</sup> There were two children of the first marriage and five of the second.

Nothing certain is known about Erskine's education, but he is thought to have attended classes at Edinburgh University from about 1708 to 1711; like his father,<sup>13</sup> he may then have gone on to study law in the Netherlands.<sup>14</sup> In February 1719 he was admitted as an advocate, being examined on Book I

<sup>8</sup> Ramsay, *Scotland and Scotsmen* (n 1) 146.

<sup>9</sup> For a detailed description, see pp 20–22 of a Disposition by Charles Erskine of Edenshead to John Erskine of Carnock dated 21 March 1748, National Records of Scotland ("NRS") GD15/30/1. Erskine acquired Cardross at a judicial sale for the price of £99,480/16/10 Scots. The conveyancing proved complicated and protracted, partly because the titles were lost – in the late 1750s the original charter of 1555 and other titles were discovered to be among the Buchan titles stored in the Laigh Hall at Parliament House – and partly because the purchase price had to be distributed among the creditors of the late Henry, Lord Cardross (who included Erskine himself, representing his late father) according to a complicated scheme of division. For information about the title, see Petition by James Erskine of Cardross, NRS GD15/832. The scheme of division is preserved at NRS GD15/29/1; the personal involvement of Erskine and his father can be traced in NRS CS99/159 and GD/15/30/3.

<sup>10</sup> But not always. Some earlier editions of the *Principles* (such as those of 1802 and 1809) refer to Cardross rather than Carnock, and the portrait attributed to Henry Smith, which was given to the Faculty of Advocates by Lord Moncrieff in 1867, is inscribed along the top "John Erskine Esqr of Cardross". As the portrait shows a young Erskine and dates from the 1720s, the inscription must have been added later. For details of this portrait, see C Sutherland and R Craik (eds), *Parliament House Portraits* (2000) portrait no 25; for portraits of Erskine more generally, see the letter by Aeneas Mackay in (1870) 14 J of Jurisprudence 56. The portrait reproduced in this volume is the one attributed, implausibly, to Sir John Medina (who died in 1710, when Erskine was only 15) but may possibly have been by his son, another John (d 1764).

<sup>11</sup> Within months of purchase, Erskine had offered to sell Cardross to the Earl of Buchan in recognition, it seems, of some family connection to the property. When negotiations finally broke down, in December 1746, Erskine paid the Earl £500 sterling for the Earl's "goodwill of his purchase". See Memorial by Erskine, NRS GD15/29/2. Both estates remained in the family after Erskine's death, Carnock being disposed to his eldest son, (the Rev) John, and Cardross to his second son and executor, James.

<sup>12</sup> Anne's dates are 1706–1779.

<sup>13</sup> Walker, *Scottish Jurists* (n 4) 206.

<sup>14</sup> Cairns (n 4). Marshall (n 4) 172 states that he attended university in Leiden but provides no evidence.

title 2 of Justinian's *Institutes (De Auctoritate Tutorum)*.<sup>15</sup> This, however, was a difficult period in which to build up a practice at the Bar.<sup>16</sup> Litigation levels were depressed in the first half of the eighteenth century,<sup>17</sup> and such work as was available was dominated by more senior figures. John Finlay's study of the Roll of Ordinary Causes shows a mere ten advocates being instructed in half of all Ordinary Cause business.<sup>18</sup> Most others struggled for work. Henry Home, the future Lord Kames, who was called shortly after Erskine, in 1723, made little or no money in his first decade at the Bar.<sup>19</sup> The same is likely to have been true of Erskine,<sup>20</sup> particularly if Ramsay is to be believed as to his unprepossessing manner:<sup>21</sup>

[T]here were insuperable obstructions to his rising at the bar. His excessive diffidence and dislike to disputation, joined to the weakness of his constitution and the extreme feebleness of his voice, forbade all public speaking, or any thing that required much exertion.

Occasional glimpses of Erskine's activities can be caught in the minute books of the Faculty of Advocates. In three separate years<sup>22</sup> he acted as one of the public examiners for admission to the Faculty and in a further two<sup>23</sup> as a private examiner, examining candidates in civil law.<sup>24</sup> In 1731 he was nominated as an advocate for the poor, and the following year he was appointed to a committee to review the new catalogue for the Advocates Library.<sup>25</sup>

As an advocate, Erskine was a member of the small pool from which law professors at Edinburgh University were drawn, for at that time, as for many years to come, Edinburgh law chairs were practically in the gift of the Faculty of Advocates. Almost from the first, Erskine seems to have had an eye

<sup>15</sup> Sir Francis J Grant, *The Faculty of Advocates in Scotland 1532–1943* (1944); J M Pinkerton (ed), *The Minute Book of the Faculty of Advocates volume 2: 1713–1750* (Stair Society vol 32, 1980) 27. According to the minute book, Erskine was “publicly examined and found qualified” on 21 February 1719 – the date given on his printed *Disputatio Juridica* – but Grant gives the date of actual admission as 24 February.

<sup>16</sup> Finlay, *College of Justice* (n 1) 130–37. See also C Camie, *Experience and Enlightenment* (1983) 200–02.

<sup>17</sup> Finlay, *College of Justice* 9.

<sup>18</sup> Finlay, *College of Justice* 139 (table 6), 267–68.

<sup>19</sup> G Scott and F A Pottle (eds), *The Private Papers of James Boswell from Malahide Castle in the Collection of Lt-Colonel Ralph Heyward Isham* vol 15 (1932) 271, quoted in Finlay, *College of Justice* (n 1) 137.

<sup>20</sup> See e.g. Chambers, *Biographical Dictionary* (n 3) 259; Marshall (n 4) 173.

<sup>21</sup> Ramsay, *Scotland and Scotsmen* (n 1) 146.

<sup>22</sup> 1720, 1723 and 1728.

<sup>23</sup> 1724 and 1732.

<sup>24</sup> Pinkerton (ed), *Minute Book* (n 15) 31, 58, 76, 109. For the role of the examiners, see W M Gordon, “Introduction” to the reprint of volume 3 of Andrew McDouall (later Lord Bankton), *An Institute of the Laws of Scotland* (Stair Society vol 43, 1995) xvi–xviii.

<sup>25</sup> Pinkerton (ed), *Minute Book* (n 15) 127, 135.

on a university position. He may already have been a candidate for the new Chair of Scots Law at Edinburgh when it was established in 1722 but, if so, he was disappointed, the position going to Alexander Bayne.<sup>26</sup> Ten years' later he polled second-highest in a Faculty election for the Chair of Civil Law so that, as statute required,<sup>27</sup> his name was one of two transmitted to the Town Council of Edinburgh for the purposes of making a formal appointment. In a field of at least six candidates, Erskine scored a respectable 82 votes to the 119 votes recorded for the successful candidate, Thomas Dundas.<sup>28</sup> In 1737 Erskine's perseverance was finally rewarded. The Chair of Scots Law having been vacated by the death of Alexander Bayne, Erskine and James Balfour "were the two that had the majority of votes" of their peers.<sup>29</sup> Voting figures are not recorded in the Faculty minutes but Erskine, being named first, presumably had the higher total, and he was duly appointed by the Town Council.<sup>30</sup> If this was success only at the third attempt, it must be remembered that the influence of patrons was at least as important as academic merit and professional standing in determining the outcome of Faculty elections. At any rate, he had been appointed: and with that appointment there opened an important new chapter not only in Erskine's life but, as it turned out, in the history of private law in Scotland.

### Professor of Scots Law

Erskine was 42 when he took up the Chair of Scots Law at Edinburgh University and he was to hold the position for 27 years, until his resignation in 1765. Like his predecessor, Bayne, he based his lectures on Sir George

<sup>26</sup> R L Emerson, *Academic Patronage in the Scottish Enlightenment: Glasgow, Edinburgh and St Andrews Universities* (2008) 265.

<sup>27</sup> Edinburgh Beer Duties Act 1722 (9 Geo I c 14): "And to the end that these professions [i.e. chairs] may be in time coming always supplied with proper and qualified persons, be it enacted by the authority aforesaid, that when and so often as any vacancies shall happen in any of the said professions, that the Faculty of Advocates shall nominate and present two persons, whom they shall judge qualified for supplying such vacant profession, to the said Magistrates and Council; and that the said Magistrates and Council shall admit and appoint one of the two persons so nominated and presented to supply the vacancy".

<sup>28</sup> Pinkerton (ed), *Minute Book* (n 15) 137; Emerson, *Academic Patronage* (n 26) 263. As Cairns (n 4) notes, Thomas Dundas was a younger son of the prominent squadrone family of Dundas of Arniston.

<sup>29</sup> Pinkerton (ed), *Minute Book* (n 15) 164.

<sup>30</sup> The tradition that Balfour "had no desire for the appointment" (see e.g. Chambers, *Biographical Dictionary* (n 3) 259; Sir Alexander Grant, *The Story of the University of Edinburgh during its First Three Hundred Years* (1884) vol II, 372) is untrue, and may reflect the practice which had grown up by the beginning of the next century when one of the names on the leet of two was "always a person whose official rank is understood to exclude him from the situation of an actual candidate": see *Edinburgh Annual Register* February 1822, 228. In fact, Balfour canvassed hard, seeking the aid of Sir John Clerk among others: see Emerson, *Academic Patronage* (n 26) 265.

Mackenzie's *Institutions of the Law of Scotland*,<sup>31</sup> a work first published in 1684 but which had been reissued in a series of new editions, the most recent being in 1730. The student notes of Erskine's lectures which survive<sup>32</sup> suggest that his method was to read out a section of Mackenzie's brief and unadorned account and to offer a reflective commentary.<sup>33</sup> In time this method must have begun to seem unsatisfactory, for in 1754 Erskine published a book of his own, *The Principles of the Law of Scotland in the Order of Sir George Mackenzie's Institutions of that Law*. As the title suggests, Erskine was careful not to disturb his students' expectations by innovating on Mackenzie's order of treatment.<sup>34</sup> But the book was much longer than Mackenzie's work and was seen, as was no doubt intended,<sup>35</sup> as a replacement for it as well as being a suitable text for private study.<sup>36</sup> One reason for the book's timing may have been the new requirement of the Faculty of Advocates, from 1750 onwards, that intrants be examined in Scots law as well as in civil law.<sup>37</sup> Erskine indeed was appointed as one of the first examiners.<sup>38</sup>

The *Principles* was an immediate and enduring success, with a second edition following in 1757 and a third – the last for which Erskine was responsible – in 1764. Once established as the favoured student text, it

<sup>31</sup> The *Scots Magazine* for August 1741 gives at p 371 "A short account of the University of Edinburgh, the present Professors, and the several parts of Learning taught by them". Of Erskine it is noted that he "uses for a text Sir George Mackenzie's *Institutions*", adding that "His college begins about the first of November".

<sup>32</sup> A number of copies survive, in the National Library of Scotland (NLS 3862 (1741)), the Signet Library (MS 106:38 (1741)), the Advocates Library (Adv MS 25.3.7), Glasgow University Library (MS Murray 76 (1740–1)), and Edinburgh University Library (Dc.8.131 (1756); this contains two sets of notes, perhaps in the same hand, the first of which clearly pre-dates the publication of the *Principles*). Erskine's manuscript of his lectures is not known to have survived. See also D B S(mith), "Mr Erskine's lectures" 1962 SLT (News) 74.

<sup>33</sup> The notes are set out according to the internal organisation (book, title, section) of Mackenzie, and some sections are passed over without commentary. Erskine also updates or corrects Mackenzie ("our author"), as for example when, under I.6.6, he notes the repeal of the statute mentioned by Mackenzie by which the parties to a clandestine marriage lost their *jus mariti* and *jus relictii*.

<sup>34</sup> Indeed, at least for a time, he continued to follow Mackenzie's precise order, section by section, even although in the *Principles* the order of the sections had sometimes been altered. See the notes from 1756 (n 32). As no later notes appear to have survived, it is not known whether in later years he adopted the order of the *Principles*. The 1756 notes, however, are no longer a commentary on Mackenzie but offer a full and uninterrupted treatment of each topic.

<sup>35</sup> See the "Advertisement" to the first edition which, having explained that Mackenzie was both too brief and out of date, states that "the following sheets are designed to supply these defects".

<sup>36</sup> Erskine's predecessor in the Chair, Alexander Bayne, had been content to bring out a new edition of Mackenzie, in 1730, although this was supplemented by the publication in the following year of his *Notes for the Use of the Students of the Municipal Law*. For the use of Erskine's *Principles* by James Boswell for private study, see xviii–xix below.

<sup>37</sup> Pinkerton (ed), *Minute Book* (n 15) 239–40.

<sup>38</sup> A Stewart (ed), *The Minute Book of the Faculty of Advocates volume 3: 1751–1783* (Stair Society vol 46, 1999) 2–3.

proved almost impossible to dislodge, surviving the qualified criticism of one prominent successor in the Scots Law Chair, David Hume,<sup>39</sup> and the production of a rival text with the same title by another, George Joseph Bell.<sup>40</sup> By 1820 there had been eleven editions of the *Principles*, by the end of that century a further eight.<sup>41</sup> It was only with the publication after the First World War of Gloag and Henderson's *Introduction to the Law of Scotland*<sup>42</sup> that this remarkable survival story came to an end.<sup>43</sup> For present purposes, however, the importance of the *Principles* lies, not in its success as a student text, but in its relationship to the much longer work on which Erskine was soon to embark; for out of "Little Erskine" there came in due course "Big Erskine", the *Institute of the Law of Scotland*.

It is possible to draw some parallels between the career of Erskine and that of his near-contemporary,<sup>44</sup> William Blackstone, who taught English law at Oxford from 1753 to 1766.<sup>45</sup> Both were pioneering professors of national private law, Blackstone the first in England,<sup>46</sup> Erskine only the third in Scotland.<sup>47</sup> Both produced a textbook for their students,<sup>48</sup> and both used that book as the basis for a much longer, "institutional" work – in the case of

<sup>39</sup> Baron David Hume, *Lectures 1786–1822* vol 1 (ed G C H Paton; Stair Society vol 5, 1939) 8–9.

<sup>40</sup> The first edition of Bell's *Principles of the Law of Scotland* was published in 1829. The fourth edition of 1839, the last for which Bell was responsible, was reprinted as volume 1 of the present series. Originally conceived as a student text, Bell's *Principles* soon became a larger, "institutional" work: see K G C Reid, "From text-book to book of authority: the *Principles* of George Joseph Bell" (2011) 15 EdinLR 6. It seems to have retained its status as the student textbook at Edinburgh until 1865, when the new Professor of Scots Law, Norman Macpherson, reverted to Erskine's work: see John Erskine of Carnock, *Principles of the Law of Scotland* (14th edn, by W Guthrie, 1870) iv.

<sup>41</sup> The Syllabus of Lectures in Scots Law at Edinburgh University for 1884–85 stated that: "The Lectures have special reference to the writings of Mr Erskine, and students are strongly recommended to make themselves familiar either with his *Principles* ... or his *Institutes*": see J P Coldstream, *The Development of the Teaching of Law in the University of Edinburgh* (1884) 9.

<sup>42</sup> W M Gloag and R C Henderson, *Introduction to the Law of Scotland* (1927). The preface explains that the choice lay between a new edition of Erskine's *Principles* or a new book. Gloag was Regius Professor of Law at Glasgow University, and Henderson one of Erskine's successors as Professor of Scots Law at Edinburgh University.

<sup>43</sup> The last edition was the 21st of 1911. The editor of that (as of the previous three) editions was Sir John Rankine, one of Erskine's successors in the Chair of Scots Law at Edinburgh University.

<sup>44</sup> Blackstone lived from 1723 to 1780.

<sup>45</sup> For Blackstone, see most recently W Prest, *William Blackstone: Law and Letters in the Eighteenth Century* (2008).

<sup>46</sup> As the first Vinerian Professor of English Law, from 1758 to 1766.

<sup>47</sup> After Erskine's predecessor in the Scots Law Chair at Edinburgh, Alexander Bayne, and William Forbes who, as the first holder of the Regius Chair of Civil Law at Glasgow University from 1714, also taught Scots law.

<sup>48</sup> Blackstone's 200-page *An Analysis of the Laws of England* was published in 1756, just two years after Erskine's *Principles*.

Blackstone his *Commentaries on the Laws of England* which was published between 1765 and 1769,<sup>49</sup> anticipating by only a few years the posthumous publication of Erskine's *Institute*.<sup>50</sup> In other respects, however, their paths were very different. Blackstone was a university politician who became a national politician; a law teacher who practised at the bar and finished up on the bench.<sup>51</sup> Erskine, by contrast, preferred the tranquillity of the university and his country estate to any engagement in the public sphere.<sup>52</sup> He was not, however, idle. Such records as survive suggest an active role in the management of Cardross Estate with a constant round of new tacks,<sup>53</sup> improvements, worries about mills and coalmines,<sup>54</sup> and the occasional lawsuit, "disagreeable and expensive",<sup>55</sup> not to mention extended visits to neighbouring landowners.<sup>56</sup>

Whether Erskine continued to practise at the bar after 1737, as his university position would have permitted, is unclear. It has been said that the *Institute* "partakes somewhat of the academical seclusion in which it was written, and indicates occasionally that the author was not familiar with the every-day practice of the law".<sup>57</sup> Possibly Erskine did maintain some practice in the early years, because the Note of Abbreviations to his *Principles* records that: "As for the decisions after 1719, which are neither to be found in any printed collection, nor in the law dictionary, some few prior to Nov. 1744 were observed by the author".<sup>58</sup> But even if Erskine avoided every-day

<sup>49</sup> For the "institutional" nature of Blackstone's *Commentaries*, see J W Cairns, "Blackstone, an English institutist: legal literature and the rise of the nation state" (1984) 4 OJLS 318.

<sup>50</sup> For a brief comparison of the two works which is strongly unfavourable to Erskine's, see an unattributed review of the second edition of Erskine: [1785] *The Political Herald and Review, or a Survey of Domestic and Foreign Politics, and a Critical Account of Political and Historical Publications* 444.

<sup>51</sup> Like Erskine, however, Blackstone was not particularly well-equipped for success at the bar or in public life, as he was lacking both in physical grace and fluency of speech: see Prest, *William Blackstone* (n 45) 161.

<sup>52</sup> Ramsay, *Scotland and Scotsmen* (n 1) 149.

<sup>53</sup> NRS GD15/358–64.

<sup>54</sup> A major concern for several years in the early 1750s was the loss of water power for Cardross Mill following the construction of a new dam on the Lake of Menteith by the Duke of Montrose. Some of the correspondence is preserved at NRS GD15/832.

<sup>55</sup> Letter by Erskine to Mr Coventry, 10 September 1753, NRS GD15/832. So for example in 1754 Erskine raised an action of the division of the commony of Flanders Moss: see NRS GD15/213. Little progress was made and it was not until after his death that the matter was revived by his sons, David and James, who argued that, far from being a commony, the Moss was actually part of Cardross Estate. In 1760 Erskine initiated an action against Thomas, Lord Erskine in respect of the lordship of Cardross: see NRS GD124/1/1046. For a later litigation, see n 62.

<sup>56</sup> Letter dated 24 November 1762 to Lord Cardross (Edinburgh University Library, MS La II.238; I am grateful to John Cairns for making a copy available to me).

<sup>57</sup> Chambers, *Biographical Dictionary* (n 3) 259–60.

<sup>58</sup> *Principles of the Law of Scotland* (3rd edn, 1764) vi.



practice thereafter, as seems likely, he appears to have remained available for consultation.<sup>59</sup>

Erskine resigned his Chair in 1765, citing his “uncertain state of health which will no longer allow me to discharge” its duties.<sup>60</sup> He was almost 70 and would only have three more years to live. The minutes of the Faculty of Advocates record that on 14 November he was waited on by two representatives of the Faculty, who “signified to him the just Sense the Faculty have of the good and able Services he has done to Society in general and in particular to the Members of their Body for some many years in the Discharge of the Duties of his Office and returned him the sincere Thanks of the Dean and Faculty upon that account”. In return, “Mr Erskine expressed the great Sense he had of the Honour the Dean and Faculty had done him and requested Mr David Dalrymple and Mr Patrick Murray to return his most respectful Compls. to the Dean and Faculty on that account”.<sup>61</sup> And with that dignified exchange of greetings, Erskine’s name disappears forever from the Faculty minutes.

### **The writing and publication of the *Institute***

In retirement at Cardross, Erskine worked to complete the manuscript of the *Institute*. But as he was by then an old man, in poor health, and with the usual responsibilities of a country gentleman and head of a large family,<sup>62</sup> it seems that much of the book must already have been written. In the third edition of his *Principles*, which appeared in 1764, Erskine explained that “the Author has carefully compared all the decisions quoted ... with the originals; and he flatters himself, that they shall be found apposite to the points which they are brought to prove” and that “He has in a few places, where he was sensible of more material errors, retracted his opinion”,<sup>63</sup> and it seems a reasonable surmise that this new research was directed mainly at the writing of the *Institute*.

<sup>59</sup> Ramsay, *Scotland and Scotsmen* (n 1) 146–47. In 1747–48 Erskine acted as arbiter to settle the marches between two of his neighbours, the Duke of Montrose and William Graham of Gartur: see NRS GD220/1/K/8/3/10.

<sup>60</sup> Resignation and Surrender of the Office of Professor of Scots Law, 13 Nov 1765, Edinburgh City Archives, McLeod’s Collection, bundle 9, shelf 36, bay C. John Cairns kindly made available to me a copy of this document.

<sup>61</sup> Stewart (ed), *Minute Book* (n 38) 150–51.

<sup>62</sup> At this time one of Erskine’s preoccupations was a complicated litigation concerning his servitude rights to dams and aqueducts on Culross Moor in which the defenders were the Trustees of the deceased Charles Cochran of Culross. An interlocutor of 2 March 1765, which upheld Erskine’s right to the benefit of four dams (only), satisfied neither party and led to further proceedings in which Erskine claimed a right to other dams, and the Trustees, resisting that claim, sought to restrict the area from which materials for repair of the dams might be taken.

<sup>63</sup> Advertisement to the 3rd edition (1764).



Ramsay provides a touching picture of Erskine at work in his final years:<sup>64</sup>

The preparing this work for the press was his chief amusement and occupation after resigning his class and retiring to the country. Nor did he desist from his task when almost worn to a shadow, and his dissolution appeared to be at no great distance. While sitting at table, or playing at cards, at which he was very keen, he would get up and retire to his study, to set down some fact or reflection that struck him at the moment.

When Erskine died, on 1 March 1768,<sup>65</sup> the manuscript was still not in its final form and it was to be a further five years before the work was published. Meanwhile a fourth edition of the *Principles* had appeared, in 1769, based entirely on amendments to “the author’s copy of the third edition, as corrected by his own hand”<sup>66</sup>

If the preface (“Advertisement”) to the *Institute* is to be believed, the editor did no more than correct some inaccuracies of language although, following the practice adopted by Erskine himself for the first edition of the *Principles*,<sup>67</sup> he also submitted the manuscript “to the perusal of several gentlemen of the law, of singular knowledge and abilities in their profession, upon whose judgement he could rely”. One of these was Robert Macqueen, the future Lord Braxfield.<sup>68</sup> The only changes made as a result of these consultations seems to have been the addition of some asterisked footnotes taking note of later cases, and indeed the Advertisement is explicit that, linguistic corrections aside, “no other alteration has been ventured on, though in some particulars the course of decisions has run contrary to the opinion laid down by the Author”. The limited role of the editor may be borne out by the fact that he is not named. Walker goes so far as to say that his identity is unknown,<sup>69</sup> but the handwritten inscription on the copy of the *Institute* reproduced in this volume – “The Society of Clerks to the Signet, Presented by Mr David Erskine, the Editor” – indicates that the editor was Erskine’s fourth son, David, a Writer to the Signet,<sup>70</sup> a view which

<sup>64</sup> Ramsay, *Scotland and Scotsmen* (n 1) 148.

<sup>65</sup> *Scots Magazine* (1768) 111.

<sup>66</sup> Advertisement to the 4th edition.

<sup>67</sup> The Advertisement to the 1st edition of the *Principles* states: “Sensible of the difficulty of composing a treatise of this kind, where every word requires accuracy and precision, I subjected my Essay, after having employed my utmost skill upon it, to several Gentlemen distinguished by their knowledge of the law: to whom I embrace this public opportunity of offering my sincere acknowledgements, for the trouble they have taken in revising it, and for their judicious remarks and just amendments”.

<sup>68</sup> J W Reed and F A Pottle (eds), *Boswell: Laird of Auchinleck 1778–1782* (1993) 240. I owe this reference to Dan Carr.

<sup>69</sup> Walker, *Scottish Jurists* (n 4) 209.

<sup>70</sup> On David Erskine, see Jasmin Hepburn, *A Lawyer and His Clients: David Erskine and the Stirlings of Keir* (LLM thesis, University of Edinburgh, 2011); also *Register of the Society of Writers to Her Majesty’s Signet* (1983) 100. He died at Naples on 5 April 1791.

receives independent confirmation from Ramsay.<sup>71</sup> Judging by his regular appearances in Boswell's *Journal*, David was a much more sociable figure than his apparently austere father.<sup>72</sup>

Why did Erskine leave completion of his manuscript until so late in the day? There is no reason to doubt Bell's view that "it had been his intention for some time to publish his lectures".<sup>73</sup> And had Erskine so wished, he would have had ample opportunity to write and publish the *Institute* during his long tenure as Professor of Scots Law. As it was, he ran the risk – of which he can hardly have been unaware – that illness or death might prevent the work from ever being finished. A possible explanation is the unexpected publication, half-way through Erskine's years as Professor, of a rival work, the compendious *Institute of the Laws of Scotland* published in three volumes between 1751 and 1753. Unnamed in the first volume, the author was revealed in later volumes to be another advocate, Andrew McDouall, whose subsequent elevation to the bench as Lord Bankton was in part an acknowledgment of the book's initial success.<sup>74</sup> The publication of so substantial an account of the law may have left little room in the small Scottish market<sup>75</sup> for a second such work, as yet another advocate, George Wallace, discovered to his cost when volume I of his *System of the Principles of the Law of Scotland* was published in 1760 and sold, it is said, only 40 copies.<sup>76</sup> No further volume by Wallace was ever to appear, and with Bankton's death in 1760, without completing the second edition on which he had apparently been working,<sup>77</sup> the way was open for a new and comprehensive account of the law of the kind which Erskine had in contemplation.

### Reception and subsequent editions

The publication of the *Institute* in 1773 was an event of some importance. James Boswell who, as a law student in Utrecht ten years before, had made

<sup>71</sup> Ramsay, *Scotland and Scotsmen* (n 1) 148.

<sup>72</sup> On Monday 5 August 1776, for example, Boswell dined with David Erskine and both became "very drunk". See further C Ryskamp and F A Pottle (eds), *Boswell: the Ominous Years 1774–1776* (1963) 165; C McC Weis and F A Pottle (eds), *Boswell in Extremes 1776–1778* (1971) 18–19, 21, 132, 134; Reed and Pottle (eds), *Laird of Auchinleck* (n 68) 154, 161, 178, 181, 199, 207, 209, 264, 274, 279, 284, 414, 443; I S Lustig and F A Pottle (eds), *Boswell: The Applause of the Jury 1782–1785* (1981) 58.

<sup>73</sup> This quotation is taken from student *Notes on The Law of Scotland from the Lectures of Mr Bell, Edinburgh College, 1822–23* (Edinburgh University Library) 15.

<sup>74</sup> A R C Simpson, "Learning, honour and patronage: the career of Andrew McDouall, Lord Bankton 1746–60", in H L MacQueen (ed), *Miscellany Six* (Stair Society vol 54, 2009) 121, 133 ff.

<sup>75</sup> A couple of decades earlier, another substantial work, William Forbes' *Great Body of the Law*, had failed to be published, although the reasons are not clear. The manuscript of the *Great Body*, held in Glasgow University Library, has now been digitised and is available at <http://www.forbes.gla.ac.uk/contents/>.

<sup>76</sup> Walker, *Scottish Jurists* (n 4) 305.

<sup>77</sup> Simpson (n 74) 159.

a special study of the *Principles* and even embarked on a Latin translation,<sup>78</sup> met regularly with a fellow advocate to read the new work through. Characteristically, there were diversions along the way. “After we had read a portion”, he noted in his *Journal* for 19 August 1774, “we fell to some of my Justiciary records, which took us up an hour, they were so interesting”.<sup>79</sup> Nonetheless by 16 September the course was “completed”, although it may be doubted whether the whole work had been read.<sup>80</sup> An altogether more severe programme of study was undertaken by the Juridical Society of Edinburgh, founded in 1773 by twelve Writers to the Signet with the newly-published *Institute* particularly in mind. Beginning with Title 1 of Book II, members were to take turns to “prelect” in writing on a portion of the *Institute*. Book II was followed by Book I, although with some defaulters, and it was only when, after five arduous years, Book III had been almost completed that the project was finally abandoned. Even so, there continued to be readings from the *Institute*, followed by discussion, until as late as 1782.<sup>81</sup>

As well as a foundation for private study, the *Institute* began to be used almost at once in advocates’ pleadings.<sup>82</sup> Soon it was being cited as often as Stair’s *Institutions*, and by the end of the century Stair was in danger of being supplanted by a work which was not only more up-to-date but also much easier to read and understand.<sup>83</sup>

The popularity of the *Institute* can be seen in the steady flow of new editions, at roughly ten-year intervals.<sup>84</sup> Thus the first edition of 1773,

<sup>78</sup> F A Pottle (ed), *Boswell in Holland 1763–1764* (1952) 21, 31, 37, 43, 192, 208, 210, 212, 216, 222, 239 (on the translation project), 241. The *Principles* had been sent to Boswell by his father, Lord Auchinleck, who thought the work “well composed” (63). A letter to Boswell from the co-pastor of the English Church at The Hague, Archibald Maclaine, warned him that his “sprightly, brilliant, amiable temperament is quite incompatible with the long arduous task of translating Erskine”: see M S Pottle et al, *Catalogue of the Papers of James Boswell at Yale University* (1993) vol II, 776 [C1825]. Although Boswell declared on 16 May 1764 that he had “already begun” the translation (239), nothing has survived and it seems likely that he did not get very far.

<sup>79</sup> W K Wimsatt, Jr and F A Pottle (eds), *Boswell for the Defence 1769–1774* (1960) 286; see also 291 and 294.

<sup>80</sup> Wimsatt and Pottle (eds), *Boswell for the Defence* 332.

<sup>81</sup> W Reid (ed), *History of the Juridical Society of Edinburgh* (1875) 1–4.

<sup>82</sup> See e.g. *Lord Frederick Campbell v Scott* 8 Dec 1773 FC (“Mr Erskine in his late *Institute*”); *Buchanan v Baird* 15 Dec 1773 FC; *Grahame v Stevenson’s Trs* 9 Feb 1774 FC; *Ann and Colhoun v Chessels* 4 March 1774 FC (referring both to Erskine’s “Lesser *Institute*” (i.e. the *Principles*) and his “Larger *Institute*”); *Watson v Gordon* 17 June 1774 FC; *Stewart v McKean* 6 Aug 1774 FC.

<sup>83</sup> J W G Blackie, “Stair’s later reputation as a jurist”, in D M Walker (ed), *Stair Tercentenary Studies* (Stair Society vol 33, 1981) 207, 213–14.

<sup>84</sup> By contrast, more than 60 years had passed between the last edition of the *Institutions* prepared by Stair (1693) and the first edition by a different hand (the 3rd edition of 1759). No new edition of Bankton’s *Institute* ever appeared.

reproduced in this volume, was followed by a second in 1785<sup>85</sup> by Alexander Fraser Tytler, Professor of Universal History at Edinburgh and the future Lord Woodhouselee, who added the marginal headings familiar to all later editions as well as noting new cases by way of footnotes.<sup>86</sup> There was a third edition in 1793 and a fourth, by Joseph Gillon, in 1805.<sup>87</sup> That edition, sold out by 1811,<sup>88</sup> was reprinted twice in 1812<sup>89</sup> with some minor additions by William Maxwell Morison, most notably the citation of cases by reference to his new *Dictionary of decisions*. By the end of the decade, copies were already said to be “scarce”,<sup>90</sup> but readers had to wait until 1824 and 1828 for the two volumes of the next edition, by James Ivory, an academically-inclined advocate and future judge.<sup>91</sup>

Although Ivory’s extensive notes on the text were much admired,<sup>92</sup> they were largely discarded in the edition prepared in 1838 by a less scholarly successor, Alexander Macallan.<sup>93</sup> In what was intended as a cheaper, “popular” edition, Macallan replaced all previous editorial notes with new and more concise notes of his own, intending “not only to invest the notes ... with the character of a commentary on Erskine’s work, but to render them a proper continuation of it to the present time”.<sup>94</sup> As with all previous editions, the text itself was left untouched. Whether through immodesty or commercial acumen, there is bound in with the first volume of Macallan’s edition some newspaper reviews so similar and so flattering as to suggest that they might have originated with the editor or publisher. “In place of

<sup>85</sup> Walker, *Scottish Jurists* (n 4) 209, perhaps relying on the date of the preface (12 November 1784), gives the year of publication as 1784. In fact it was published on 7 March 1785, as appears from an advertisement on the front page of the *Caledonian Mercury* for that day.

<sup>86</sup> On Tytler see Alexander du Toit, “Tytler, Alexander Fraser, Lord Woodhouselee (1747–1813)”, *Oxford Dictionary of National Biography* (2004).

<sup>87</sup> Gillon may also have been responsible for the third edition; no editor is named.

<sup>88</sup> Preface dated 12 Nov 1811 to the revised reprint by William Maxwell Morison.

<sup>89</sup> As James Ivory notes in the preface to his edition of 1824–28.

<sup>90</sup> W & C Tait, *Index to the Decisions of the Court of Session contained in all the original collections and in Mr Morison’s Dictionary of Decisions* (1823) 540. This is part of a two-page price list for “Scottish & English Law Books sold by W & C Tait, 78, Princes Street, for ready money only”. The price for Erskine’s *Institute* is £3/3/-, as compared to a mere 12 shillings for the *Principles*. By contrast, both Stair’s *Institutions* and Bankton’s *Institute* are unpriced and so presumably hardly obtainable.

<sup>91</sup> See A H Millar, “Ivory, James, Lord Ivory (1792–1866)”, rev Nathan Wells, *Oxford Dictionary of National Biography* (2004).

<sup>92</sup> The most recent use of Ivory’s notes in case law appears to be *Fortington v Lord Kinnaird* 1942 SC 239 at 265 per Lord Justice-Clerk Cooper. For earlier citations, see e.g. *Bell v Andrews* (1885) 12 R 961 at 964 per Lord Mure.

<sup>93</sup> Macallan was the author of an elementary book, *Pocket Lawyer; or Digest of the Law of Scotland, Mercantile Law of Great Britain, and Forms regulating the Law of Scotland*, which went into four editions between 1830 and 1854.

<sup>94</sup> Preface vii–viii.

the two lumbering and costly *folio* volumes in which Erskine's labours were formerly dressed, at the serious price of *five guineas*", wrote *The Scotsman*, "we have now an opportunity of making ourselves master of two portable and handsome printed royal 8vo's, for 28s". This "miracle of cheapness and typographical excellence",<sup>95</sup> other newspapers added, replaced the "repulsive and unwieldy form"<sup>96</sup> – "the cumbrous and now justly exploded folio size"<sup>97</sup> – of previous editions. The editing, too, was commended; for instead of being "harassed with reprints of obsolete opinions, conveyed in lengthened and useless notes, the reader is here presented with brief and comprehensive summaries, exhibiting in the clearest manner the modern law of Scotland as settled by the most recent decisions of our Supreme Court and the House of Lords".<sup>98</sup> In summary, the new edition put the work within the reach, not merely of "the wealthier members of the legal profession"<sup>99</sup> but of "the merchant and the mechanic, as well as the country gentleman and justice of the peace", thus preventing "much practical mischief in the every-day business and transactions of life".<sup>100</sup>

By the time of Macallan's edition, some sixty years after the first, the reputation of the *Institute* had never stood higher. It was, George Joseph Bell told his students in the 1820s, "the most useful book which the Student can possess",<sup>101</sup> a work "admirable for its clearness of principle, and sound sense" which "has become the one of all others most quoted".<sup>102</sup> And if the frequent use of Latin was beginning to present an obstacle to some readers,<sup>103</sup> this was remedied by the publication in 1820, with a second edition in 1827, of a translation of every Latin phrase "according to the idiom of the text".<sup>104</sup> The author was Peter Halkerston, who was also

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<sup>95</sup> *Edinburgh Evening Post*.

<sup>96</sup> *Caledonian Mercury*. *The Fife Herald* has "repulsive and costly form", one of a number of examples of similarity of language and tone.

<sup>97</sup> *The Patriot*.

<sup>98</sup> *The Fife Herald*.

<sup>99</sup> *Fifeshire Journal*.

<sup>100</sup> *Caledonian Mercury*.

<sup>101</sup> [George Joseph Bell], *Outline of Lectures on the Law of Scotland; for the use of students in the University of Edinburgh* (1827) iii.

<sup>102</sup> *Notes on The Law of Scotland* (n 73) 15–16.

<sup>103</sup> Rather later, in 1859, an anonymous writer calling for improvements in legal education offered the optimistic thought that, "We expect to see the time when every Scottish lawyer may be able to translate the Latin phrases in 'Erskine's Institute': see (1859) 3 J of Jurisprudence 443, 449.

<sup>104</sup> P Halkerston, *Translation and Explanation of the Principal Technical Terms and Phrases used in Mr Erskine's Institute of the Law of Scotland in the order of the Books, Titles, and Sections; with a copious Index Materialium* (2nd edn, 1829). In the preface Halkerston was careful to emphasise that "he never supposed that those who professionally perused that work could not translate these terms and phrases for themselves"; his book was offering something more than mere translation.

responsible for a number of other works, including *A Collection of Latin Maxims and Rules*.<sup>105</sup> Halkerston's useful book, more needed today than ever before, is reproduced as part of this volume.

In addition to its dominant position in Scotland, the *Institute*, like a handful of other Scottish works,<sup>106</sup> had some usage in the United States of America, particularly in the first half of the nineteenth century. A modern study found around seventy citations of the *Institute* in American case law in the nineteenth century,<sup>107</sup> and there are a number of references in textbooks and periodical literature.<sup>108</sup>

The success of the *Institute* can be explained in a number of ways. One, of course, was the reliability, clarity and sheer quality of a text which was also "quite adapted to practice".<sup>109</sup> Another was its ready navigability, for the *Institute* was organised in precisely the same way as the *Principles*, familiar to lawyers from their student days. But there was also an element of good fortune. No new treatise covering the whole of Scots law was written in the first 60 years after 1773 and so there was no challenge from a competing work.<sup>110</sup> If Erskine's *Institute* had been published twenty years before Bankton's *Institute* instead of twenty years after, it might have been Bankton's work and not Erskine's which ran to multiple editions.

In due course the good fortune, if that was what it was, began to run out. Beginning early in the nineteenth century, a first wave of textbooks started to appear on subjects such as bankruptcy, leases, bills of exchange, partnership,

<sup>105</sup> P Halkerston, *A Collection of Latin Maxims & Rules, in Law and Equity: selected from the most eminent authors, on the civil, canon, feudal, English and Scots law; with an English translation, and an appendix of reference to the authorities from which the maxims are selected* (1823). For this work and some details of Halkerston's life, see R G Anderson, "Introduction" to George Watson (ed), *Bell's Dictionary and Digest of the Law of Scotland* (7th edn, 1890; repr Old Studies in Scots Law vol 2, 2012) xiv–xvii. Further biographical information can be found in J Finlay, *Admission Register of Notaries Public in Scotland, 1700–1799* (Scottish Record Society, 2012) vol 2, 92.

<sup>106</sup> In particular the works of George Joseph Bell: see Reid (n 40) 29. For the use of works by Kames, see D J Carr, "Introduction" to Lord Kames, *Principles of Equity* (3rd edn, 1778; repr Old Studies in Scots Law vol 4, 2013) xxxix–xliv.

<sup>107</sup> R H Helmholz, "Scots law in the New World: its place in the formative era of American law", in H L MacQueen (ed), *Miscellany Five* (Stair Society vol 52, 2006) 169, 178.

<sup>108</sup> For example: W W Story, *A Treatise on the Law of Contracts not under Seal* (2nd edn, 1847) 37; J Bouvier, *Institutes of American Law* vol 1 (1854) 394, 410, 420, 448; E Washburn, *A Treatise on the American Law of Real Property* vol 1 (1860) 128. The *Institute* was cited, indeed quoted, as late as 1915 in Roscoe Pound's celebrated article on "Interests of Personality": see (1915) 28 *Harvard Law Rev* 343, 352–53; but Erskine is described only as "an eighteenth-century writer".

<sup>109</sup> Anon, "Cultivation and progress of law in Scotland" (1851) 14 *Law Review and Quarterly Journal of British and Foreign Jurisprudence* 241, 254.

<sup>110</sup> Of course it might be argued that one reason why no rival work appeared was that Erskine's was so firmly established.

trusts, and succession.<sup>111</sup> But the more serious rival was another general work, the *Principles of the Law of Scotland* by George Joseph Bell, one of Erskine's successors in the Chair of Scots Law at Edinburgh and a jurist of the first rank. Conceived on first publication, in 1829, as a work for students, the *Principles* was developed and expanded during the 1830s into a form suitable for practitioners; and while it was not ultimately to supplant Erskine's *Principles* as a student text,<sup>112</sup> it presented a serious challenge to the position of the *Institute*. By the end of the decade there had been four editions; after Bell's death, in 1843, the work was greatly expanded by William Guthrie in further editions which appeared regularly for the remainder of the century.<sup>113</sup> By comparison with Erskine's *Institute*, Bell's *Principles* was more "modern" in style, organisation and content, and it gave greater prominence to the issues of commercial law which had become so important in newly industrialised Scotland. In a competition between them it was hardly surprising that Bell's work should in the end be the victor.

After Macallan's "popular" edition of the *Institute* in 1838, no further edition was published until 1871. Badenoch Nicholson's edition of that year abandoned Macallan's notes – which he tactfully described as "very excellent" – and restored those of Ivory as well as some of the notes of earlier editors.<sup>114</sup> It was to be the last.<sup>115</sup> And when it was reprinted in 1989<sup>116</sup> it was as an authoritative exposition of general principle and not as an account of the living law.

### Structure

As its name suggests, the *Institute* was intended to be an "institutional" work as that term was then understood, that is to say, a work which set out the

<sup>111</sup> Of these the most important and enduring was George Joseph Bell's masterly *Commentaries on the Law of Scotland and on the Principles of Mercantile Jurisprudence* which first appeared in 1800–04 (under a different title) and went through seven editions, the last (by John McLaren) in 1870.

<sup>112</sup> See xiv above.

<sup>113</sup> The last edition, the 10th, was published in 1899. There were other general works too, most notably the lectures, posthumously issued, of John Schank More, Bell's immediate successor in the Scots Law Chair: see J S More, *Lectures on the Law of Scotland* (ed J McLaren, 1864).

<sup>114</sup> Prefatory Note vi. Although the title page says only that this was "a new edition" this is generally treated as the 8th edition on the basis, presumably, that Morison's modified reprints of 1812 can be treated as a distinct edition.

<sup>115</sup> The last edition of Erskine's *Institute* was published within a year of the 6th edition of Bell's *Principles*. Even as late as this, reviewers of each work thought Erskine remained the favourite of the practising profession. See an unsigned review of Erskine's *Institute* (1871) 15 J of Jurisprudence 512, 517 ("the institutional writer who has held his ground best against all comers"); review of Bell's *Principles* (1872) 1 Law Magazine and Review 165, 166 ("Measured by the respect in which he is held by the profession, no author in our legal literature is greater than Erskine").

<sup>116</sup> By the Law Society of Scotland and Butterworths.



law in a comprehensive and systematic way after the pattern of Justinian's *Institutes*.<sup>117</sup> In structure the work was modelled on Mackenzie's *Institutions*, a borrowing which (as earlier with the *Principles*) was deemed a sufficiently strong selling-point for it to be paraded, rather clumsily, in the title: *An Institute of the Law of Scotland In Four Books In the Order of Sir George Mackenzie's Institutions of that Law*.<sup>118</sup> Mackenzie's order of treatment was, in turn, a rough copy of the order followed in Justinian's *Institutes*, but with succession moved from Book II to Book III, and delict from Book IV to Book III.<sup>119</sup>

Erskine, in both of his works, follows Mackenzie's structure "precisely", title for title.<sup>120</sup> "The objects of the law", Erskine writes near the start of the *Institute*, "or the matters of which it treats, are three: *first*, Persons; *2dly*, Things, or rights which persons are capable of enjoying; *3dly*, Actions, by which the persons intitled to those rights make them effectual".<sup>121</sup> And from this traditional Roman trichotomy comes the four-book structure used by Mackenzie and then by Erskine: Book I for Persons but, as in Justinian's *Institute*, preceded by a scene-setting account of laws in general;<sup>122</sup> Books II and III for Property, with a rough but not fully consistent division between heritable property (the subject of Book II) and moveable property (the subject of Book III);<sup>123</sup> and Book IV for Actions, but including a final section<sup>124</sup> of some 45 pages on criminal law and procedure. As with Justinian, those rights which are correlative to obligations – contractual rights in particular – are seen as part of Property and are the subject of the first part of Book III.<sup>125</sup> The other main topic covered in that book is the law of succession. As was standard with "institutional" works, in Scotland as elsewhere,<sup>126</sup> no special prominence is given to commercial law, although Bell, over-anxious perhaps to promote a work of his own, goes too far when he says in the preface to the second edition of his *Commentaries* that "there is very little to be found [in the *Institute*] concerning commercial

<sup>117</sup> J W Cairns, "Institutional writings in Scotland reconsidered" (1983) 4 J Leg Hist 76 esp at 76–81; A Watson, *Legal Transplants* (2nd edn, 1993) 38.

<sup>118</sup> It is not clear, however, whether the title is Erskine's or that of his editor son, David.

<sup>119</sup> P Birks and G McLeod, "Introduction", *Justinian's Institutes* (1987) 19–20.

<sup>120</sup> Erskine, *Institute* IV.4.1.

<sup>121</sup> Erskine, *Institute* I.2.1. *Principles* I.2.1, though terser, is to similar effect.

<sup>122</sup> I.1.1 and I.1.2.

<sup>123</sup> The main inconsistencies are that acquisition of moveable property is dealt with in title 1 of Book II, and positive prescription for heritable property and heritable succession in Book III, respectively in titles 7 and 8.

<sup>124</sup> IV.4.4.

<sup>125</sup> Erskine, *Institute* III.1.1: "Moveable rights fall now to be explained, the doctrine of which depends chiefly on obligations".

<sup>126</sup> Cairns (n 49) 353–54. As Cairns points out, Blackstone has sometimes been criticised for his neglect of commercial law.



law”.<sup>127</sup> In fact the *Institute* contains significant coverage of topics such as loan,<sup>128</sup> sale,<sup>129</sup> rights in security,<sup>130</sup> caution,<sup>131</sup> bills of exchange,<sup>132</sup> partnership,<sup>133</sup> and mandate,<sup>134</sup> while charter parties and insurance are treated in brief.<sup>135</sup> The discussion of diligence, both heritable and moveable, is particularly extensive.<sup>136</sup>

Whether the rapidly developing law of Erskine’s time was best accommodated within the confines of a four-book structure devised for a different system of law is a subject which can of course be debated. Later Baron Hume was to say that the order of treatment chosen by Erskine “has generally been accounted somewhat unfortunate”.<sup>137</sup> But as well as being serviceable enough in its own terms, it had the merit of being familiar to those who had already been schooled in the *Institutes* of Justinian. And by retaining for the *Institute* the structure already used for the *Principles*, Erskine ensured that those who had first learned Scots law from the smaller work would find the larger work easy to navigate.

### Relationship to the *Principles*

If Erskine had written the *Principles* after the *Institute*, it is likely that the first would have been little more than a summary of the second. So it was with William Forbes, whose *Institutes of the Law of Scotland* often seems no more than a collection of the opening sentences, section by section, of his much longer (but unpublished) *Great Body of the Law of Scotland*.<sup>138</sup> But with Erskine it was the shorter work which came first; and the *Institute*,

<sup>127</sup> George Joseph Bell, *Commentary on the Law of Scotland, and on the Principles of Mercantile Jurisprudence considered in relation to Bankruptcy; Competitions of Creditors, and Imprisonment for Debt* (2nd edn, 1810) vi. This passage, which does not appear in the first edition, is repeated in later editions. For uncritical repetition of this view, see Nicolson (n 5) vii–viii; Lord Cooper, *Selected Papers 1922–1954* (1957) 49; Walker, *Scottish Jurists* (n 4) 213. But compare Blackie (n 83) 225 (Bell’s views “to a great extent a puff”).

<sup>128</sup> Erskine, *Institute* III.1.18–25.

<sup>129</sup> Erskine, *Institute* III.3.2–12.

<sup>130</sup> Erskine, *Institute* II.8.1–30 (wadset); II.8.31–37 (annualrent); III.1.33 (pledge); III.34 (hypothec).

<sup>131</sup> Erskine, *Institute* III.3.61–74.

<sup>132</sup> Erskine, *Institute* III.2.25–38.

<sup>133</sup> Erskine, *Institute* III.3.18–29.

<sup>134</sup> Erskine, *Institute* III.3.31–46.

<sup>135</sup> Erskine, *Institute* III.3.17.

<sup>136</sup> Erskine, *Institute* II.11 (inhibition), II.12 (apprising and adjudication); III.6 (arrestment and pinding).

<sup>137</sup> Hume, *Lectures* vol I (n 39), 8–9.

<sup>138</sup> Forbes’ *Institutes* was reprinted in 2012 as volume 3 of the present series. At pp ii–iii of the preface to the first volume, on private law, and invoking the examples of Voet and Justinian, Forbes explains that the first volume of the *Great Body* now being “in some Measure finished”, “the first Volume of the *Relative Institute* doth now come forth to publick View”.

while following the structure of the *Principles*, offers a far richer and more developed account of the law.<sup>139</sup> Of course, from time to time a sentence passes from the *Principles* to the *Institute* unchanged. Yet this is relatively rare. The *Institute* is so much the longer of the two works – around 550,000 words to the 130,000 words of the *Principles* – that the ideas which it expresses can seldom be contained within the language of the earlier work. Of course both works must to some extent share a common source in Erskine's lectures to the class of Scots law.<sup>140</sup> But the much greater sophistication of treatment in the *Institute* is obvious at every turn. Two examples, chosen almost at random, must serve for the rest.

In Book I of the *Principles*, Erskine explains the nature of marriage in the following words:<sup>141</sup>

Marriage is truly a contract, and so requires the consent of parties. Idiots therefore, and furious persons cannot marry. As no person is presumed capable of consent within the years of pupillarity, which, by our law, lasts till the age of fourteen in males, and twelve in females, marriage cannot be contracted by pupils, *l. 3.C. quando tut. vel cur.*; but if the married pair shall cohabit after puberty, such acquiescence validates the marriage, *l. 4. de rit nupt.* Marriage is fully perfected by consent; which, without consummation, founds all conjugal right and duties. The consent required to marriage must be *de praesenti*. A promise of marriage, (*stipulatio sponsalitia*), tho' it was guarded by certain penalties in the Roman law, *l. 5. C. de spons.* may, by ours, be safely resiled from, as long as matters are entire; but if any thing be done by one of the parties, whereby prejudice arises from the non-performance, the party resiling is liable in damages to the other, *F. 2. Jan. 1685. Graeme*. The canonists, and after them our courts of justice, explain a *copula* subsequent to a promise of marriage, into actual marriage, *New Coll. 46.*

The equivalent passage in the *Institute*<sup>142</sup> opens with the same sentence, but the 195 words of the original are expanded into a discussion of more than four times that length. The rule that pupils cannot consent to marriage is contrasted with the position under Canon law where “a pupil may enter into marriage, where there is an ability to procreate or conceive”. This Erskine regards as thoroughly unsatisfactory, partly because it “draws after it an indecent *inspectio corporis*” and partly because of “first principles: for if the law declares a pupil incapable of entering into the most trifling contract,

<sup>139</sup> In editing the 14th edition of the *Principles* (1870), William Guthrie added references to the corresponding parts of the *Institute* and drew attention to significant discrepancies: see Preface v–vi.

<sup>140</sup> But of different periods. Of the lecture notes which survive (for which see n 32), the *Institute* bears a resemblance only to the set which dates from after the publication of the *Principles*; before then they were little more than a commentary on Mackenzie's *Institutions*. These notes contain some material which is in the *Institute* but not the *Principles* (e.g. I.6.1).

<sup>141</sup> Erskine, *Principles* I.6.2. All quotations are taken from the 3rd edition of 1764, the last to appear during Erskine's life.

<sup>142</sup> Erskine, *Institute* I.6.2–4.

from a defect of judgement, it surely ought not to suffer him to engage in an indissoluble society, the nature of which he cannot form the smallest notion of". Following a discussion of marriage contracts, Erskine proceeds to contrast the refusal of Scots law to enforce promises to marry with the position in Holland where, according to Brouwer,<sup>143</sup> promises can be enforced by imprisonment, the seizure of goods, and by a judicial declaration that the marriage is perfected. Even in Scotland, however, "a *copula* subsequent to such promise constitutes marriage, from a presumption or fiction, that the consent *de praesenti* which is essential to marriage, was at that moment mutually given by the parties, in consequence of the anterior promise". This presumption, Erskine admits, is artificial ("but slightly founded in nature"); nonetheless it is "abundantly recommended by its equity, and the just check which it gives to perfidy".

The second example comes from the very beginning of Book II. The opening lines in the *Principles*, while admirably succinct, lurch from topic to topic without any attempt at connection or explanation:<sup>144</sup>

The things or subjects to which persons have right, are the second object of law. The right of enjoying and disposing of a subject at one's pleasure, is called property. Where a subject belongs in common to two or more different persons, the right is called common property. Proprietors are restrained by law, from using their property emulously to their neighbour's prejudice: But wherever the lawful act of the proprietor tends to his own advantage, though it should prove detrimental to his neighbour, law allows him to use what is his own, at pleasure. Every state or sovereign has a power over private property, called by some lawyers, *dominium eminens*, in virtue of which, the proprietor may be compelled to sell his property for an adequate price, where an evident utility on the part of the public demands it.

In the corresponding passage in the *Institute*,<sup>145</sup> these staccato-like propositions are subjected to analysis and development, resulting in an interlocking account of many of the foundational principles of the law of property. As in the earlier example the passage is, at five times the length, very much longer than in the *Principles*. Erskine's starting point, entirely absent from the *Principles*, is with the idea of real rights ("all rights which affect any subject"), property<sup>146</sup> being "the sovereign or primary real right". To the rights which property confers – the rights of use and disposal – mentioned in the *Principles*, Erskine adds the limitation, "except in so far as we are restrained by law or paction" – an unacknowledged reference to Mackenzie<sup>147</sup> and to the broader *ius commune*

<sup>143</sup> Hendrik Brouwer, *De iure connubiorum* (1665).

<sup>144</sup> Erskine, *Principles* II.1.1.

<sup>145</sup> Erskine, *Institute* II.1.1–3.

<sup>146</sup> In the sense of ownership.

<sup>147</sup> Mackenzie, *Institutions* II.1.

tradition.<sup>148</sup> Property, says Erskine, is exclusive, so that “every incroachment ... founds the proprietor in an action of damages”. Further, property cannot be lost “without either the voluntary act, or the delinquency, or the negligence of the proprietor”. Of course, “If the proprietor has the power of disposing of his property, he must also have power of charging or burdening it with inferior real rights”. But while “the right of property may be in one person, while that of servitude, impignoration, or other inferior right in the subject, is vested in another”, “it be a rule founded in common sense, that two different persons cannot have, each of them, the full property of the same thing at the same time” – a principle which was to be unexpectedly fought over but eventually reasserted at the very end of the twentieth century.<sup>149</sup> Of the restrictions on property, Erskine repeats the two mentioned in the *Principles* – *aemulatio vicini* and *dominium eminens* – but gives further details. So for example a proprietor “may lawfully drain his swampy or marshy grounds, though the water thrown off from them by that improvement should happen to hurt the inferior tenement. But he must not make a greater collection of water than is necessary for that purpose; seeing such use would be merely *in aemulationem vicini*, without any profit arising to himself.” Finally, Erskine emphasises that such restrictions “are not designed to hurt property, but rather to secure and strengthen it, by inhibiting our licentiousness in the exercise of it”.

Depth and sophistication of treatment, then, are the main differences between the *Institute* and the *Principles*. The order of treatment, however, is the same, and only a small number of topics – most notably parent and child, and master and servant<sup>150</sup> – were added in preparing the *Institute*. The work finishes with a short appendix of conveyancing styles, followed by an account, part quotation and part summary, of two statutes passed after Erskine’s death and so not dealt with in the text.<sup>151</sup> The latter, of course, is the work of Erskine’s editor, but the former seems likely to have been prepared by Erskine himself.

### Sources

More than any previous work on Scots law, the *Institute* is copious in its citation of authority and so gives a particularly clear impression of the

<sup>148</sup> The definition originated with Bartolus in the 14th century and was much repeated by later jurists: see E J H Schrage, “Property from Bartolus to the New Dutch Civil Code”, in G E van Maanen and A J van der Walt (eds), *Property Law on the Threshold of the 21st Century* (1996) 43–46.

<sup>149</sup> *Sharp v Thomson* 1997 SC (HL) 66; *Burnett’s Tr v Grainger* [2004] UKHL 8, 2004 SC (HL) 19. For background see e.g. Scottish Law Commission, Report on *Sharp v Thomson* (Scot Law Com No 208, 2007).

<sup>150</sup> Respectively I.6.49 ff and I.7.60 ff. The law of master and servant makes a brief appearance in *Principles* I.7.38.

<sup>151</sup> Entail Improvement Act 1770 (10 Geo 3 c 51) and Bills of Exchange Act 1772 (12 Geo 3 c 72).

sources which were used. Although court decisions do not, Erskine writes, bind a future court especially “if it shall appear to them contrary to the law”, nonetheless they “are frequently the occasion of establishing usages, which, after they have gathered force by a sufficient length of time, must, from the tacit consent of the state, make part of our unwritten law”.<sup>152</sup> Cases are cited in profusion in the *Institute* even although Erskine would sometimes have had to rely on manuscript reports or even on personal observation. Statutes are also extensively cited, and it is explained that they may, with caution, be extended to “similar and omitted cases; for as the reason of the law is truly the will of the lawgiver,<sup>153</sup> therefore in every case where the reason is the same the law ought also to be the same”.<sup>154</sup>

A prominent place is given to legal literature. Stair’s *Institutions*,<sup>155</sup> already a hundred years’ old by the time Erskine was writing, is very frequently referred to, although without much sign of the veneration with which it would come to be regarded in the next century.<sup>156</sup> Certainly Erskine is quite prepared to contest Stair’s views, as he is the views of other jurists. Craig’s *Jus Feudale*<sup>157</sup> is also a fairly constant presence, and not just in the extensive account of feudalism in Book II, and there are many references to works written later in the seventeenth century – to Hope’s *Minor Practicks*,<sup>158</sup> to Dirleton’s *Doubts*<sup>159</sup> and Stewart’s *Answers*,<sup>160</sup> and especially to Mackenzie’s *Institutions* and, where appropriate, his *Observations on the Acts of Parliament*<sup>161</sup> and *The Laws and Customs of Scotland in Matters Criminal*.<sup>162</sup> In his passages on legal history,

<sup>152</sup> Erskine, *Institute* I.1.47.

<sup>153</sup> Law being “the command of a sovereign”, i.e. of “the supreme power, whether it be lodged in the hands of one or of many”: Erskine, *Institute* I.1.2.

<sup>154</sup> Erskine, *Institute* I.1.56 and 57. On statutes and their interpretation, see I.1.49–60.

<sup>155</sup> James Dalrymple, Viscount Stair, *The Institutions of the Law of Scotland*. Although first published in 1681, this was largely written in the 1660s: see J D Ford, *Law and Opinion in Scotland during the Seventeenth Century* (2007) 68–73. The standard 1981 edition by David Walker is based on the 2nd edition of 1693, the last for which Stair was personally responsible.

<sup>156</sup> On that veneration, see Blackie (n 83) 219, 225–27. Although at one point Erskine refers to Stair as “that great lawyer” (II.10.30) the context is scarcely promising. The full passage reads: “the opinion of that great lawyer must have carried double authority with it in the construction of a statute which had passed so near his own time, if it did not infer a manifest absurdity”.

<sup>157</sup> Thomas Craig, *Jus Feudale*, a work written around 1600. Erskine used the third (and last) edition of 1732. A translation by Lord Clyde was published in 1934.

<sup>158</sup> Sir Thomas Hope of Craighall, *Minor Practicks or, A Treatise of the Scottish Law*. Although written a century earlier, this work was first published only in 1726 in an edition prepared by Alexander Bayne. It was this edition which was used by Erskine.

<sup>159</sup> Sir John Nisbet, Lord Dirleton, *Doubts and Questions in the Law, Especially of Scotland* (1690).

<sup>160</sup> Sir James Stewart, *Dirleton’s Doubts and Questions in the Law of Scotland, Resolved and Answered* (1715, but written earlier).

<sup>161</sup> Sir George Mackenzie, *Observations on the Acts of Parliament* (1686).

<sup>162</sup> Sir George Mackenzie, *The Laws and Customs of Scotland in Matters Criminal* (1678, reprinted, ed O F Robinson, Stair Society vol 59, 2012). On the use of Mackenzie’s works in the 18th century, see Blackie (n 83) 216–18.

Erskine also draws from *Regiam Majestatem*,<sup>163</sup> *Quoniam Attachiamenta*,<sup>164</sup> and the *Leges Burgorum*. Contemporary or near-contemporary writing is far less well represented. The most recent work of all, the *System of the Principles of the Law of Scotland* by George Wallace, receives only a single mention,<sup>165</sup> as does Kames' *Principles of Equity*,<sup>166</sup> while Forbes' *Institute* is ignored altogether, either as too elementary to merit attention or – a less charitable explanation – as a competitor work to Erskine's own *Principles*. Only Bankton's *Institute* is properly acknowledged, with more than thirty citations, although Erskine seems more inclined to challenge his views than the views of any other jurist.<sup>167</sup>

As well as Scottish authority, Erskine makes frequent reference to the *Corpus Iuris Civilis*. Sometimes this is to contrast Roman law with Scots, or to explain the Roman origins of a Scottish rule. Much more frequently, however, it is to lend support to what is presented as a statement of Scots law, the Scottish rule thus often being borrowed, or at least adapted, from the Roman source.<sup>168</sup> In this Erskine is typical of those other writers of the eighteenth century, most notably Forbes and Bankton, who were attempting a systematic account of the law; for a systematic account exposes the gaps, and the more the shortcomings uncovered in native sources, the greater the attractiveness of Roman law as an aid to building a coherent body of law. Far, therefore, from the Union of 1707 leading to an inrush of English law, as might have been expected, it seems to have presaged a fresh reception of Roman law. Grant McLeod brings this out particularly well in his detailed examination of the use of Roman law in the property book of Erskine's *Institute* and of various other "institutional" writings:<sup>169</sup>

When Roman references are made, they sometimes say that Scots law has adopted a Roman rule, but more commonly they just sit there as the only authority given

<sup>163</sup> For a modern edition, see Lord Cooper (ed and transl), *Regiam Majestatem* (Stair Society vol 11, 1947).

<sup>164</sup> For a modern edition, see T David Fergus (ed and transl), *Quoniam Attachiamenta* (Stair Society vol 44, 1996).

<sup>165</sup> Erskine, *Institute* I.6.47.

<sup>166</sup> Erskine, *Institute* III.9.4. Kames' *Historical Law Tracts* fares rather better: see I.3.1; I.3.24; II.5.32; II.5.33.

<sup>167</sup> See Erskine, *Institute* I.6.31; I.7.54; II.3.30; II.3.45; II.10.39; III.7.25; III.8.51; IV.3.9. In the interests of balance it should be added that Bankton is also sometimes singled out for praise: see in particular I.1.35 ("ingeniously retorted") and II.5.75 ("justly observed").

<sup>168</sup> In a study of the references to Roman law in Book II of the *Institute* (omitting title 10, on teinds), Grant McLeod found that, in almost half of the 156 references, Roman law was used as the sole authority for a rule of Scots law, while it was contrasted with Scots law in 22 per cent of the references. See G McLeod, "The Romanization of property law", in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000) vol 1, 220, 236–37.

<sup>169</sup> McLeod (n 168) 243. See also J W Cairns, "The civil law tradition in Scottish legal thought", in D L Carey Miller and R Zimmermann (eds), *The Civilian Tradition and Scots Law* (1997) 191, 218–20.

for a proposition on Scots law. In practice, irrespective of what is said about the authority of Roman law in theory, it is treated by implication as authoritative again and again. This is Romanization at its strongest and occurs a great deal in the treatment of moveable property, possession, and servitudes. In these areas there was probably little native law, allowing the writers to make up the rules as they went along, with constant reference to Roman law.

In the *Institute*, Roman law bears to be taken directly from the *Corpus Iuris Civilis*<sup>170</sup> and there are scant references to more recent Continental civilians. In private correspondence, Erskine wrote that “of all the commentators I have looked into, Vinnius appears to me both the most substantial and the plainest”.<sup>171</sup> But Vinnius (1588–1657) is not mentioned in the *Institute*, and even Johannes Voet (1647–1713) is referred to on only three occasions.<sup>172</sup> Grotius (1583–1645) fares rather better, as an exponent of natural law,<sup>173</sup> and occasional reference is made to Pufendorf (1632–94) and indeed Hobbes (1588–1679).<sup>174</sup> Domat (1625–96), a favourite of Forbes, goes unmentioned. Of course, it can hardly be doubted that Erskine was familiar with at least the principal works of Continental scholarship of his and the preceding century. But while he occasionally records of the views of the *ius commune* “doctors”, treated as a group,<sup>175</sup> he is disinclined to engage in the kind of comparative and speculative writing that was to be a hallmark of George Joseph Bell a few decades later. Deliberately and unashamedly, the *Institute* is a work on the law of Scotland, founded on Scottish and Roman sources.

### Later reputation

During the second half of the nineteenth century, the *Institute* gradually lost its primacy of place as the leading statement of contemporary law.<sup>176</sup> By the time of the final edition, published in 1871, a reviewer could write that “Erskine is referred to not so much for the facts of law as for the accuracy

<sup>170</sup> Always accurately: see McLeod (n 168) 236.

<sup>171</sup> Letter to Lord Cardross (n 56). The work in question is Arnoldus Vinnius’ commentary on Justinian’s *Institutes*: *In quatuor libros Institutionum imperialium commentarius academicus et forensis* (1642). Plainness is likely to have had a particular appeal to Erskine.

<sup>172</sup> Johannes Voet, *Commentarius ad Pandectas* (1707): see Erskine, *Institute* I.2.25; I.6.52; I.7.62.

<sup>173</sup> See Erskine, *Institute* I.1.7; I.1.58; I.6.9; I.7.62; II.1.2; II.1.6; III.3.45; III.3.88; IV.4.60. Except for II.1.6, where the work cited is *Mare liberum* (1609), the reference is always to *De Jure Belli ac Pacis* (1625). There is no evidence that Erskine had the command of Dutch which would have been needed for Grotius’ celebrated work on Roman-Dutch law, the *Inleidinge tot de Hollandsche Rechts-geleerdheid* (1631).

<sup>174</sup> Erskine, *Institute* I.1.5; I.1.14; III.3.88.

<sup>175</sup> Disproportionately these are found in the treatment of criminal law and procedure in title 4 of Book IV: see IV.2.38; IV.4.8; IV.4.12; IV.4.44; IV.4.80; IV.4.99. But see also I.7.40; I.7.48; II.1.25. Occasionally individual writers are mentioned by name, e.g. Hendrik Brouwer (I.6.3) or Antonio Gomez (II.4.44).

<sup>176</sup> See xxi–xxiii above.



of his historical statements, his clear enunciation of the principles on which the rules settled in his time rest, and for his own opinions upon open questions”.<sup>177</sup> But as the *Institute* moved from being an “institutional” work in the sense of a comprehensive account of contemporary law to one in the modern sense of an authoritative statement of general principle, there was a marked shift in evaluation. Whereas in an earlier period the *Institute* had been lauded as indispensable and unrivalled, now it began to be weighed against the works of Stair and Bell, and found wanting.<sup>178</sup> Stair’s *Institutions*, although out of print and apparently little read,<sup>179</sup> was judged “out of sight the most powerful and, in many respects, the most valuable of the three”.<sup>180</sup> Bell was admired for his “wider jurisprudential culture and profound legal dialectic”.<sup>181</sup> As for Erskine, while he had certainly written a useful book, he was criticised for his dogmatic and unenquiring positivism, for his indifferent literary style, and above all for his lack of flair. He was “a man without genius”<sup>182</sup> who “deals with the letter of the law alone, and displays throughout a timid hesitancy in introducing philosophic principles”.<sup>183</sup> His style “sets the standard of undistinguished pedestrian prose only too familiar to the reader of the modern legal text-book”.<sup>184</sup> In short, Erskine’s

<sup>177</sup> Unsigned review 1871 (n 115) 513.

<sup>178</sup> A much earlier example of this is the review of the 2nd edition of the *Institute* found in an English periodical: see unsigned review 1785 (n 50) 444–45 (“He has less genius than Lord Stair, less learning than Lord Bankton, and less of a happy precision than Sir George Mackenzie”).

<sup>179</sup> Unsigned review 1872 (n 115) 166: “Scotch lawyers, who have edited Erskine, may, without any serious exaggeration, be said to be quite as numerous as those who have read Stair.” Another reviewer worried as to “whether we shall ever see another edition of Stair”: see unsigned review 1871 (n 115) 512. In fact none was published between J S More’s edition of 1832 and David Walker’s edition of 1981.

<sup>180</sup> Unsigned review 1871 (n 115) 512. For attitudes to Stair in the 19th century, see Blackie (n 83) 219 ff. Bell, while praising Erskine’s work, as we have seen, has no hesitation in awarding the palm to Stair: “Stair’s *Institute*, though sometimes savouring of the philosophy of the times, is a work of extraordinary perfection; it gives a view of the subject quite admirable compared with any other work on our law or perhaps on any law whatever”. See *Notes on the Law of Scotland* (n 73) 15.

<sup>181</sup> Unsigned review 1872 (n 115) 166. For the growth of Bell’s reputation, see Reid (n 40) 28–32.

<sup>182</sup> But, the writer conceded, “of powerful, accurate and industrious mind”: see W C Smith, “Thomas Erskine of Linlathen” (1875) *The Theological Review* 353, 354.

<sup>183</sup> Anon, “The Scottish school of jurisprudence” (1883) 27 *J of Jurisprudence* 337, 344. See also unsigned review 1785 (n 50) 444: Erskine “is not remarkable, however, for penetration; and his timidity is too apparent ... he was too little cultivated by study and reflection, to exercise that spirit of philosophy, without which jurisprudence is only a collection of maxims and precedents”.

<sup>184</sup> Cooper, *Selected Papers* (n 127) 48. By the florid standards of the 18th century, Erskine’s style must have struck contemporaries as unusually plain. That certainly was the view of the anonymous reviewer of 1785: “As to literary merit, Mr Erskine does not pretend to it. Taste is seldom a feature in the mind of a lawyer. His diction is harsh without being strong. His manner is earnest without being spirited.” See unsigned review (n 50) 447.



book was as dull as his life. In the “institutional” Olympics, his medal was forever the bronze; perhaps indeed he was fortunate to be on the podium at all.<sup>185</sup>

The criticism was not always fair. In discussing *communio bonorum*, for example, Patrick Fraser wrote that: “Of course Erskine, *who never differs from anyone*, repeats the language he found in Stair”,<sup>186</sup> whereas a notable feature of Erskine’s writing, as we have seen,<sup>187</sup> is the way in which he engages, and often disagrees, with other writers, an “academic” approach not found in the work of any of his predecessors. But, fair or not, much of the late-Victorian evaluation now seems beside the point.<sup>188</sup> The product of different times and circumstances, each institutional writer offers the modern reader different things. To try to rank them seems unhelpful and misguided. Today, the value of Erskine’s *Institute* lies in its exceptional thoroughness, clarity, and grasp of principle. It continues to be read and to be cited in court,<sup>189</sup> and in many areas of private law no serious investigation could proceed without it. In all of this there is a remarkable affirmation of the enduring value of the *Institute*, as well as an ample justification for its reprint in the form in which Erskine left it, nearly a quarter of a millennium ago.

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<sup>185</sup> Cooper, *Selected Papers* (n 127) 48: “He does not, and probably could not, display the philosophic breadth of Stair or the bold insight of Bell.” Lord Cooper was not the only judge to engage in this sport. In a letter dated 18 May 1954 to Randall Philip, reproduced in F Craddock (ed), *Journal of Sir Randall Philip OBE, QC* (1998) 392, Lord Normand gives his own evaluation, and those of Lords Dunedin and Clyde. Again it is Erskine who comes off worst: he alone “did nothing new for the Scots Law”.

<sup>186</sup> P Fraser, *Treatise on Husband and Wife according to the Law of Scotland* (2nd edn, 1876) vol I, 649 (my emphasis). That Fraser should say such a thing in print without proper investigation suggests how far Erskine’s reputation had fallen by this time.

<sup>187</sup> See xxix–xxx above. And see also Blackie (n 83) 222–24.

<sup>188</sup> Of all the evaluations of this period the most balanced may be that found in A J G Mackay, *Memoir of Sir James Dalrymple, First Viscount Stair* (1873) 172: “His work is peculiarly adapted to the tendencies of the Scotch intellect: plain rather than subtle, sure as far as he goes rather than going to the bottom of the subject, he is the lawyer of common sense”.

<sup>189</sup> A survey of the period 1949 to 1989 found more than 150 references to Erskine’s *Institute* in reported cases: see McBryde (n 4). If anything, the use of the *Institute* has increased since then. For example, in 2012 it was cited in seven cases in the Court of Session and Supreme Court: *Highlands and Islands Airports Ltd v Shetland Islands Council* [2012] CSIH 12, 2012 GWD 7–120; *Turner v Turner* [2012] CSOH 41, 2012 SLT 877; *Joint Administrators of Rangers Football Club plc, Noters* [2012] CSOH 55, 2012 SLT 599; *Pentland-Clark v Macle hose* [2012] CSIH 29, 2012 GWD 18–372; *Anton v South Ayrshire Council* [2012] CSOH 80, 2013 SLT 141; *Grant Estates Ltd v Royal Bank of Scotland plc* [2012] CSOH 133, 2012 GWD 29–588; *Morris v Rae* [2012] UKSC 50, 2013 SC (UKSC) 106.



## A NOTE ON THE EDITION

This is a reprint of the first edition of *An Institute of the Law of Scotland* by John Erskine. Published in 1773, five years after Erskine's death, it was brought to the press by his son, David, and comprises the text as Erskine left it subject only to the silent correction of "some inaccuracies observed in the language", and to a few asterisked footnotes which refer to new cases or legislation.<sup>190</sup> In the seven subsequent editions – the last was in 1871 – increasingly energetic attempts were made to update the law, usually by means of (extensive) footnotes but occasionally by the unmarked insertion of cases into the text itself.<sup>191</sup> By contrast, the first edition, reprinted here, provides a statement of the law as Erskine believed it to be at the time when he completed the work, in the 1760s. It is therefore the authoritative version of Erskine's text.

When Erskine was writing, William Maxwell Morison's multi-volume Dictionary of Court of Session decisions lay almost half a century in the future.<sup>192</sup> In locating and citing cases, Erskine relied on the printed collections which had begun to appear in the preceding decades (some in respect of cases from the previous century),<sup>193</sup> on the first three volumes of the new series of reports begun in 1760 by the Faculty of Advocates and known as

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<sup>190</sup> Advertisement to the edition. See also xvii above.

<sup>191</sup> Erskine, *Institute* III.3.79: *Gordon v Innes* (1681) 3 Br Sup 409; III.4.19: *Paterson v M'Aulay* (1742) Mor 2646; III.5.7: *Till v Jamieson* (1763) Mor 2858; III.5.8: *Smith v Vint* (1709) Mor 3483; III.6.11: *Wodrop v Fairholm and Alexander Arbuthnot and Company* (1744) Mor 1025 and *Crawfurd* Feb 1773 (unreported); III.7.17: *Douglas v Duke of Argyle* (1736) Mor 11102 and *Ferguson v Muir* (1737) Mor 11103; III.7.18: *Donaldson v Murray* (1766) Mor 11110; III.7.24: *Borthwick v Crawfurd* (1715) Mor 11008 and *Gordon v Cumming* (1707) Mor 11190. I owe this information to Dr Jill Robbie. Some of these cases were already present in the 2nd edition (1785). It will be noted that all the cases bar one pre-date Erskine's death and that they are confined to a small number of titles in Book III. Why this should be so is unclear.

<sup>192</sup> Morison's work was published between 1801 and 1804, but with a later appendix which included cases up to the reorganisation of the Court of Session in 1808. The full title is *The Decisions of the Court of Session, from its institution until the separation of the court into two divisions in the year 1808, digested under proper heads, in the form of a Dictionary*. The Dictionary is available in electronic form in the Scottish Legal History library of HeinOnline.

<sup>193</sup> See J S Leadbetter, "The printed law reports 1540–1935", in H McKechnie (ed), *An Introductory Survey of the Sources and Literature of Scots Law* (Stair Society vol 1, 1936) 47–58.

*Faculty Collection*,<sup>194</sup> on the two-volume Dictionary of Decisions published by Henry Home, the future Lord Kames, in 1741,<sup>195</sup> and, to a limited extent, on unpublished collections.<sup>196</sup> In the Tables of Cases which follow, the cases are listed both by name (Table A) and, where they so appear in Erskine's text, by printed collection (Table B). References to the report in Morison's Dictionary have been added. The tables were prepared by Dr Jill Robbie.

Like all writers of the period, Erskine makes extensive use of Latin. Within a generation or two, however, this seems to have been viewed as an obstacle to comprehension, for in 1820 David Halkerston published a *Translation and Explanation of the Principal Technical Terms and Phrases used in Mr Erskine's Institute of the Law of Scotland*. In his preface, Halkerston was at pains to say that he "does not suppose that those who peruse that [i.e. Erskine's] Work are unable to translate or understand Latin terms and phrases; but he may safely say, that they are often passed over, by the readers of Mr Erskine's Institute, without any attempt being made to ascertain their true meaning, and the bearing they have upon the text". Today, when knowledge of Latin can no longer be assumed, the need for Halkerston's translation has never been greater. Accordingly, in this reprint the text of the *Institute* is preceded by the second (and final) edition of Halkerston's *Translation and Explanation*, which was published in 1829. There is thus a double system of pagination in this reprint (or indeed triple if the current and other preliminary pages, paginated in Roman numerals, are taken into account). Halkerston's work comprises 251 pages after which the numbering re-starts at 1 with the first page proper of Erskine's *Institute*.

<sup>194</sup> The title page, however, gives the name as *Decisions of The Court of Session, From ... to ... collected by ... Advocates*.

<sup>195</sup> Also known as the Folio Dictionary. This was the predecessor of Morison's Dictionary and bore a similar name: *The Decisions of the Court of Session from its first Institution to the Present Time, Abridged, and Digested under proper Heads, in Form of a Dictionary*. Two supplementary volumes were published after Erskine's death (in 1770 and 1797) by Alexander Fraser Tytler (later Lord Woodhouselee).

<sup>196</sup> They are listed in the Note of Abbreviations at the start of the *Institute*: the collections of the Earl of Haddington, Lord Gosford, William Forbes, and Lord Tinwald.