









THE HAMLYN LECTURES

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BRITISH JUSTICE:  
THE SCOTTISH CONTRIBUTION

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# British Justice : The Scottish Contribution

BY

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THE Hamlyn Trust came into existence under the will of the late Miss Emma Warburton Hamlyn, of Torquay, who died in 1941, aged eighty. She came of an old and well-known Devon family. Her father, William Bussell Hamlyn, practised in Torquay as a solicitor for many years. She was a woman of dominant character, intelligent and cultured, well versed in literature, music and art, and a lover of her country. She inherited a taste for law, and studied the subject. She travelled frequently on the Continent and about the Mediterranean and gathered impressions of comparative jurisprudence and ethnology.

Miss Hamlyn bequeathed the residue of her estate in terms which were thought vague. The matter was taken to the Chancery Division of the High Court, which on November 29, 1948, approved a scheme for the administration of the Trust. Paragraph 3 of the Scheme is as follows:

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The thirteenth series of Hamlyn Lectures was delivered in October 1961 by Professor T. B. Smith of Edinburgh University.

JOHN MURRAY,  
*Chairman of the Trustees.*

October, 1961.

## CHAPTER 1

# PERSPECTIVES: HISTORICAL AND COMPARATIVE

### PROLOGUE

THIS particular series of Hamlyn Lectures—the thirteenth—must contend with more than superstition. The previous twelve series have been delivered by judges of exceptional eminence—such as Lord Denning, Lord MacDermott and Lord Justice Devlin; by scholars of world-wide reputation—including The Master of University College, Oxford, Professor Sir Carleton Allen, and the Professors of Comparative Law at Oxford and Cambridge. Most recently the Attorney-General of India, who is largely responsible for guiding in legal matters the 500 millions of that vast Republic in its first generation of independence has made a memorable contribution. My predecessors have been American, Australian, Indian, Irish, Welsh or English—yet the theme of each has been, mainly, the contribution of *English* law. The principles of the Anglo-American common law are applied in many lands throughout the world, and, indeed, govern—a point to which I shall return later—the daily lives of millions of men and women whose ethnic roots do not reach down into Anglo-Saxon soil. Now, after various aspects of this system have been expounded by my twelve distinguished predecessors, for the first time the *Scottish* contribution to British justice, nourished in a

very different legal tradition, is to be discussed—in fulfilment of the object of the Hamlyn Trust to further “the knowledge of the Comparative Jurisprudence and the Ethnology of the chief European countries, including the United Kingdom, and the circumstances of the growth of such jurisprudence to the intent that the Common People of the United Kingdom may realise the privileges which in law and custom they enjoy in comparison with other European peoples.”

The law of the sister kingdom of England has in earlier series of Hamlyn Lectures had its full measure of praise already; and the tributes paid to that original product of English genius were well merited. Let me at the outset make one thing very clear. Though my great purpose in life has been to serve the law of Scotland in Aberdeen and Edinburgh, I have also had the privilege of studying the English law at Oxford under great teachers such as Goodhart and C. K. Allen; and I have shared in the corporate life of that Inn of Court which the present Lord Chancellor and his predecessor, the Earl of Birkenhead, F. E.—the greatest of all legal Smiths—have adorned. These English legal influences I remember with gratitude; and I should be both ungrateful and unscholarly were I to compare Scottish and English law in any spirit of chauvinism or national intolerance. Such behaviour may in the past have been in order—as we shall see—for certain legislators at Westminster or for certain judges in the House of Lords when adjudicating on Scottish appeals. It would be unfitting for a Scotsman of integrity nurtured in the cosmopolitan Civilian traditions of Scots Law. Much

in English culture and English law I admire, but like my forebears, I cannot brook with patience those periodic manifestations of arrogance or ignorance whereby—in the supreme confidence that they know what is best for us—certain southern mandarins have sought to subvert valued and valuable Scottish institutions. Nor do I find the reflection comfortable that Scotsmen and Scots lawyers, who should have known better, so often proved willing accomplices. Moreover, even though comparisons may certainly be invidious, I must sometimes make them. I shall not conceal from you my conviction that an impartial arbiter would often prefer, or have preferred, solutions of Scottish law to those of English law. Further, it may be noted that when Scots law has influenced English law this has always proceeded on serious comparative evaluation, and thus has almost invariably been beneficial to the receiving system. Conversely, though English legal influence has been beneficial in certain fields of Scottish jurisprudence, the introduction of English solutions into Scots law has too often been prompted—not by comparative method—but by a policy of unconscious or deliberate anglicisation, and has certainly not always resulted in improvement.

The Hamlyn Trust seeks to further in particular the study of comparative jurisprudence. Of Scots law I shall assert the claim that it provides the ideal foundation for such a study—not only for what has been achieved, but also as a warning against the confusion which can result from pseudo-comparative methods. Some, like Professor Lawson, may regard the Scottish

system as the "Paradise Lost" of the comparatist.<sup>1</sup> Others take a rosier view. Lévy-Ulmann, in a paper read in Paris in 1924 claimed<sup>2</sup> "Scots law, as it stands, gives us a picture of what will be some day (perhaps at the end of this century) the law of the civilised nations, namely a combination of the Anglo-Saxon system and the Continental system." More recently, Professor Friedmann of Columbia has written,<sup>3</sup> "A comparative consideration of Scottish law might well help to form a bridge between the systems and methods of Anglo-American and Continental jurisprudence." In my final lecture I shall give my own assessment of "The Destiny of Scots Law." Meanwhile to the pessimists I would just observe that Milton wrote another epic in sequel to "Paradise Lost," and stress in general the importance which Scots law has already had for comparative jurisprudence. As in Ceylon, Quebec, Louisiana and South Africa, so in Scotland, one can discern a fluctuating contest between, or comparative evaluation of, romantic principles and the principles of Anglo-American law: also to some extent the achievement of a synthesis between them. The late Lord Cooper of Culross rightly observed that, without the stimulus of comparative law Scots law "will assuredly perish."<sup>4</sup> Law teachers and practitioners in the so-called "mixed systems" must, of necessity, deal with legal concepts and rules derived from basically different *genera*—not

<sup>1</sup> *Current Legal Problems* (1949) at p. 229; *Common Lawyer Looks at the Civil Law* (1955), p. 18.

<sup>2</sup> (1925) 37 *Jur.Rev.* 370.

<sup>3</sup> *Legal Theory*, 4th ed., p. 469.

<sup>4</sup> *Selected Papers*, p. 144.

merely different varieties—of legal thought. Some grafting from modern solutions of Anglo-American law, especially in the mercantile and economic field, has proved useful, but the roots of the Scottish system of private law, in particular, go deep into a European, romanistic legal soil, and similar principles are to be found in other “mixed systems” or in those of the Continent of Europe. These principles we have in some measure (as Professor René David<sup>5</sup> of Paris and others have noted) even mediated to English law; and moreover in recent years study of Scottish criminal law and procedure has provided English lawyers with a number of solutions worthy of imitation. Though no system of “British Law” exists, Scotland has made no mean contribution to British justice—both by evolving the particular Scottish system, and also by influencing the neighbouring system of England. David has discussed earlier this year “Existe-t-il Un Droit Occidental?”<sup>6</sup> He concluded that the expression “Western Law” has meaning already in the sociological and philosophical sense, and may well in the future have an actual juristic content. In much the same way one may refer to British justice. British justice is a term which I use in a broad sense, to describe the sum total of legal ideas and aspirations which the British peoples share, despite differences in their methods of achievement.

These Lectures are intended primarily for the benefit of “The Common People of the United Kingdom of

<sup>5</sup> “XXth Century Comparative and Conflicts Law,” 62; *Droit Civil Comparé*, 309.

<sup>6</sup> “XXth Century Comparative and Conflicts Law,” 56.

Great Britain and Northern Ireland," and—though I am privileged to address directly an audience mainly of my fellow countrymen in the capital city of Scotland—through the publication of these Lectures in book form, I hope also to speak indirectly to a wider audience. Therefore, the legally learned must forgive me if I spend time on matters which (to them) are elementary or self-evident; while the "Common People" may pardon me if I credit them with less legal background than some of my predecessors have been able to assume. But then, through press, film, radio, and the detective novel English law has received much wider publicity—not all, I must confess, to its credit. So far as possible, I shall avoid technical legal expressions when the currency of ordinary speech will serve. Stair, author of Scotland's greatest classic, first published in 1681, hoped that his description of our laws "might not only be profitable for judges and lawyers, but might be pleasant and useful to all persons of honour and distinction." My more modest aim is to serve those who enjoy the honour and distinction of being citizens of this realm, and those in other lands who are linked with Scottish institutions through ties of blood or sympathy.

## THE FOUNDATIONS

### SCOTS LAW IN TIME

The English monarchy as early as the time of the Plantagenets established its effective political authority and firm control over the administration of justice

in England. Precedent by precedent, the King's judges built up, largely drawing on local customs and by manipulation of writs or forms of action, that system called "The English Common Law." This was essentially a professional law, based on the Inns of Court, which were close corporations of lawyers. At quite an early stage these lawyers adopted a semi-insular and self-sufficient outlook; and, in particular, set their faces against the competition of ecclesiastical courts, against the Roman law, against the authority of academic treatises and against a system of professional legal education based on the Universities. (The activities of the English lawyers of Doctors' Commons who accepted these influences were restricted to certain specialised fields.) By the time of the Union of 1707, the creative genius of the English common lawyers—though manifest in the field of public law, particularly in the vindication of personal liberties of Englishmen—had apparently reached a temporary stage of exhaustion so far as the development of private law was concerned. Especially before the era of Mansfield, the system of private law had become arid and formalistic. A partial remedy for the inadequacies and injustices of the common law was found in the separate but parallel legal system, equity, evolved by the Chancellors. This system, administered in the Court of Chancery, in due course was to become dilatory and technical, until reformed in the nineteenth century. Under Mansfield's leadership during the eighteenth century, mercantile law was developed vigorously in England. To achieve this, the insularity of the common law had to be overcome,

and account taken of Law Merchant, the *lex mercatoria* of Europe. In general, however, English lawyers preferred their system to grow in isolation, until it had begot children of its own to share the family way of thinking—though these are not necessarily accepted on terms of equality.

Looking at English law since the Union with Scotland in 1707, an objective observer might select for admiration the quality, courage and integrity of judge and practitioner; the development of public law; and, in private law, the working out of the trust and certain branches of mercantile law. In such fields of private law as delict, contract and unjustifiable enrichment, family law and the law of moveables, the English system matured late; and, unlike American jurisprudence, was restricted by doctrines of strict precedent and by a certain professional arrogance from profiting more fully by the experience of neighbouring Civilian systems. An added misfortune has been, as I shall demonstrate later, that English lawyers in the past often so little understood the Civilian's solutions to problems of private law—frequently solutions which would be preferred in England today—that through Parliament, the House of Lords or the Privy Council they imposed their own doctrines when political factors provided them with influence over others.

The background and ethos of Scots law have been very different. By the end of the seventeenth century—shortly before the Kingdoms of Scotland and England were united in the new kingdom of Great Britain—Scottish private law had become a coherent and rational system, largely as the result of a creative

and authoritative restatement in one treatise, *The Institutes of the Law of Scotland* by Viscount Stair, Lord President of the Court of Session, first published in 1681. The smaller but valuable *Institutes* of Sir George Mackenzie of Rosehaugh was published three years later; while the first edition of the same author's *Laws and Customs of Scotland in Matters Criminal* had been published in 1678. Clearly neither constitutional nor criminal law had achieved the same level of maturity as had private law, nor can it be said that the quality of justice administered in Scotland at the time of Union can be assessed only by reading the works of Stair and Mackenzie. I shall, however, deal in due course with the actual machinery of justice. What lies behind these treatises is largely of academic interest—and of great academic interest—but of little direct relevance today. I shall therefore touch on it very briefly.

Effective centralised royal justice came much later in Scotland than in England, and until this was achieved a national legal system in the full sense of these words could not emerge. Nevertheless, the sources which Stair and Mackenzie would use, and the European orientation of Scots law, were determined in the late thirteenth century. For some time before Edward I attempted to annex Scotland, relations between Scotland and England had been on the whole amicable; and, at this early period, Anglo-Norman legal influence in Scotland is apparent. Edward's rapacity resulted in the Franco-Scottish alliance of 1295, which, though primarily political and military in its objects, had even more durable consequences in

cultural matters, including the course of legal development.<sup>7</sup> The "Auld Alliance" remained in force even after the Union of the Crowns in 1603. Feudal and other customary law, as well as national statute law, was important; but the other main sources relied on in Scotland, as in other countries of medieval Europe, were civil or romanistic law and canon law. Professional lawyers, who were often clerics, studied these disciplines in the Universities as a preparation for practice in the Courts. Though the three pre-Reformation Universities in Scotland taught law—and Elphinstone's foundation at Aberdeen was in particular intended as a school of civil and canon law for the training of laymen as well as clerics—it was to the leading law schools of Northern France, in particular Orleans and Bourges, and to Louvain—that many Scotsmen resorted. In the fourteenth century they were sufficiently numerous at Orleans to constitute a "nation," and the Civilist at Aberdeen was instructed to follow in his teaching the method of Orleans. Scotland in effect received her Roman law at second hand from France in the first phase of legal development, and Scots lawyers were particularly interested in how the French courts handled in practice the various elements of feudal, customary, canon and civil law. It was therefore a "learned" law, the law taught in the universities and expounded by leading European commentators in their treatises, which was applied where custom or statute provided no ready solution—at least when trained judges or procurators

<sup>7</sup> See the author's "Influence of the 'Auld Alliance' on the Law of Scotland," 1961 S.L.T. (News) p. 125.

were present. The church courts exercised wide jurisdiction even in lay disputes, while even in the local feudal courts, trained lawyers might represent parties. Thus the civil law grew up from below in the centuries before the constitution of the Court of Session as the College of Justice in 1532 prepared the way for the formulation of a consistent and unified Scottish system, strongly influenced by the Civilian and European background of the leading judges and advocates. *Vixere fortes ante Agamemnona.*

With the establishment of this court stimulus was given to rather rudimentary forms of legal literature, represented either by collections of decisions such as Durie or Dirleton or works on procedure from which a good deal of substantive law can be deduced, such as the Practicks of Balfour, Spottiswoode and Hope. In 1655 (nearly half a century after the author's death) Craig's *Jus Feudale* was published—the first “institutional” treatise on Scots law, a work strongly influenced by François Hotman. Being written in Latin, it enjoyed a considerable vogue on the Continent. This work was in fact not restricted to feudal law, but was the first attempt to reduce the various elements of Scots law to a coherent system. It incorporated, to quote Professor Stein,<sup>8</sup> “much Roman law, using it, as it were, as mortar to bind together the irregularly shaped slabs of feudal law into a harmonious whole.” Scots customary law had never been consolidated like the *Coutumes* of France, and

<sup>8</sup> “The Influence of Roman Law on the Law of Scotland” (1957) 23 *Studia et Documenta Historiae et Juris*, 154; and see generally for the classic treatment of this subject.

there was particular need for Roman law to introduce system and to supply deficiencies. Craig's method was comparative, and he himself had studied in France. Later, however, during the seventeenth century, the law schools of the Netherlands, such as Leiden, Utrecht and Groningen soared in reputation, and it was to these universities that Scotsmen—especially those who were Protestant and did not wish to be associated with Jacobitism—tended increasingly to send their sons for legal training. Between 1600 and 1800 some 1,600 Scottish law students studied at Leiden alone.

The Natural Law school, associated with the name of Grotius in particular, had a profound effect on seventeenth century Scots lawyers in general, and on Stair in particular. Grotius in 1631 published the first edition of his *Introduction to Roman Dutch Law*—and, despite the fact that others had written in that field before him, he became Father of Roman Dutch law. Fifty years later Stair, by publishing his more comprehensive treatise, became truly the Father of Scots law. Gathering the various threads of Roman, Canon, Feudal and other Customary law which had already been recognised by the courts, and drawing upon the learning of Europe's leading Civilian commentators, Stair "restated" the law of Scotland in an original, selective, comprehensive, systematic and rational manner. He was a very experienced judge of philosophical mind and academic background, but was no antiquarian. Undoubtedly he made an original contribution to Scots law of first importance. Under the guise of recording what the law of Scotland was

in his day, he gave the whole system a “ new look ”— in a European style, which could be worn with urbanity in Paris or Leiden. The full title of his work is *The Institutions of the Law of Scotland, deduced from its originals and collated with the Civil, Canon and Feudal Laws and with the Customs of Neighbouring Nations*. His contemporary Mackenzie’s treatise on criminal law is entitled *The Laws and Customs of Scotland in Matters Criminal wherein is to be seen how the Civil Law and the Laws and Customs of other Nations doth agree with, and supply Ours*. That very distinguished French judge and scholar, Marc Ancel, has recently stressed that until the eighteenth century the lawyers of the European continent lived in the tradition of a universal common law, represented by Roman law, to such an extent that national laws were in effect exceptions to a general pattern. For Stair, who had come under Dutch influence, in particular, and for Mackenzie too, who had studied in France, this “ common law of the world ” had real meaning— and how very different that meaning was from the contemporary English use of the words “ Common Law ” to describe the consolidated customs of England. Scotland, of course, like the various regions of France had her own customary or common law, and this looms large in the older reports and treatises before Stair. With Stair, however, the process of systematising the law, under the influence of the civil law, superseded some customary law, and rationalised much of what was retained.

Thus at the time of Union with England in 1707 Scots law as administered in the Central Courts was

cosmopolitan and comparative—in striking contrast to English law, and was set forth in modern, systematic and intelligible treatises written in English. The leaders of the Scottish Bench and Bar, through legal education on the Continent of Europe and intellectual contact with European legal literature, could scarcely be other than cosmopolitan. Scotland became a country of the civil law through legal education nourished by legal literature. The treatises in general use by practitioners—as Lord Dunedin has pointed out,<sup>9</sup> a determining factor in legal development—are set out in the Catalogue of the Advocates' Library, founded by Sir George Mackenzie in 1680. The range is wide—especially in Dutch and French materials—and the collection was maintained up to date. There are few English legal writings included—but then it was the lack of comparable English legal literature which in the early eighteenth century drove the young Murray (later, as Mansfield, to be Lord Chief Justice of England) to the works of Stair and Mackenzie, to the *Corpus Juris* and the compilations of French jurists.

The Union Agreement provided express safeguards for the Scottish courts and legal system, and the pattern set by the time of the Union was on the whole maintained during the eighteenth century and overlapped into the nineteenth. New institutional works, following Stair and Mackenzie, systematised developments in case law—though, of course, the doctrine of the binding single precedent was not accepted. Bankton, Erskine and Kames who wrote in the eighteenth century, together with Hume and Bell who

<sup>9</sup> *Encyclopaedia of the Laws of Scotland*, Preface to Vol. 1.

completed their labours in the early nineteenth century, have been recognised as “institutional writers”—that is to say that a statement of the law by one of these authors has approximately the same authority even today as the decision of a bench of judges of the Court of Session or High Court of Justiciary. Their role may be compared with, for example, Domat, Pothier, Grotius, or the Voets on the Continent; and in Scotland, it may be noted, institutional status was accorded to “professorial” treatises as well as to those of judges. Bankton’s *Institutions*, which in 1751 attempted a comprehensive comparison of Scottish and English law, are important. Kames in his *Principles of Equity* champions against the English doctrine of dichotomy the view of Scottish and other European lawyers that equity and common law should be united in one court<sup>10</sup>—“for what is originally a rule in equity, loses its character when it is fully established in practice; and then it is considered as common law.” Of much greater influence, however, were Erskine’s *Institutes* (published posthumously in 1773) and Bell’s *Principles and Commentaries* which appeared in the early nineteenth century. Erskine as a writer was less original than Stair, but restated the law of his time in a masterly and comprehensive fashion—paying particular attention moreover to feudal law which increased in importance with the confiscations and redistribution of land following the Jacobite Risings of 1715 and 1745. In some ways he was also closer to the original Roman law than was Stair.

<sup>10</sup> *Principles of Equity*, 4th ed., p. 20.

The economic setback which followed the Union of 1707 had arrested development in Scottish mercantile law. Bell's main contribution was to supply the deficiencies in Scottish commercial jurisprudence to meet the challenge of Scotland's economic revival in the latter part of the eighteenth century. He turned to Pothier and Toullier and other French authorities, but in particular to the system of mercantile law worked out by Mansfield and his successors in England. This was perhaps the most cosmopolitan chapter of English law and well worth considering in developing Scots law. Even so, Bell prepared the way for subsequent confusion by quarrying too much material from a system whose technicalities he had not mastered completely. Moreover, his example of quoting English precedents in mercantile matters was copied by advocates in fields of law where English decisions could only confuse rather than clarify. The factor of a common language has not infrequently blinded those concerned with Scots and English law to the dangers of indiscriminate citation, in inappropriate contexts, of decisions from one system in dealing with the other. Though Scots law and English law have come closer since his time, there is still force in Lord Justice-Clerk Hope's protest in 1852,<sup>11</sup> "I am only the more confident that we do not understand nine out of ten of the (English) cases which are quoted to us, and that in attempts to apply their law, we run the greatest risk of spoiling our own by mistaking theirs."

Throughout the eighteenth century the tradition of

<sup>11</sup> *McCowan v. Wright* (1852) 15 D. 229 at p. 232.

legal study in the Netherlands<sup>12</sup> continued, though latterly the stream dwindled as facilities for legal education in Scotland improved, and as, through Scottish institutional treatises and judicial decisions, a more complete municipal law of Scotland was developed. The background and outlook of the leading judges was, of course, essentially feudal and Civilian, though more and more they favoured their own decisions. No longer the Natural Law school, but the rationalist comparative approach to law, the thought of Montesquieu in particular, influenced judges such as Kames and Monboddo.<sup>13</sup> In 1750 the Faculty of Advocates (the Scottish Bar) insisted on an examination in Scots law as such, as well as in civil law, as a condition of admission to practice. Scottish lawyers, nevertheless, had kept themselves well supplied with the latest contributions made to legal thought by Continental scholars. As Professor Walker observed in his Report on the civil law collection in the Advocates Library,<sup>14</sup> "Down to 1800 the collection seems to include the principal works of all the important Civilians. . . . Thereafter the connection with Europe as evidenced by the collection dries up." It is as definite as that. The influence not only of the literature, but also of Continental legal education, was suddenly extinguished. In 1793 revolutionary France had conquered Belgium, was threatening the Netherlands, had torn up the Treaty of the Scheldt. For

<sup>12</sup> See the author's "Scots Law and Roman-Dutch Law," 1959 *Acta Juridica*, 36.

<sup>13</sup> Stein, "Legal Thought in 18th Century Scotland," 1957 *Jur. Rev.* 1; Lehmann, *John Millar of Glasgow*, Chap. 10.

<sup>14</sup> Not published (1952).

the next twenty-two years Britain and France were to be engaged in a life and death struggle, during which Scotland was cut off from her traditional contacts with Europe. When peace came, too much had altered for these to be renewed as before. The Napoleonic Codes had been established in France and the Netherlands; feudalism had been abolished; academic study in their law schools focused on the Codes or "pure" Roman law. Scots law in Lord Cooper's opinion<sup>15</sup> in the early nineteenth century was a "finished philosophical system well in advance of its times"; during the eighteenth century it "came within an ace" of sinking its identity in the European school, "and only failed to do so because of the growing power of . . . forces introduced by the Union of 1707." The system of Scottish private law might well have been codified on the basis of the institutional writings of Stair, Erskine and Bell—but there is no evidence of pressure in Scotland for that solution, nor would it have been approved at Westminster. During the nineteenth century Scottish jurisprudence was thus isolated—at least temporarily—from a cosmopolitan tradition, and in isolation was not immune from the dangers of a restricted horizon. Moreover, legal education at the Scottish Universities was inadequate to meet the challenge of the times. After over a century, "the forces introduced by the Union of 1707" had eventually brought Scottish private law into contact with English law on less than equal terms; and the assimilating policies of Parliament and the House of Lords became increasingly manifest. In

<sup>15</sup> *Selected Papers*, pp. 178-179.

the period after the Napoleonic Wars new economic and social problems, confronting Britain as a whole, were more and more tackled through United Kingdom or Great Britain legislation, and the area covered by common principles between Scotland and England increased greatly. In short, the Napoleonic Wars mark the end of one era of Scottish legal development, and the beginning of another, characterised by a closer association with English law especially in the field of private law. This I can best consider in future lectures devoted to modern law. If the era which had passed was characterised for Scots law as one strongly influenced by a comparative and cosmopolitan outlook, that which followed was to be marked, not only by genuine comparative efforts to secure synthesis in certain fields between systems of different traditions, but also by many examples of pseudo-comparative law—in short, the tendency to assimilate legal systems, not by evaluating their respective merits, but according to the political and economic power which each can call to its support. Such pseudo-comparative techniques were most used in the period up to 1867, when no Scottish judge sat in the House of Lords. Today that illustrious tribunal would not deliberately override a principle of Scots law if convinced that it exists—but as I shall explain in due course, this is not an infallible safeguard.

Let me sum up, however, the main characteristics of Scottish private law at the end of its Classical Period—the turn of the eighteenth century. By this time Scots law had become “a finished philosophical system in advance of the times.” The leading judges

were obviously robust Scotsmen, as Raeburn has portrayed them, trained in a civilian tradition, but not diffident about relying on their own interpretations, and maintaining them as the law of Scotland. The land law was essentially feudal; and mercantile law, when it developed, was strongly influenced by those doctrines of the cosmopolitan Law Merchant which Mansfield had made part of English law. The law regarding moveable property, obligations, civil wrongs and unjustifiable enrichment was essentially Romanistic, and very close to the solutions of other European systems—yet containing original and valuable doctrines worked out in Scottish practice. The Roman law itself—in its original form or as expounded by the later commentators—though not actually binding on a Scottish court, was regarded as the most powerful persuasive authority in cases where no rule had already been settled. In the field of family relations, custom, Roman law and canon law had all contributed to a result which was unique and well adapted to the conditions of the age. The essentials of the law were clearly expounded in Scottish institutional treatises which were regarded as authoritative sources of law. Principle ruled rather than precedent; and doctrines of equity were applied in the ordinary courts of justice.

I have said little about the historical development of criminal law. Sir George Mackenzie writing at the end of the seventeenth century held that the civil or Roman law was to be followed by the Scottish Criminal Courts where “our own Statutes and Customs are silent or deficient.” By the time Hume

wrote his celebrated *Commentaries on the Law of Scotland in Matters Criminal* at the very end of the eighteenth century, there had certainly been a drift from Roman influence, and an independent system of Scots criminal law really first clearly emerged as a result of Hume's own treatise. The House of Lords has no appellate jurisdiction from the Scottish criminal courts, and the legislature has not endeavoured, on the whole, to assimilate Scottish and English law where the graver crimes are concerned. Paradoxically, Scottish criminal law—about which I shall have more to say later—benefited by the fact of its relatively late development. It was less rigid in the nineteenth century than was the English system. During the eighteenth century valuable doctrines had been borrowed from English criminal law, but, due to strict precedent and a jungle of legislation, the English system eventually became rigid, harsh and confused. Though the Scottish judges of Braxfield's time were not noted for their benevolence towards lawbreakers, it may be noted that for the period of thirty years preceding 1797, the average of capital sentences in Scotland was six *per annum*, and during the fifteen-year period prior to 1782 the average of executions in the Capital City of Scotland was two each three years. This may be contrasted with the position in the Southern Kingdom where at the same period there were over two hundred capital offences, and a sickening slaughter of offenders was perpetrated in the name of justice. In the mid-twentieth century Scottish practice was again to provide an example to England

in restricting capital punishment. But this must be discussed in a later lecture.

#### SCOTS LAW IN SPACE

Having surveyed Scots law in time, it may be well to sketch the position of Scots law in space. The first reflection, no doubt, of the casual observer would be that English law has become a world-wide system, while Scots law is restricted to a population of some five million. This is true, but not the whole truth; nor did the migration of the common law across the seas depend on any superiority of principle or technique to the largely civilian jurisprudence of Scotland. During over a century of "personal union" (1603–1707) and over a quarter millennium of "incorporating union" (1707–1961) with England, a constant policy, which has never lacked influential adherents, may be discerned of seeking to exclude Scottish law in dealing with British problems—both as regards external and internal affairs. This policy has seldom, if ever, considered these solutions on their merits at the time, though these solutions may eventually prevail. Some of the consequences of this policy which concern Britain internally, I shall consider in my lecture on constitutional questions. Meanwhile, I wish to discuss those which may relate to external relations.

#### *International Law*

Addressing the Grotius Society in Edinburgh in 1953, Lord McNair (then Sir Arnold) observed,<sup>16</sup> "I

<sup>16</sup> *Transactions*, 1954, p. 183.

must not be thought to overlook the former importance of public international law in Scotland, and the special interest in private international law which has been characteristic of Scots lawyers for some centuries. . . . It would seem probable that the importance of public international law and the frequency of its application in Scotland have diminished since the Act of Union." So far as public international law is concerned, I would, with respect, suggest that Scotland's active *participation* in public international law is what has been restricted since 1707. The foundations of international law were laid by the Civilians. It is not surprising that lawyers of Civilian background in Scotland should have made Britain's first contributions to European literature in this field, nor that the Court of the Lord High Admiral of Scotland should have been kept well occupied. I shall mention the "pirating" of Scottish admiralty jurisdiction, when discussing the various Scottish courts. Lord Normand addressing the International Law Association in 1954 stressed <sup>17</sup> "one topic in which Scotland has, by her geographical situation, her long and much indented coastline, her many islands and her large seafaring population, always had a lively interest, is the law of the sea." This interest appears from the writings of Scots lawyers such as King, Balfour, Bisset, Welwood and Stair in the sixteenth and seventeenth centuries. Welwood, whose writings were well known in Europe, in his *Abridgement of All Sea Laws* (1613) and *De Dominio Maris* (1615) engaged in controversy with Grotius, attacking the doctrine of the

<sup>17</sup> *Report of the 46th Conference*, p. 6.

latter's *Mare Liberum*; and sought to distinguish between liberty of navigation and liberty of fishing. Welwood was the only critic whose arguments Grotius deemed worthy of a reasoned answer. Generally, pre-Union Scottish lawyers on the whole seem to have been much more in accord with the views urged by Norway and Iceland in the fishing disputes of the twentieth century, than have been the contentions of these English lawyers who have spoken for Britain since the Union. It has just been assumed that English law regarding territorial waters must, after the Union, be that of Great Britain. It has unfortunately seldom occurred to those concerned with legal aspects of Britain's external relations that Scots law and Scottish lawyers might have something useful to contribute or some interest for consideration. Lord McNair has done much research on the opinions delivered to the British Government by English Law Officers on international questions. How often, I wonder, have the Scottish Law Officers been asked to advise—except, perhaps, where as in the *Moray Firth Fishing Case* in 1906<sup>18</sup> the relevance of Scottish interests would be too obvious to miss.

### *Naturalisation*

In other contexts pretensions have been made only too often to uphold English law as the imperial law, and to regard Scots law as a provincial system, excluded from equal participation in British affairs.

<sup>18</sup> *Mortensen v. Peters* (1906) 5 Adam 121. The ironical sequel is discussed: Sir Thomas Taylor, *The Scotsman*, June 6, 1961. Scottish doctrine regarding territorial waters is fully considered by Fulton *Sovereignty of the Sea* (1911).

This attitude resolves itself into the proposition that Scottish means Scottish, and English means British, and British means English. A remarkable example of this attitude is the recent case<sup>19</sup> in which Prince Ernest of Hanover sought a declaration from the English courts that he was a "British subject" by virtue of the pre-Union English Act which, to encourage them to study the English law and constitution, conferred the privileges of English nationality on descendants of the Electress Sophia of Hanover; one of whom, of course, as George I succeeded to the British Crown. Perhaps personal legal study was not the entire incentive for the Prince's action, but he certainly has given others occasion for a good deal. Until his case reached the House of Lords, counsel on both sides, and the judges in their opinions, assumed without question that a pre-Union Act granting English nationality must confer British nationality today. In the House of Lords, however, judges learned in Scottish and English law participated, and counsel were requested to argue the effect of the Union upon legislation of this kind. By pre-Union Scottish legislation the privileges of naturalisation in Scotland had been conferred upon all Frenchmen, and on various other groups of foreign nationals. Legal opinion in Scotland had concluded that these pre-Union Acts were probably abrogated by the Union<sup>20</sup>—since, for example, it was scarcely to be supposed

<sup>19</sup> *Att.-Gen. v. Prince Ernest Augustus of Hanover* [1957] A.C. 436.

<sup>20</sup> See 1956 S.L.T.(News.) 89; 1957 S.L.T.(News.) 22 for refs.

that the English in 1707, in the midst of Marlborough's wars, would have been happy in a situation whereby Frenchmen generally could claim to be British. In 1820<sup>21</sup> the Court of Session held that a foreign shareholder in the Bank of Scotland could not found on a pre-Union Scottish Act to claim British nationality. The Scottish lawyers concerned were very much aware that in a case of this kind English interests were also involved. This opinion was vigorously, and indeed offensively, confirmed by the House of Lords, which at this time comprised no Scottish lawyers. Lord Redesdale denied vehemently that the Court of Session could competently pronounce on a matter which affected the whole United Kingdom and involved the rights of persons in England. At the Union, he asserted, without any authority save his own prejudice, "the Court of Session became a Court of local jurisdiction, and not of general jurisdiction." In the light of this Scottish case, one might have expected the Attorney-General (Sir Reginald Manningham Buller) to have argued in Prince Ernest of Hanover's action that like reasoning should apply, and that the English courts could not disregard Scottish interests. Far from it: he declined to press the point at all. As a result their Lordships were left in the embarrassing position of not being able to pronounce thereon in the absence of argument. Prince Ernest accordingly obtained a declaration of British nationality which is effective within the jurisdiction<sup>22</sup>

<sup>21</sup> *Macao v. Officers of State*, November 14, 1820, F.C.; (1822) 1 Sh.App. 138.

<sup>22</sup> *The Scotsman*, December 25, 1956.

of the English courts—but not necessarily so in Scotland. The moral seems to be that what is sauce for the goose is not necessarily sauce for the gander, at least if one is dealing with a certain sort of cook. If that is not the moral, then a good number of Frenchmen would seem entitled to British nationality under the Scottish Act of 1558—which might have an interesting effect on negotiations regarding the European Common Market.

### *Diplomatic Privilege*

From the time of the Union statutes dealing with Britain's foreign relations have failed to grapple adequately with severalty of administration of justice in a unitary state. An early example, which still remains on the Statute Book, is the Diplomatic Privileges Act, 1708. This provides that certain "violators of the laws of nations" shall be brought for punishment before one or more of the principal English judges. This Act was passed because "several turbulent and disorderly persons" in England had insulted the person of the ambassador of "his Czarish Majesty of Great Russia," by taking him with violence out of his coach and detaining him. It may have been assumed that the Scots were too courteous to proceed in this way, but it seems only fair to warn H.E. A. A. Soldatov of the U.S.S.R. that the statute could not be enforced in Scotland.

### *Fugitive Offenders and Runaway Marriages*

Much more topical and relevant is the question of how to deal with alleged fugitive offenders from other

jurisdictions. By international agreement Britain undertakes to surrender such persons if certain requirements are fulfilled. If the fugitive is a foreigner the procedure to be followed is prescribed by the Extradition Acts, 1870–1935.<sup>23</sup> Certain offences, to be construed according to the law of England or of “a British possession” are regarded as extradition crimes, and—unless the health of the accused is in jeopardy—the appropriate judge to decide on extradition is a Metropolitan Magistrate at Bow Street in London. What, however, if the person whose extradition is sought is in Scotland, and, if, though his conduct might be an “extradition crime” by the laws of the foreign power and of England, it would not be so by the laws of Scotland? In 1956 a German aged twenty-nine was reft from Christmas festivities, and taken off to Bow Street with a view to his surrender in respect of the abduction of a Dutch girl aged eighteen. They had come to Scotland to be married—since Scots law does not require parental consent to the marriage of persons over sixteen years. On another occasion in recent years an American in Scotland seems to have been expelled<sup>24</sup> on a deportation order from London because he intended to marry in Scotland an “infant” ward of an English court. Whether his conduct was illegal and merited deportation should

<sup>23</sup> A curious anomaly is that fugitive offenders from the Dominions may be committed by a Sheriff in Scotland; and it is perplexing to understand the principle upon which the English courts purport to exercise “imperial” jurisdiction in territories subject to the jurisdiction of the British Crown: *Ex p. Mwenya* [1960] 1 Q.B. 241.

<sup>24</sup> Anton and Francescakis, “Modern Scots ‘Runaway Marriages’,” 1958 *Jur.Rev.* 253 at p. 270.

surely have been decided by the Scottish courts. Some may well think, as indeed I do myself, that Scots law should not give marriage facilities for eloping foreigners, who would be disabled from marrying by the law of their domicile. Legislation would be necessary, but the General Assembly of the Church of Scotland—perhaps the body most representative of Scotland as a whole—has been told this year that no action can be taken at present on their request for parliamentary action. This is an international problem affecting Scotland, but Scotland is powerless to take appropriate measures. No difficulties, of course, arise regarding marriages of Scottish minors.

#### *International Movement for Unification of Law*

Many matters of private law are debated these days on an international level—aiming at a measure of unification among the legal systems of the world. There is, for example, the International Institute for the Unification of Private Law in Rome, where uniform law on sale of goods, formation of contract, agency, domicile, and arbitration have recently been considered. The Hague Conference on Private International Law has been concerned with matters such as international sale of goods, alimentary obligations to children and legalisation of documents. The general coalescence of the West in the post-war era; development of American interests in Europe; the emergence of the European Common Market and other European organisations have stimulated, and, indeed, compelled, the nations to strive for greater uniformity of law regulating not only commercial matters but other

fields as well. Broadly speaking, reconciliation has to be achieved between the traditional attitudes of civil law systems and those of the Anglo-American common law. Writers of authority have constantly noted that the "mixed" systems, such as that of Scotland, may have a particularly valuable contribution to make in harmonising the contending principles. Ironically, however, Scottish participation in British efforts to achieve uniformity of law with other nations has been almost completely excluded.

### *Military Law*

The armed forces of the Crown are drawn from all parts of the United Kingdom, and may serve at home or overseas. A body of law is clearly necessary to punish purely military offences, such as "cowardly" or "insubordinate" behaviour, and also to deal with certain "civil" crimes, such as murder, theft and rape which may be committed by a member of the forces. In this situation it might have been thought that the wisest course would be to enact a code, specifying military offences and also defining a number of the graver "civil offences" triable in certain circumstances by a military court, offences such as murder, culpable homicide, rape, theft, and so forth when committed by a soldier. This self-contained code could be supplemented by a section providing for punishment of conduct to the prejudice of good order and military discipline—which would be comprehensive enough to deal with minor cases of anti-social activity either within or without the scope of military duty. Such a course was indeed contemplated in the

nineteenth century, but when the Army Act, 1879, was promulgated, a section was included making punishable under military law any act which "when committed in England is punishable by the law of England." This incorporation by general reference of the whole of English criminal law led to manifest absurdity, as when a Scottish soldier was tried by court-martial in Scotland under the extremely technical rules of English law relating to crimes of dishonesty. After Hitler's war the Army Act (and the Acts dealing with discipline in the Royal Navy and Royal Air Force) were recast. At the time when these measures were being considered (1954) I ventured to suggest<sup>25</sup> that the military code for the Army should be self-contained: "In completing a military code for the British Army it would be appropriate . . . to take into consideration at each stage the solutions not only of the English legal system, but of the Scottish legal system as well. The better of the two should be adopted, or indeed it might be possible in some respects to improve on both." I had in mind that in addition to purely military offences, a small number of "civil offences" such as murder should be codified, an offence of "conduct to the prejudice of good order and military discipline" should be retained, and the section of general reference to the English criminal law should be done away with. I was convinced that the law of Scotland had much to contribute in improving trial procedure, in rationalising such crimes as murder and theft, and in freeing

<sup>25</sup> See correspondence *The Glasgow Herald* and *The Scotsman*, November 26, 1954; *The Times*, November 27, 1954.

defences such as provocation and insanity from the then current restrictive interpretations of English law. Two questions put in Parliament to the Secretary of State for War were as follows: "If, in considering a new military legal code for the British Army, he will take into account at each stage on their merits the solutions not only of the English legal system, but also of the Scottish legal system," and "if, in considering any future changes in the Army Act, he will take steps to define the various military offences which may be charged and the defences available to persons who may be charged with such offences; and, in doing so, if he will incorporate, on their merits, the provisions of the relevant Scottish law as well as those of the relevant English law." These proposals were laid before Parliament and were treated with ridicule by the majority of both parties. Thus the Army Act, 1955, was enacted, with section 70 incorporating by general reference the whole criminal law of England. This, at a period when Scotsmen were conscripted for National Service, meant, for example, that if a soldier were charged with murder, the doctrine of constructive malice applied, insanity was assessed by the M'Naughten Rules, provocation was most narrowly and technically construed, and no defence of diminished responsibility was competent. Consideration of Scottish criminal law would have eliminated, as the Homicide Act, 1957, eventually did, these blemishes; but to Parliament, discussing the Army Bill in 1955, it appeared that bad English law was preferable to impartial consideration of available solutions. The Homicide Act has not, of course, done away with the

other defects of section 70, which incorporates English criminal law generally. The opportunity was lost to accomplish in a limited field a codification of British law for the British Army. The Acts governing discipline in the Royal Navy and Royal Air Force follow this policy of uncritical rejection of Scottish solutions for no better reason than that they were Scottish.

### *Private International Law*

There is a particular irony in the virtual exclusion of Scotland from participation in British policy-making in the private international law field, since it may be no exaggeration to contend that, only through union with Scotland, did English law take account of this branch of jurisprudence at all. The Union itself, of course, gave a new urgency to the development of this branch of law in Britain. That Scotland had the advantage of a long start was due to the cosmopolitan background of her legal system, which, in matters of "foreign law" or conflict of laws—as in many others—drew upon the learning of Europe. Both before and after the Union the Scottish courts expressed astonishment that in England the judges refused to apply the "law of nations." Cheshire indeed pointed out that it was not until the close of the eighteenth century that, through Mansfield's influence, the duty of English courts to give effect to foreign laws was recognised. This result, including the introduction into English practice of Continental theories of conflict of laws, may be largely attributed to the fact that Mansfield himself, as counsel in Scottish appeals, had been brought into contact with the decisions and

literature, including the writings of the European authorities, which were familiar in Scottish practice. The Scottish system, knowing no division between law and equity was well adapted to handle questions of "foreign law." Lord Kames was a vigorous and versatile Scottish judge of the eighteenth century. In the chapter on "Foreign Matters" of his work on Equity dedicated to Mansfield in 1767, he adverted to the English practice of trying "foreign matters" on the fiction that the cause of action had originated in England, and commented,<sup>26</sup> "Lucky it is for Scotland that chance, perhaps more than good policy, hath appropriated foreign matters to the Court of Session, where they can be decided on rational principles, without being absurdly fettered, as in England, by common law." It has been suggested by Professor Anton, certainly the outstanding Scottish scholar in this field, that though Mansfield and others had access to authors such as Huber when acting as counsel in Scottish appeals, the effective reception into English law of Continental theories regarding conflict law was primarily due to a series of Scottish appeals as late as the 1790s. The chapter in Kames' *Principles of Equity* upon "Foreign Matters" was brought to the notice of American lawyers through Blackstone's attack on the views expressed by the former as to the role of equity—namely that equity and ordinary jurisdiction should blend in the administration of justice, and not be exercised in separate courts. Thus Kames

<sup>26</sup> *Principles of Equity*, 4th ed., p. 541; and see generally on this topic Anton (1956) I.C.L.Q. 534; Nadelmann, *Festgabe für Max Gutzwiller* (1959) p. 263.

became an authority cited as early as 1788 also in the United States, and must have been known to Story. American lawyers also took note of Mansfield's judgments across the Atlantic, and these reflected his knowledge of current principles gained in Scottish appeals. The importance for the development of private international law, both in England and America, of Scotland's contribution after the Union has been recognised by experts such as Anton, Llewelfryn Davies, Nadelmann and Westlake. Scotland's potential contribution to British justice in this field was not necessarily exhausted after English lawyers had been instructed in the essentials. The addition of a Scottish specialist on private international law to the Lord Chancellor's Committee on that subject could be of general benefit and importance.

*Diaspora of the British Peoples and Migration of English Law*

One of the most astonishing developments in the world's legal history has been the expansion of the Anglo-American common law—which, with variations from country to country and from state to state, now applies to many millions of people in the United States and throughout the Commonwealth, whose racial ancestry is certainly not Anglo-Saxon.<sup>27</sup> With the Renaissance and the widening of the mental

<sup>27</sup> The Lord Chancellor has noted with pride that Anglo-American common law governs nearly a third of the world's population. Professor Goodhart has noted, however, that whenever there has been a choice between this common law and Roman law, the decision has always been in favour of Roman law (1960) 76 L.Q.R. 44-45.

horizons of Europeans, came also a great expansion of the physical world in which they were to work out their dreams, desires, and destinies. European law migrated across the oceans of the earth in the era of discovery and colonisation to America, Africa, Asia, and Australasia. Civil law and English law alike followed in the train of discoverers, merchant adventurers, colonists and conquistadores, sea beggars and buccaneers, viceroys and governors, missionaries and slave traders. Spain and Portugal were first in the field of colonisation, favoured by the bounty of Pope Alexander VI who bestowed lavishly what was never his to give. In the seventeenth century England, and to a lesser extent Scotland, entered seriously into the competition for colonies in North America—where France too, impelled by the initiative of Colbert, was planting the *fleur de lys* by the Mississippi and St. Lawrence. The Netherlands, shaking themselves free from Spanish rule, emerged as a leading sea power with world-wide trade interests, which they buttressed by settlements along the main trade routes. Where each of these colonial powers imposed its dominion, it established ideas and ideals of law. The juristic pattern then established has proved more durable than colonial rule. Today the Spanish-American and Portuguese-American Empires are no more; but the Republics of the South American sub-continent continue in the tradition of the civil law, transplanted by Iberian colonists whose other conquests have crumbled away. Through codification, moreover, law-makers in these Republics have supplemented voluntarily their debt to the civilian jurisprudence of

Europe, which had been imposed on their forefathers—for the civil law, unlike the common law, has not depended on political factors alone for its expansion. Netherlands traders and administrators carried the Roman-Dutch law to the Cape of Good Hope, Ceylon, Indonesia, Guiana and elsewhere; and established Civilian foundations which stood firm even after British rule supervened. In retrospect, however, the most important transplantation of a legal system in history was probably the establishment in the eighteenth century of the fundamentals of English law in North America. This phenomenon, in due course, was to be of enormous importance for many millions of men and women, who from various cultures and ethnic stocks became citizens of what is now the world's most powerful republic. The transplantation of English law to America was to make cosmopolitan an insular system. In fact, a better solution was available.

At the time of Union in 1707, the main success of English law had been in the constitutional field, and in developing principles of criminal law.<sup>28</sup> On the other hand, private law was going through a phase of formalism, rigidity and insularity before Mansfield infused his civilising and civilianising influence. Moreover, the law of England could only be found through the jungle of reported cases, or in forbidding treatises such as those of Coke in the pre-Blackstone era. The young Murray (later Lord Mansfield) we

<sup>28</sup> Reference in particular must be made to the unpublished lectures on this theme delivered in 1959 in Paris by Prof. C. J. Hamson of Cambridge.

are told<sup>29</sup> was repelled by “crabbed and uncouth compositions” of English law which reduced him to despair, and turned for enlightenment to the works of Stair and Mackenzie. These were not merely expositions in English of Scots law—but expositions of that law in a comparative, civilian spirit. They provided in large measure a compendium of European legal thought—which could be carried in a saddle-bag—for the solution of legal problems in newly settled territory. Looking back, I cannot but reflect how rational it would have been if the works of Stair and Mackenzie had taken the place later filled by Blackstone as the basic legal manual for the American colonies in the eighteenth century. Blackstone’s *Commentaries on the Laws of England*, first published by him in 1765—and the first comprehensive and reasonably comprehensible treatise on English law—had tremendous importance for the development of American law. Had a true comparative approach to British questions in 1707 been made we might well by now have had a “common law of the world” in many chapters of jurisprudence.

*Dis aliter visum.* Though both Scotland and England had colonising ventures before the Union, the pre-Union Scottish colonies in Nova Scotia and Darien were lost—in the latter case with the connivance at least of William of Orange and his English advisers. When Nova Scotia was recovered from the French in 1713, it became a British Colony. After the Union of 1707 the arbitrary rule had been imposed

<sup>29</sup> Campbell’s *Chief Justices of England*, Vol. ii, pp. 327–328.

from London that British emigrants—Scottish as well as English—to territories overseas with no established legal system should take with them the essentials of the English common law. Thus it was that the many thousands of Scotsmen who sought new homes across the Atlantic during the economic and political upheavals of the eighteenth century, or who voyaged further to Australia and New Zealand, took with them, paradoxically, the principles of a legal system which in the private law field at least was inferior to their native jurisprudence. A synthesis of British law was, of course, unthinkable to the majority when Great Britain came into existence at the beginning of the eighteenth century—except in the sense of anglicising certain aspects of public law as contemplated in the Union Agreement. It was less justifiable to overlook Scotland's potential contribution to the jurisprudence of British Colonies established in the nineteenth century, many of which are now emerging into nationhood, especially in Africa. One could wish that lawyers and missionaries alike—those men whose labours in Africa redeem so many errors and injustices—might have given a less divided witness.

It may well be that in the century that lies ahead, the African nations—often carved out by European policies with frontiers which disregarded ethnic or religious considerations—will come together in one or more large federal groups. Far-sighted men like Lord Denning have been thinking in terms of linking the former British colonies in Africa to Britain through legal education and the Judicial Committee of the

Privy Council,<sup>30</sup> while a great deal of research on "African law" is being carried out from London. I have yet to be convinced that any or adequate consideration has been given to the fact that, apart from Islamic law and customary native law, the English legal system is not the only European law of relevance for Africa's future. The civil law in accessible codifications, or uncodified as in Southern Rhodesia—not to mention South Africa—may well have an important part to play in African jurisprudence. Syria, Egypt and other countries of the Middle East have a civil law tradition. Belgian, Dutch, French, Italian and Portuguese colonists have carried the same tradition to vast areas of this awakening continent. Its political groupings and frontiers are unlikely to remain as the Europeans left them, and African legal institutions of the future will probably have to harmonise Romanistic and Anglo-American doctrine. Great though my admiration is for English law, I think that Lord Denning and others overstress it in planning for Africa. The importance of sound legal education for the African lawyers we train in Britain is obvious, but they will cease to come in their thousands (as did Indians in the past) when they have their own law schools. Meanwhile, I should have thought it politic not to exclude the civil law from their curriculum, but to ensure that some understanding of the evolved civil or Romanistic law was imparted to all.

<sup>30</sup> See his Report on Legal Education for Students from Africa, Cmnd. 1255/1961. Scottish participation in this Dominion enterprise has been excluded. See also *The Times*, July 11, 1960; *The Observer*, March 20, 1960.

Nor do I share the unqualified confidence, so often expressed, about the part which the Privy Council is to play in the future. Whatever be the outlook of certain older Dominions such as Australia towards the Privy Council, the trend for new Dominions to contract out of appeal to the Privy Council will probably continue. It is not merely a matter of national pride—though the country which in such matters as personal liberty cannot achieve justice with its own resources is scarcely ripe for emancipation. The Judicial Committee of the Privy Council, however erudite and Olympian, is a remote and expensive tribunal with limited experience, if any, of local conditions in many of the jurisdictions from which the appeal is brought. Ability, integrity and impartiality are beyond dispute—except perhaps for the possible subconscious predilection of a majority for the solutions and methods of English law. Resentment at the tendency of the Privy Council, in the past, to construe the Canadian Constitution like an English statute may suggest caution in assuming that a body of mainly English-trained lawyers is necessarily most suitable to interpret the constitutions of other countries. It would be strange indeed if judges, who hesitate to scrutinise judicially the constitution of their own country, were to prove the best interpreters of other constitutions. Only Scottish judges have so far faced the challenge of upholding the fundamental Constitution of Great Britain.<sup>31</sup>

The interaction of Scots law and English law, which

<sup>31</sup> *MacCormick v. Lord Advocate*, 1953 S.C. 396; and see for other references "The Union of 1707" [1957] *Public Law* 99.

I shall deal with incidentally in later lectures, need not be developed now. It is sufficient to say that through legislation, the Privy Council and the persuasive authority of House of Lords' decisions, the fruit of such *rapprochement* as there has been was transmitted not only to Britain, but to much of the Commonwealth as well. Scottish judges in the Privy Council have, as a rule, been particularly vigilant to protect the integrity of Romanistic systems within the British Commonwealth. It would be tedious, and perhaps pretentious, to catalogue in detail the occasions upon which particular aspects of Scots law have commended themselves to other systems—as when in framing the Indian Specific Relief Act of 1877, the Scottish action of declarator was used as the model for the chapter on “Declaratory Decrees”; or as when in preparing the English language version of the Quebec Civil Code of 1866, Scottish legal terminology was used to ensure a civilian construction. Perhaps, however, I may mention in passing the reciprocal influence which existed between American law in its formative era and Scots law at the end of the eighteenth century<sup>32</sup>—the classical period—and the early decades of the nineteenth century. Lord Kames' chapter on “Foreign Matters” in his *Principles of Equity* was cited in the American courts in 1788 and may indeed have introduced there the theory of comity in dealing with questions of foreign law. Moreover, in 1790 James Wilson, Scottish-born member of the Supreme Court of the United States,

<sup>32</sup> See Nadelmann, “Joseph Story and George Joseph Bell,” 1959 *Jur.Rev.* 31.

in his lectures at the University of Pennsylvania referred frequently to the writings of Kames. Kent's *Commentaries* (1826), the first treatise on American law, makes numerous comparative references to Scots law—including citations from Fergusson's consistorial reports and Bell's *Commentaries*—while Joseph Story, whose *Commentaries* were first published in 1832, refers on many occasions to Stair, Erskine, Kames and Bell. This influence was by no means one-sided, and Bell in the 1839 edition of his *Principles* relies frequently on Kent and on Story, with whom he corresponded on terms of mutual admiration. The Scots lawyer and the American lawyer—selective, creative and comparative in outlook—had ground for common understanding. Neither believed that the ultimate revelation of legal wisdom had been given to one chosen people at one particular period in time.

#### SCOTTISH LAWYERS AND THE ANGLO-AMERICAN LAW

Scotland's influence on legal thought and administration through Scots law has been limited by factors such as those I have already mentioned. It is a different story when one considers the world-wide impact which Scotsmen as practising lawyers have had on other legal systems. Earlier this year that distinguished English judge, Lord Denning, in his David Murray Lecture<sup>33</sup> delivered at Glasgow University, claimed that over the past two hundred years English law had been borrowing from Scotland

<sup>33</sup> Not yet published: Press reports, *Glasgow Herald* and *The Times*, May 6, 1961.

“principles and men, in both of which Scotland had no equal in the world.” Whatever the present situation, these words are not altogether extravagant when applied to the Scotland of my forefathers, and to the Scotsmen who left home to seek livelihood and liberty, or fame and fortune, in other lands. Over many centuries Scotland’s chief export has been her sons—a matter of pain as well as pride. So often it has been the cream of the nation which set out to match its talents against the fiercest challenges of human competition or of nature. Scholars, soldiers of fortune, doctors, teachers and missionaries, engineers and mariners, traders and pioneers, administrators and lawyers—what magnificent men they have been. The majority of those descended from the Scots of 1707 are now overseas, and the ethnic centre of Scotland is probably on the west shore of the Atlantic. Many Scots of the diaspora have risen to the highest judicial and executive offices, and, through law, even to the rank of Prime Minister in the Dominions. Paradoxically, there are those in this country who doubt the ability of Scotsmen to govern their own domestic affairs wisely. Few legislatures in the Commonwealth can have less Scottish lawyers than Parliament at Westminster—where one advocate alone (the Lord Advocate) sits in the House of Commons.

As I reflected on the potential contribution which Scots law could have made to the world, I was haunted by the realisation that often the men who could best have made that contribution were serving

with distinction in the various systems of Anglo-American common law. The tradition of the Scottish nation—tattered, alas, in the twentieth century—seems to have fitted the Scotsman for the profession of law wherever he may be. Through the Presbyterian ethos, a love of dialectic and argument was transmitted—qualities well suited to judge and advocate; while the “bonny fechter” suits well both forum and the field.

Time would fail me to tell of the noble contribution of so many Scottish lawyers to common law jurisdictions—in Africa, Australia, Canada, India, New Zealand and many more. For the Colonial (now the Overseas) Legal Service, moreover, there was, and is still, no differentiation against a Scottish qualification. Grasping this opportunity, numerous Scottish advocates have risen to high judicial office outside their own country. I cannot pause to name them, nor to pay individual homage to the part played by Scottish lawyers in the various Dominions where Anglo-American common law is administered. The main pivots of that system—England and the United States—however, must be mentioned briefly.

At the time of the American War of Independence about 7 per cent. of the colonial population were Scots. Yet nine of the 56 signatories of the Declaration of Independence and twelve of the 54 delegates to write the American Constitution came from that minority. I shall refer later to the significant fact that the descendants of those who had accepted the Union of 1707 showed no enthusiasm for the solution of a unitary state or a legislature beyond judicial

control. They did not write into the Constitution the requirement that all American citizens by the third generation must have acquired a Scottish ancestor. This depends on tacit convention. Two of the five members of Washington's first Cabinet came from the same Scottish minority, as did two of the five original Associate Justices and the second Chief Justice of the United States Supreme Court. It has been estimated that of those who have served on that court, at least a third have been of Scottish descent. A similar pattern may be traced in other American courts—State and Federal—and among leaders of the practising profession.

The contribution made by Scotsmen in England to the common law is a theme for a course of lectures. Fortunately in 1954 the present Lord Chancellor (then Home Secretary) addressed the Canadian Bar Association on "Scottish Influence on the English Bar,"<sup>34</sup> and this year Lord Denning at Glasgow dealt with the contribution made by Scotsmen as judges in England. Lord Kilmuir is a master of English law, but is so dedicated to all matters small as well as great affecting his native Scotland that he even volunteered to take the chair at one of these Hamlyn Lectures—the first series in Scotland. At Winnipeg he chose for discussion four of his Scottish predecessors to reach the highest judicial offices in England—Mansfield, Loughborough, Erskine and Haldane. Alexander Wedderburn, Lord Loughborough, was the only one of the four to have practised as an advocate in Scotland before attaining the glittering prizes of

<sup>34</sup> [1954] 32 Can.Bar Rev. 844.

Bar and Bench in England. In the eighteenth century when Scots in England had to contend with prejudice and hatred, he proved nevertheless that these prizes were within a Scotsman's reach. Thomas Erskine (born 1750), though he became Lord Chancellor, will be remembered above all else for his courageous and forceful advocacy. He was, according to that caustic critic, Lord Campbell, "the greatest forensic master that Britain ever produced" and, as Lord Kilmuir has said, the master and forerunner of such militant advocates as Russell, Carson and F. E. Smith. Haldane, the philosopher concerned with first principles, made a major contribution not only in the House of Lords, but also in the Privy Council—which he was anxious to develop as the one unified Supreme Court of Appeal for the Commonwealth.

I have already mentioned the contribution of Mansfield (who became Lord Chief Justice in 1756) to the development of mercantile law and private international law in England, and also his early interest in Scots, Roman and French law as law student and as counsel in Scottish appeals heard in the House of Lords. His Scottish practice indeed launched him on his career, and Edinburgh, in particular, was grateful to him for his representation of the city's interests after the Porteous Riots. During his lifetime he was assailed with charges of Jacobitism, and of introducing Scottish legal doctrines into English law. Even in our own times Sir William Holdsworth, most distinguished of English legal historians, assesses Mansfield rather grudgingly as

follows<sup>35</sup>: "Lord Mansfield was a Scotchman by birth, but he was educated at Westminster and Oxford, and he was a barrister of Lincoln's Inn. He had kept up some connection with Scotland and Scotch law, so that both his birth and his education, as well as the qualities of his mind, tended to make him a jurist learned in Roman and Continental law as well as in English law. The breadth of his learning prevented him from attaining that accurate knowledge of the development of common law rules which could only come to an English lawyer who had devoted the largest part of his time to the study of its complex technicalities. . . . But, naturally, the continued exercise of these qualities tended to make him think that he could settle on rational principles all the branches of the common law. This was a mistake." In fact, Mansfield was careful to avoid giving the impression that he wished to civilianise the common law of England,<sup>36</sup> even though "The law of England when he came to the Bench was an archaic survival in an age of rationalism." So far as lay within his power, and using the traditional techniques when possible, he attempted to reform many branches of English law. Such was his authority as a judge that he was only reversed on six occasions during over thirty years on the Bench. Significantly, these were instances when legal conservatism revolted successfully against reason and common sense. Today the doctrine of consideration remains as the anachronistic but indispensable badge of simple contract in

<sup>35</sup> *History of English Law*, Vol. vii, pp. 45-46.

<sup>36</sup> See generally Fifoot, *Lord Mansfield*.

England. Had Mansfield had his way, a solution similar to that of Scots law might well have been in operation. But the House of Lords would have none of it. Another aspect of legal conservatism has eventually tended to limit Mansfield's achievement. Through his close contact with the merchants, whose advice he valued, mercantile custom and usage was brought within the common law. Once flexible custom had been incorporated into the law, however, the doctrine of precedent exercised a fossilising effect. Today mercantile law lags behind the needs and practices of commercial men.

Two other native Scots who made important contributions as English lawyers may be mentioned. Lord Campbell (born near Cupar in 1779), after a successful career at the English Bar and in politics, became in turn Lord Chief Justice and Lord Chancellor. He is one of the select few to have their names immortalised by association with a statute. Lord Campbell's Act—as the Fatal Accidents Act, 1846, is known—gave in England a right of action to near relatives of a person killed wrongfully—a right which already existed by the common law of Scotland. This may have encouraged Lord Campbell to make like provision for England, but it must be said that the learned judge proved a better influence on English law than on Scots law when, sitting as Lord Chancellor, he adjudicated on Scottish appeals. Men of Scottish birth who attain high judicial office in England have not always shown sympathy or understanding for their native jurisprudence.

Lord Finlay, who became Lord Chancellor in 1916,

and was Lord Rector of Edinburgh University in 1902, had studied medicine in that university before turning to law. He made an important contribution to the development of English law in several fields, especially perhaps in connection with international law questions. Later he was appointed British judge of the Permanent Court of International Justice.

Let me touch on another aspect of the influence of Scotsmen in English law. Since 1876 there has always been at least one, and usually two, Lords of Appeal in Ordinary from the Scottish legal profession who sit in the House of Lords. These are Scottish lawyers, but they spend a good deal of their time dealing with appeals from the English courts, and in so doing have undoubtedly made contributions of great importance to the development of English law. The names of Lords Dunedin, Thankerton and Macmillan, to select only three from the past, will be remembered among the architects of English law. A Scottish judge or advocate must of necessity in the course of his professional life have acquired a certain knowledge of English law before he is appointed to the House of Lords, and owns the English reports and treatises; while an English lawyer may be appointed with no previous knowledge of Scots law. Moreover, a Scottish judge in the House of Lords is constantly concerned with questions of English law, and, though he will seek to reach the most just solutions, is unlikely to do it on the basis that Scottish and English law on the point in issue must or should be the same. This may explain why there has never been an outcry from the English "oppressed majority," as Mr.

Megarry puts it,<sup>37</sup> when Scottish judges hold the balance of power in English appeals.

Perhaps, however, the most surprising way in which Scottish Lords of Appeal have managed to develop the common law of England is by their decisions in Scottish appeals concerned with questions of Scots law—during which there has been some incidental discussion of English law—and which have subsequently been adopted as though they were great achievements of English jurisprudence. One example—a notable one—must suffice, the so-called doctrine of *Donoghue v. Stevenson*,<sup>38</sup> popularly known as the “Snail in the Bottle Case.” Since the seventeenth century at least the law of Scotland recognised that the fact that A had contracted with B was no reason why he should not be liable in delict for his carelessness, if he harmed C, with whom he had no contract. This doctrine had, however, been obscured during the nineteenth century through the grafting onto Scots law of English notions regarding privity of contract. In 1931 an appeal was taken from the Scottish courts to the House of Lords to establish whether, if a lady had sustained damage through consuming ginger beer polluted by the decomposing remnants of a snail, she had a remedy (on the principle of *culpa* or fault) against the manufacturer with whom she had no contract. To this the House of Lords gave an affirmative answer—which restored the *status quo* in Scots law. This decision was then immediately accepted in England as a milestone in the development of the common law—as

<sup>37</sup> (1956) 19 M.L.R. 95.

<sup>38</sup> 1932 S.C.(H.L.) 31; [1932] A.C. 562.

recognising a “tort of negligence,” a concept which is certainly not identical with *culpa* or fault in Scots law. I doubt, however, if nine English lawyers out of ten realise this fact, or that the decision in the *Snail Case* was not an English tort action at all. Lord Walker, a Scottish judge, at the American Bar Association Meeting in Washington in 1960, made this point very clear :

“ Within the last two days in this city, *Donoghue v. Stevenson*—better known as ‘the Snail in the Bottle’—has been mentioned as though it were an English case exemplifying the merits of the common law. The hypothetical snail may perhaps have originated in England, but the damage which allegedly it did to the lady who swallowed it occurred in Scotland, and her claim was for reparation under Scots law. That the claim succeeded was due no doubt to the fact that, of the five judges who sat in the House of Lords, two were Scots lawyers. Had the decision depended solely on the votes of the three English lawyers, the lady’s claim would, I fear, have foundered on the common law rock of privity of contract ! ”

*Donoghue v. Stevenson* has had almost revolutionary importance in the common law world as a whole. The trail of the snail leads from London to Adelaide, from Ottawa to Singapore. Scottish lawyers had provided their learned friends in the South with a new revelation, and grist for their mills for years to come. Vindicated at last, Scottish judges of the classical age slumber peacefully again in Greyfriar’s Kirkyard.

## CHAPTER 2

### MACHINERY OF JUSTICE \*

#### THE BASIC SYSTEM

PERHAPS alone among the countries of Western Europe in medieval times, the King of England succeeded in establishing central control over the administration of justice throughout his realm. This had many advantages, but, as Professor Plucknett has pointed out, the cost was heavy. English common law developed in isolation without an effective competitor, and, to quote this distinguished legal historian,<sup>1</sup> "England had to wait until 1846 for a co-ordinated system of local courts. The crown's incurable fear of the sheriff is largely responsible for this. How great an opportunity was missed can be seen by looking at the vigorous and useful institution of the sheriff in Scotland, where the office was allowed to develop along natural lines." In discussing the courts in Scotland, I need make no apology for stressing the role, not only of the superior courts, but also of the Sheriff, the territorial judge, as he is today. If the quality of a country's laws may best be assessed by considering the pronouncements of the highest tribunals, the quality of a country's justice is most frequently tested in those lower courts which handle the great bulk of civil and criminal business.

An account of the Scottish courts in medieval times

\* See diagrams of courts, pp. 136-139.

<sup>1</sup> *Concise History of the Common Law*, 5th ed., p. 105.

would be largely concerned with the local courts. Apart from the ecclesiastical courts, which were manned by professional lawyers and exercised extensive jurisdiction, civil and criminal justice was administered by laymen in burgh courts or by feudal proprietors exercising heritable jurisdiction either as sheriffs or by grant of a franchise such as a barony or regality. When the King was strong his Justiciars and Chamberlain exercised supervision and administered peripatetic justice, hearing the pleas of the Crown and "falsing dooms" of the lower courts, but, in the troubled era which followed the Wars of Liberation, these duties were often neglected. Reform of the local administration of justice was therefore attempted. In 1496 a statute required all barons and freeholders to send their heirs to study Latin and law at the universities—Latin being of course essential to a study of Roman law. Had this project succeeded, those who presided in the feudal courts, or attended as suitors, would (or at least could) have been learned in the law—but the disaster of Flodden (1513) blighted this hope, and wiped out those who should have fulfilled it. Reform of justice at the top of the hierarchy thus became an increasingly urgent problem. The principal hope of the party aggrieved by delay or denial of justice in a feudal court was to lay his complaint before the King as fount of justice. From the varying committees of Parliament and Privy Council set up to deal with this business, developed the Lords of Council and Session, and ultimately, in 1532, the College of Justice or Court of Session—Scotland's supreme civil tribunal. For the

establishment of this tribunal, which was constituted permanently in 1541, James V had secured a Bull from Pope Paul III. The money to pay the new permanent professional judiciary—comprising half laymen and half churchmen—was intended to be derived from ecclesiastical revenue. At the time when the Court of Session was constituted as the College of Justice, Scotland's relationship with France was particularly close culturally and politically. Predominantly French influence may be discerned in the organisation and procedure of the College of Justice in Scotland, though it has been suggested—erroneously I submit—that the model was the Collegio dei Giudici at Pavia.<sup>2</sup>

From the sixteenth century until well into the nineteenth the basic structure of Scotland's superior civil courts remained substantially unaltered, though no appointments of Chancellor or Extraordinary Lords of Session were made after the early eighteenth century; and after the Reformation clerical appointments to the Bench were forbidden. The permanent judiciary of the Court of Session, therefore, comprised the Lord President and fourteen Ordinary Lords. The court was essentially a collegiate or unitary tribunal sitting permanently in Edinburgh. In cases of great moment "the hail fifteen" sat together in the Inner House, while nine judges were normally a quorum, and twelve had to examine any proof. Judges sent to the Outer

<sup>2</sup> See esp. Stein, "The College of Justices at Pavia" (1952) 64 *Jur.Rev.* 204. For the history of the Scottish courts generally, see Stair Soc., vol. 20, *Introduction to Scottish Legal History*. The present author prefers his own conclusions on a few points.

House were little more than commissioners, executing delegated functions and reporting back to the whole court. No matter of importance was disposed of by a single judge. By marked contrast with the position in England, a bench of judges were masters both of fact and law. Though in criminal trials and for various purposes in the local courts facts were found by juries, this method was regarded as too uncouth for the Court of Session.

Professional lawyers, acting as counsel, agents or notaries, had practised in Scotland long before the constitution of the Court of Session as the College of Justice. Indeed, the first statute dealing with legal aid to poor persons goes back to 1424; and in 1469 the King asserted the right to appoint notaries—these having hitherto derived authority from Pope or Emperor. Nevertheless the establishment of the College of Justice influenced the organisation and discipline of the legal profession. During the sixteenth century, from the ten procurators originally licensed to appear before the Session, evolved the Faculty of Advocates (the Scottish Bar) with the Dean of Faculty (corresponding to the bâtonnier in France) as its elected head. In the same century the Society of Writers to H.M. Signet—the senior corporation of solicitors in Scotland—emerged as an organised body, sharing with the advocates membership of the College of Justice; while other societies of solicitors (such as the Royal Faculty of Procurators in Glasgow) were organised in the principal burghs of Scotland, and maintain their identity today within the Law Society of Scotland, which was created in 1949.

From the outset the Court of Session exercised control over the local courts, and attracted to itself most important civil litigation. It was not, however, the court of first instance for all types of cause—admiralty and consistorial matters for example. Until the nineteenth century various central courts maintained their independence though subject to review by the Court of Session. Thus the Admiral of Scotland exercised jurisdiction both in civil and criminal matters and also in prize. The expedition and simplicity of process before the Court of Admiralty made it a serious rival to the Court of Session for commercial litigation, while the Justiciary Court grudged this competitor in the criminal field.

Before the Reformation, the ecclesiastical courts in Scotland has been conceded wide jurisdiction, and thereafter their place was taken by the Commissary Courts. The local commissaries, though largely occupied with executory matters, had also limited jurisdiction to adjudicate on obligations fortified by an oath, or in actions by widows and other “poor and miserable persons,” and for slander. The judges of the Superior Commissary Court in Edinburgh were advocates, many of whom later became Senators of the College of Justice. Besides their local jurisdiction the Edinburgh Commissaries exercised a general jurisdiction covering Scotland as a whole, in such matters as legitimacy, marriage and divorce.

Though dependent on Royal favour for appointment during the Stuart era, Senators of the College of Justice held office for life and, even if their selection or their administration of justice were not always

beyond reproach, it was from the judges of the Court of Session—not from Coke—that James VI and I was to receive his first sharp lesson on judicial independence. In the case of *Bruce v. Hamilton*<sup>3</sup> in 1599 James intervened in person in the debate on behalf of one of the parties. The best account is perhaps that of an Englishman, George Nicolson, Elizabeth Tudor's agent in Scotland, reporting to his master, Cecil, in London. "The Lord of Newbottle (Newbattle) then also stood up and said to the King that it was said in the town to His slander and theirs, that they durst not do justice but as the King commanded them; which he said should be seen to the contrary, for they would vote against Him in the right in his own presence." The Lords then so voted, "Whereat the King raged marvellously and is in great anger with the Lords of Session—The King swears he will have Mr. Robert Bruce's case reversed, which the President understanding, says he will pen in Latin, French and Greek to be sent to all the judges of the world to be approved, and that by his vote it shall never be reversed. And so say the whole Session." As Lord Birkenhead observed of Seton's opinion, "A nobler and more courageous expression of judicial independence was never made." It rings across the centuries and may atone for less worthy conduct among some of the successors of Seton and Newbattle whose impartiality was not always beyond the reach of influence. I regret to disclose that the greatest name in Scots law, Viscount Stair, Lord President and author of our

<sup>3</sup> For various accounts, see Lord Cooper, *Selected Papers*, p. 116; also Lord Normand, 46th Rep., Int.L.Assoc. at pp. 9-10.

leading legal treatise, accommodated Lauderdale, favourite of Charles II, by having a cause called out of order so that it could be dealt with by judges well disposed to one party. When the loser appealed to the Parliament of Scotland, the King was induced to intervene and to prohibit all such appeals for the future. As a result those members of the Scottish Bar who upheld the right were barred from practice. After making their submission eventually, the incident so rankled in the breasts of many that in the Claim of Right, 1689, the right to appeal to Parliament for "remeid of law" was reasserted. But for the incident which I have mentioned, it might never have occurred to Scottish litigants to invoke the appellate jurisdiction of the House of Lords in civil causes after the Union of 1707.

While the Court of Session, sitting permanently in Edinburgh, from the mid-sixteenth century established its control over civil causes, administration of criminal justice from the Capital became effective only at a much later date. The early justiciars when they went on ayre had exercised criminal jurisdiction, but in troubled times the holding of ayres was discontinued. Eventually in 1672 the High Court of Justiciary, Scotland's supreme criminal court, was constituted, and the office of justice-depute was abolished. It was provided that the judges of the new court were to be the Lord Justice General, the Lord Justice-Clerk, together with five judges of the Court of Session sitting as Lords Commissioners of Justiciary. These were required to hold circuit courts outside Edinburgh, but during most of the Stuart

period it is clear that royal justice was not effective in dealing with crime throughout Scotland. Indeed, not until the heritable jurisdictions were abolished in 1748 after the second Jacobite Rising was this end achieved. The local feudal courts were controlled by territorial magnates, who might condone crimes of their followers which the Crown wished punished. Though the Sheriffs had originally been appointed as royal officials responsible to the King, through operation of the heritable principle they became substantially independent, and valued their jurisdiction as a source of revenue. The judicial duties of the Sheriff were usually performed by deputed, who also appointed substitutes—and various Acts of Parliament encouraged the appointment of such as had legal training.

James VI was greatly concerned by the unsatisfactory situation which obtained under the system of heritable jurisdictions. He did not, however, abolish them. Instead he attempted to graft the English institution of Justices of the Peace on to the Scottish system. This institution was introduced by the Act of 1609, and this Act was followed by many more—in particular that of 1661 which is the basic Act today, and the Act of 1708—endeavouring to increase the effectiveness of the Justices. By an astonishing stroke of ignorance or arrogance the Commission issued after the post-Union Act of 1708 included the two English archbishops, the English law officers and all English members of the Privy Council. Despite efforts made by the central government before and after the Union, however, Justices of the Peace in Scotland have not flourished as an institution. Their

role in criminal matters is very restricted, and their civil jurisdiction today is negligible. At times it is true, before the reform of the Sheriff Courts in the eighteenth and nineteenth centuries, the justices had many duties to discharge, and they also gained jurisdiction from the burgh courts and moribund baron courts. Since then, unlike the situation in England, administration of justice locally in Scotland, in matters of more than minor importance, has been in the main kept out of the hands of laymen, and has been committed to professional judges. In England "magistrate" usually implies Justice of the Peace. When a Scotsman refers to a "magistrate," he usually means either a stipendiary, or an elected local government representative who may sit in a burgh court.

#### THE EFFECT OF UNION WITH ENGLAND

##### *The Union Agreement*

Before passing to consider the changes made in the machinery of justice in Scotland, mainly by nineteenth-century statutes, I must comment briefly on the effect of the Union of 1707 upon the Scottish courts. Though, since the Union, Queen and Parliament have both been established in London, Scotland's supreme courts have sat on in the Parliament House in Edinburgh symbolising, as it were, the nation's survival in her laws. The Union Agreement—the fundamental law of the new Kingdom<sup>4</sup> of Great Britain and of the new Parliament of Great Britain which on May 1,

<sup>4</sup> See generally T. B. Smith, "The Union of 1707 as Fundamental Law" [1957] *Public Law* 99.

1707, replaced the former Kingdoms and Parliaments of Scotland and England—contains important safeguards for the administration of justice in Scotland. Scotland's supreme civil and criminal courts, the Court of Session and High Court of Justiciary, were to remain "in all time coming" within Scotland as constituted at the Union, with the same authority and privileges as before. No causes from Scotland were to be "cognoscible" in any court in Westminster Hall. The Scottish Admiralty Court was to be continued, subject to Parliament's right to make regulations and alterations for the whole United Kingdom—a weaker safeguard than those provided for the Court of Session and Justiciary. The Exchequer Court in Scotland was only to continue until a new court should be settled by Parliament after the Union; while it was provided that "the Queen's Majesty and her royal successors may continue a Privy Council in Scotland . . . until the Parliament of Great Britain shall think fit to alter it." The Union Agreement also safeguarded Presbyterian government and discipline in the Church of Scotland—the established Church—and thus recognised the authority of the courts of the Church within their jurisdiction.

### *The Exchequer Court*

After the Union an Exchequer Court on the English model was established in Scotland to deal with matters of customs, excise and revenue of the Crown. Within this limited field prerogative writs such as habeas and certiorari were introduced to the utter bewilderment of the profession. Though this Exchequer jurisdiction

was absorbed by the Court of Session in 1856, the ghosts of these writs remain to haunt us still, and Belhaven's gloomy prophecy on the eve of the Union was fulfilled,<sup>5</sup> "I think I see our learned judges . . . studying the common law of England, gravelled with certioraries, nisi priuses, writs of error, verdicts indovar . . . etc."

### *The Privy Council*

The Scottish Privy Council was abolished a year after the Union. So far as the administration of justice was concerned this had important repercussions. The Privy Council, by virtue of the royal prerogative, had supplemented action by the supreme courts both civil and criminal. It had been useful to curb the over-mighty subject, but had also been an engine of persecution. Though the Court of Session had always administered law and equity together—equitable principles guiding the development of legal rules—the Privy Council had also exercised an extraordinary equitable jurisdiction by virtue of the *nobile officium*. After the abolition of this body by statute, the Court of Session, Kames observed,<sup>6</sup> succeeded to this "noble office" to modify or abate the law—though in modern times, I may add, it has become restricted in practice through the influence of precedent. Not only in England is there scope for a "New Equity."

### *The Justiciary Court*

The privileges of the High Court of Justiciary were

<sup>5</sup> *I. R. C. v. Barrs*, 1960 S.L.T. 278.    <sup>6</sup> *Hist. Law Tracts*, p. 231.

expressly safeguarded by article XIX of the Union Agreement, yet the Treason Act, 1708, might well be construed as a breach in spirit at least, if not also of the letter, of that article. True, the Agreement by Article XVIII permitted the new Parliament, subject to certain express reservations, to assimilate the laws of Scotland and England in matters "concerning publick Right, Policy and Civil Government." Parliament, however, achieved this end, so far as the law of treason was concerned, by a most regrettable device; and proceeded to divest the High Court of Justiciary, as such, of jurisdiction to try persons accused of treason. The former Scottish law of treason has been denounced by Hallam as "one of the most odious engines of tyranny ever designed against public virtue," and certainly it was in need of reform; but in fact it was the relative leniency of the law of Scotland to those who had participated in the abortive Jacobite Rising in the year following the Union which induced Parliament to extend the English law of treason to Scotland, and to provide for Commissions of Oyer and Terminer on the English model to try persons accused thereunder. Despite the strong protest of the Scottish peers in Parliament, no statement of the English treason laws was provided in the Scottish statute. Perhaps no one was able or willing to provide the schedule requested. Procedure as well as substantive law were to follow English example—which meant that the accused was deprived of the rights which he would have had under Scots law to full particulars of the indictment and witnesses against

him, representation by counsel and so forth. In fact this ill-contrived legislation has on the whole been seldom invoked. After the 'Forty-Five Rising Scottish prisoners were in the main tried at Carlisle. When in 1820 Commissions of Oyer and Terminer on the English model were set up to try Scotsmen on treason charges in Scotland, as Cockburn recalls, the services of an English sergeant were provided to keep the court right on the law of treason. The experiment left a bad taste<sup>7</sup>—"They were all guilty of high treason, no doubt; as any old woman is who chooses to charge a regiment of cavalry. But to make such a parade about such treason did no good either to the law or to the people." Perhaps it did this much good—no prosecution for treason has been known in Scotland for the last 140 years. In 1945 jurisdiction to try treason was restored to the High Court of Justiciary, and in 1950 they were at long last relieved of the prospect of imposing the gory penalties of drawing and quartering. Nevertheless, the former Lord Justice General publicly expressed<sup>8</sup> the disinclination of Scottish judges to try persons charged under this still highly technical branch of English law. The conviction of William Joyce (Lord Haw Haw) surprised and disturbed him.

#### *Appeals to the House of Lords*

A more important consequence of the Union has been the recognition of the appellate jurisdiction of

<sup>7</sup> Cockburn, *Memorials*, p. 366.

<sup>8</sup> In evidence to Royal Commission on Capital Punishment, 18th Day.

the House of Lords in civil causes. The Union Agreement had expressly provided that no Scottish cases should be cognisable by any court sitting in Westminster Hall, but the articles were silent (perhaps, as Defoe suggests, deliberately so—since English claims would never have been agreed to by the Scots) regarding the competency of appeal from the supreme courts of Scotland to Parliament. As I have already mentioned, at the end of the seventeenth century the competency of appeal to the Parliament of Scotland “for remeid of law” had been reasserted within narrow limits. Soon after the Union of 1707, the question was raised as to whether the House of Lords as judicial organ of the new Parliament of Great Britain had succeeded to the jurisdiction formerly exercised by the Three Estates of the Scottish Parliament. In the first session of Parliament after the Union, the House of Lords of the new Parliament of Great Britain accepted jurisdiction in a Scottish civil appeal, on the assumption that it had succeeded to this jurisdiction. Thereafter appeals multiplied, and appellate jurisdiction was exercised far beyond the limits of “protestation for remeid of law.” The consequences for Scotland of allowing appeals from the Court of Session to the House of Lords really only became fully apparent in the nineteenth century. These included the emergence of more rigid doctrines of precedent (*stare decisis*); the introduction of civil jury trial; the *mystique* of the single judge as an evaluator of testimony; radical changes in civil procedure; and the extension of English legal influence to various chapters of the law of Scotland. I shall

comment on these presently in a modern context. During the eighteenth century, though one could cite instances of the House of Lords altering established doctrines of Scots law, and intervening in partisan fashion when political passions were roused, the Scottish judges did not at first regard the Lords' decisions as binding on them for future cases, and in any event they were not collected systematically until 1807. Lord Denning in his *Romanes Lecture* has paid his tribute to coroneted amateurs in the ultimate appellate tribunal.<sup>9</sup> Study of the conduct of Scottish appeals in the eighteenth century—when any peer, except, of course, Scottish peers not of the Sixteen, could intervene and vote—does not fill me with like enthusiasm. When the issues lacked political interest, and were therefore left to the lawyers in the House of Lords—in effect to the Lord Chancellor or his deputy—no person trained in the law of Scotland attended to advise, and often no Scottish counsel were heard in argument. Though purporting to construe definitively the laws of a substantially Romanistic system, their lordships, even as late as the mid-nineteenth century, did not have access in their library even to the *Corpus Juris* of Justinian—by which time Scottish advocates were forgetting or despairing of its use. It is fair I should add that in the main it was Scottish litigants and their advisers who invoked this strange jurisdiction. Where a right of appeal exists, its attractions are irresistible. Indeed, the increasing number of Scottish appeals to the Lords became an intolerable burden to successive Lords Chancellor, who

<sup>9</sup> *From Precedent to Precedent*, p. 18.

did not relish coping unaided with the problems of an unfamiliar system of jurisprudence and not infrequently protested or displayed their ignorance of its principles. "I know something of the law," cried Lord Chancellor Erskine,<sup>10</sup> "but of Scotch law I am as ignorant as a native of Mexico!" It is perhaps not surprising that the House of Lords tended to apply the law which its legal members did understand. They, as much as Scots lawyers, were victims of an unjustifiable system.

On the other hand, on the assumption that the former Scottish Parliament had exercised no equivalent jurisdiction in criminal causes, the House of Lords declined to entertain appeals from the High Court of Justiciary. Though the matter was raised afresh in 1876 by one Mackintosh<sup>11</sup>—who complained that he had been certified insane—the conclusive declinature of jurisdiction was in the case of *Bywater*<sup>12</sup> in 1781. In that case Lord Mansfield repeated the advice he had given fifteen years earlier, when Katharine Nairn or Ogylvie, according to his recollection,<sup>13</sup> had attempted to appeal to the Lords against her conviction for adulterous incest and murder. This lady, being of rank and fortune, as Lord Mansfield noted, had the best legal advice available. Her trial and its sequel stirred the public imagination of her day much as did that of Madeleine Smith in the nineteenth century. Though the House of Lords would not hear an appeal—which had little to favour it on the merits

<sup>10</sup> *Cit. Gibb, Law from over the Border.*

<sup>11</sup> (1876) 3 R.(H.L.) 34; 2 App.Cas. 41.

<sup>12</sup> (1781) 2 Paton 563.

<sup>13</sup> But see *Trial of Katharine Nairn*, ed. Roughead, Appendix IX.

—she was not at the end of her resources. Her execution being deferred on grounds of pregnancy, she escaped after delivery in the clothes of the midwife; and, after hiding for some time in the house of her uncle, an advocate, escaped abroad escorted by the latter's clerk. As for the lady herself, she is reputed either to have married and lived happily ever after amid a multitude of progeny, or, alternatively, to have taken the veil in France, dying at a ripe old age in England. Her uncle became Lord Dunsinnan, a judge both of the Court of Session and of the High Court of Justiciary.

#### REORGANISATION AND REFORM

By the early nineteenth century the need to improve the organisation and procedure of the Scottish courts was generally accepted; but the proposals for reform suggested by a succession of Select Committees and Royal Commissions disclose little agreement as to the most expedient solutions. Empiricism and at times prejudice determined the course of certain earlier legislative changes, while others have proved wise and far-sighted.

#### *Reorganisation of the Court of Session*

First, we may note that the Court of Session, for the conduct of normal business, lost its unitary character. After various experiments the organisation (which still operates) was adopted of dividing the court into an Inner House of two permanent chambers or Divisions, and an Outer House in which the

eight junior judges sit singly as Permanent Lords Ordinary—judges of first instance. The First Division of the Inner House is presided over by the Lord President, and in the Chair of the Second Division is the Lord Justice-Clerk. Unlike the system of judicial promotion in England, a Lord Ordinary is promoted to the Inner House according to seniority of appointment, while vacancies in the offices of Lord President and Lord Justice-Clerk are usually filled by former law officers. Each Division (comprising four judges, but with a quorum of three) exercises both an original and an appellate jurisdiction, though its work is mainly appellate. The appellate jurisdiction of the Divisions comprises appeals from the Lords Ordinary and from the Sheriff Courts.

The original unitary character of the Court of Session has, however, survived for certain important purposes. Questions of special difficulty or importance may be argued before five judges or seven judges or before the whole court. Moreover, a Lord Ordinary may report a case of difficulty, without deciding it himself, in order to have an authoritative ruling. Though strictly a decision by one Division may not be a binding precedent except for single judges, in fact choice between conflicting precedents, or the overruling of an unsound precedent, is usually achieved by convening a court of seven judges—or if necessary, all sixteen—who could overrule any precedent other than that of the House of Lords. This is a very convenient device, and results from the theory that in a collegiate court the majority of judges cannot

be bound by a minority regarding law or fact. The converse solution has been reached by the Court of Appeal in England.

### *Consolidation of the Central Courts*

The next development to be noted is the merging during the nineteenth century of other central civil courts—over which there had previously been appellate jurisdiction—into the Court of Session itself. There was, of course, no question as in England of need to fuse law and equity—since these had never been separated in Scottish practice. (Lord Eldon, in the era described in *Bleak House*, concluded—sombre thought—that until a division between law and equity had been achieved in Scotland, the House of Lords could not deal properly with Scottish appeals. Fortunately, on this point at least he was restrained.) The Court of Session by a succession of reorganising statutes absorbed the higher Commissary Court, the civil jurisdiction of the Admiralty Court, the Court of Exchequer and the Jury Court—this last, as will be explained, itself a creature of the nineteenth century. In 1836 the Commissary Court was suppressed; and so thereafter consistorial matters such as marriage and divorce and also most questions of status generally have been within the exclusive jurisdiction of the Court of Session—though the Sheriffs have concurrent jurisdiction regarding judicial separation and custody of children. The Scottish Court of Admiralty—administering a law in which Scotsmen had given the lead to Britain—succumbed to the

jealousy of three rivals. In 1825 by a particularly offensive example of the tendency of certain influential interests to regard the English courts as imperial and the Scottish as local and limited, jurisdiction in prize was taken from the Scottish court, and vested solely in the High Court of Admiralty of England. This attitude had already been manifested without statutory warrant in 1783 when Lord Mansfield advised<sup>14</sup> the House of Lords that a Scottish privateer bringing her prize to Port Glasgow should have resorted "to the Admiralty of England to bring the proper process." (I may interpolate in this connection that in 1953 the Faculty of Advocates, whose then Dean had served afloat with distinction in two World Wars, urged on the Royal Commission on Scottish Affairs<sup>15</sup> that prize jurisdiction should be restored to Scotland. The Clyde, Scapa and Rosyth—not to mention the Scottish air bases, since prize law now extends to aircraft—were key centres of Britain's defence. And what is one to say in 1961 about the Holy Loch?) In 1827 the civil and criminal jurisdiction of the Scottish Admiralty Court was distributed between the Court of Session, the High Court of Justiciary and the Sheriffs. The Scottish Court of Exchequer set up after the Union to deal with revenue questions was absorbed into the Court of Session in 1856, but Exchequer jurisdiction is still subject to certain specialties due to the English origin of many matters which concern it.

<sup>14</sup> *Hendricks v. Cunningham* (1783) 2 Paton 609.

<sup>15</sup> Cmd. 9212 (1952-54).

*The Jury Court*

I must comment at greater length on the Jury Court and its ultimate amalgamation into the Court of Session. The House of Lords—which in practice meant the Lord Chancellor or his deputy—at the beginning of the nineteenth century complained that Scottish appeals were presented with prolix and (to their lordships) largely incomprehensible pleadings dealing with fact and law combined. Lord Eldon, who became Lord Chancellor in 1801, sought to find a solution to his difficulties by thrusting on Scotland a system of civil jury trial, which was totally alien, and was resisted by many enlightened men in both countries. The Jury Trials (Scotland) Act, 1815, has been censured both by Holdsworth and by Lord Campbell, who rightly concluded that a better plan would have been to provide for a clearer separation of law and fact in the Scottish record (pleadings) and reforms in the law of evidence. Eldon, however, had his way, and a separate Jury Court was set up in Scotland with a political lawyer trained in England but of Scottish descent as first Chief Commissioner. In 1830 this jurisdiction, too, was merged in the Court of Session. Hence the existing institution of civil jury trial for certain “enumerated causes.” The jury of twelve is chosen from the Sheriffdom of the Lothians and Peebles only, and is entitled to give a majority verdict. Civil jury trial has never commanded the confidence or support of the Scottish legal profession as a whole; but among its defenders may be counted those who make somewhat speculative

claims, and those whose knowledge of history is so defective as to assume that Magna Carta had something to do with Scotland. All efforts to secure abolition have so far failed. No Royal Commission or departmental committee has been satisfied with the operation of civil jury trial, yet none has recommended its total abolition. Paradoxically, today when actions for damages for personal injury are normally heard in England by a judge sitting alone, these actions are usually sent for jury trial in Scotland. It is a matter for reflection that the staple diet of the Court of Session today is probably divorce actions and jury trials in respect of personal injuries—both being nineteenth century acquisitions of jurisdiction. The most recent Report—that of the Strachan Committee in 1959<sup>16</sup>—by a majority has again recommended the retention of jury trial—describing it as “a plant which has taken root and flourished” but is now overgrown. The majority recommended abolition of civil jury trial in the Sheriff Court (where it is rarely used) and of “the enumerated causes” in the Court of Session—thus restricting the procedure in the Court of Session to actions in respect of death or personal injury, breach of promise, seduction and wrongful arrest. (These categories, except the first two, are rarely encountered in the Court of Session.) The minority, noting that the majority opinion in the legal profession was opposed to civil jury trial, while no evidence had indicated lack of confidence in the single judge, recommended total abolition. One of the minority, Sheriff Kermack,

<sup>16</sup> Cmnd. 851.

considered that, if a plurality of minds was desired—associating the layman with the administration of justice—there was much to be said for associating with the professional judges panels of “lay judges,” who gained experience in court work—unlike the juror who sits perhaps once in a lifetime. Other evidence suggested a more extensive use of experts or assessors. Traditionally, of course, the Court of Session brought to bear a plurality of trained minds to questions both of fact and law (though one judge heard evidence in the first place), and, as on the Continent today, so in Scotland until the changes of the nineteenth century, the single judge was not left to determine matters of importance. Today, according to the statutes governing Court of Session procedure, on appeal the judges of the Inner House have still a duty to apply their minds to the probabilities of conduct to be inferred from the recorded evidence, giving due weight to impressions made by the witnesses on the Lord Ordinary. Nevertheless, the House of Lords, having in mind, no doubt, the Queen’s Bench judge sitting without a jury (and succeeding to its mastery of fact), has in a series of judgments in the present century (with the assistance of Scottish Law Lords) sought to reduce the Inner House’s powers of review over fact to conform to those conceded to the Court of Appeal in England.<sup>17</sup>

### *Evidence and Procedure*

During the nineteenth century striking innovations

<sup>17</sup> See (1950) 62 *Jur.Rev.* 7.

were also introduced by statute in the field of Adjective Law. From the sixteenth century the procedure of the Court of Session had been based on Romano-Canonical styles such as were used in France. Pleading for centuries had for the most part been by written "papers," in which the parties set forth matters of fact, law and inferences from the evidence: all adorned by an abundant citation from the Roman and canon law and from the leading juristic writings. Such pleadings might be very numerous and diffuse without the area of real dispute between pursuer and defender being very clearly defined. To the judges in the House of Lords, accustomed to English methods, where in common law proceedings facts and law were clearly divided by the functions of judge and jury, Romano-Canonical pleading and practice was particularly vexatious. In two stages (1825 and 1850) pleading by "written papers" was abolished in Scotland, and the "closed record" was introduced. This required the pursuer to set forth in explicit terms the nature, extent and grounds of his cause of action, and the relief he asked the court to grant; while the defender for his part had to set forth all his defences and pleas in law. As a result oral argument became normal—one interesting indirect consequence being the virtual disappearance of citation from the *Corpus Juris* of Justinian or of the learned Civilians such as Voet and Heineccius.

Before the nineteenth century reforms, when oral evidence was received at all, it was taken down in writing by a Lord Ordinary or by a Commissioner,

and was later deliberated upon in the form of depositions by a collegiate court. Technical rules of law excluded the testimony of various categories of witness, such as parties or their spouses, or admitted it only in certain circumstances and subject to qualification. The Evidence (Scotland) Acts of 1853 and 1866 not only made competent witnesses of several categories of person formerly excluded, but provided for the taking of evidence before a Lord Ordinary at a diet of proof, while the whole process was greatly expedited by the authorisation of shorthand-writers to record the evidence.

In the Court of Session today proceedings, though sometimes by petition, are usually initiated by summons in the Outer House. The summons, a writ running in the name of the Queen and passing the Signet, is prepared by the pursuer's legal advisers. After the summons proper identifying the parties and requiring the defender to appear, there follow "*conclusions*," *i.e.*, brief statements of the remedies claimed, a *condescence* (*i.e.*, numbered paragraphs setting forth the facts on which the pursuer relies) and *pleas in law*, which are brief propositions of law stating the legal foundation of the pursuer's case. The defender in his defences must answer statement by statement the pursuer's allegations of fact; counterclaim when appropriate; and state his pleas in law. An "open record" is then prepared, so that the several paragraphs of the pursuer's *condescence* are each followed by the defender's answers, and the defender's pleas in law follow those for the pursuer. After adjustment, the record is "closed"

by interlocutor of a Lord Ordinary, and (unless subsequent amendment is permitted) this defines the limits of competent argument. A "plea to the relevancy"—equivalent to demurrer in English law—is very frequently encountered; and it was thus on a hypothetical statement of facts that the law was enunciated in *Donoghue v. Stevenson*.<sup>18</sup>

In completing my account of the jurisdiction of the Court of Session, I may note that its judges also sit to determine legal questions as members of statutory courts such as the Valuation Appeal Court and Election Petition Court and on the Restrictive Practices Court (which, with the Courts-Martial Appeal Court, is perhaps the nearest approach to a British court applying British law).

A point which would surprise the American and English observer in Scotland is the lack of specialisation on the Bench and at the Bar. Though some counsel are particularly sought after in certain types of case, none can specialise in one field exclusively. This has merits and disadvantages. (One advantage is that a judge on appointment has wide general experience, while among the disadvantages may be counted the fact that in very technical branches of law such as patent law, Scotland cannot produce a Stafford Cripps. The leading experts in fields such as company law, taxation and financial trusts may be found among specialists in firms of solicitors.) For the very great majority of entrants to the legal profession, advocates and solicitors, the professional qualification is a university degree in law

<sup>18</sup> 1932 S.C.(H.L.) 31; [1932] A.C. 562; *supra*, p. 51.

—which facilitates transfer from one branch to the other, if, for example, a solicitor wishes eventually to specialise in advocacy. Moreover, there is no atmosphere of stratification between the two branches. Members of the Faculty of Advocates alone (the Scottish Bar) have right of audience in the superior courts, but solicitors may plead in the Sheriff Courts which have very considerable jurisdiction. Advocates who practice in the Parliament House have an address in the New Town of Edinburgh and may not combine in partnership. Solicitors, on the other hand, normally practise in partnership. Recruitment for the practice of law in Scotland is democratic; but, particularly since the Union, those who maintain the legal heritage of Scotland—especially in the Parliament House—have become a professional aristocracy by function.

In civil actions, whether in the Court of Session or Sheriff Court, much less use is made of *extempore* judgments than in England: taking the case to *avizandum* (*scil.* taking time for consideration) is normal practice. A further point worthy of comment is that interlocutory proceedings are dealt with by the judge in court—not by an officer of the court such as a Master in Chambers. The late Lord President was of opinion<sup>19</sup> that pre-trial procedure in Scotland was too dilatory, and the expense of litigation correspondingly too great. He had studied with interest the Report by the Evershed Committee on Supreme Court Procedure in England, but favoured more drastic

<sup>19</sup> "Defects in the British Judicial Machine" (1952) 2 J.S.P. T.L. (N.S.) 91.

solutions—in effect the judge taking control of the litigation once it had been brought into court. This is not, I think, a probable development in the foreseeable future. Rules of Court were made in 1948 by authority of the Administration of Justice (Scotland) Act, 1933, and these are the basis of contemporary procedure—though the Court of Session has also powers to make Acts of Sederunt regarding matters of process and judicial administration. In the past these powers were invoked in effect for purposes of general legislation.

#### *Central Courts other than the Court of Session*

The other courts which exercise civil jurisdiction in Scotland are the Lyon Court, which has jurisdiction in questions of arms; the Land Court, set up by the Small Landholders Act, 1911, but now concerned with a wide variety of questions relating to agricultural land, and the Sheriff Court. From all these courts (which have their own series of reports) appeal lies to the Court of Session. The presbyterial courts of the Church of Scotland have sole right to legislate and adjudicate finally in all matters of doctrine, worship, government and discipline in that Church. The General Assembly of the Church of Scotland is its highest court, and also legislates without Royal or other lay consent. Recognition by the civil power of the separate and independent jurisdiction of this Church in matters spiritual gives no authority to the civil power to interfere with the judgments of the Church within its own jurisdiction, and this recognition of the “Two Kingdoms” in Scotland is expressly

affirmed in Articles Declaratory annexed to the Church of Scotland Act, 1921.

### *The Sheriff Court*

I must stress in particular the importance of the Sheriff Court in Scotland today—and contrast the role of the Sheriff with the very different arrangements made in England for the administration of justice outside the Supreme Courts. After the abolition of the hereditary sheriffdoms in March, 1748, the Sheriffs Depute were paid from public funds. These Deputes were advocates practising in Edinburgh, but were required to reside in their sheriffdoms for four months in the year—a duty which they frequently shirked when it conflicted with the claims of practice in the courts. They were authorised to appoint substitutes to act in their absence (whose salaries after 1787 were paid by the Crown). These substitutes might be men with no adequate legal experience, and therefore any matter of consequence was reported to the Sheriff Depute for decision. Thus Walter Scott as Sheriff Depute of Selkirk handled much more judicial work himself than most writers have realised.<sup>20</sup> In 1838 Sheriffs Depute (other than those appointed to Edinburgh and Glasgow, which are full-time appointments) were released from the duty of residence in their sheriffdoms, while a series of statutes increased greatly the status of and qualifications required of Sheriffs Substitute. They were required to be advocates or solicitors of at least five years' standing; they were

<sup>20</sup> J. Aikman Smith, "The Great Shirra," *The Scotsman*, January 12, 1959.

appointed and remunerated by the Crown, and thus became the territorial judges of Scotland. No titular Sheriffs can now be appointed. (The Sheriffs Depute, now generally known as Sheriffs Principal are thus today not in fact depute to anyone, while the designation Sheriffs Substitute is equally misleading, since they are not in fact substitutes for anyone.) Both categories are addressed on the Bench as " My Lord " and off the Bench as " Sheriff."

Though in civil causes an appeal lies from the interlocutor of a Sheriff Substitute to the Sheriff Principal, it is equally competent for a litigant to appeal direct to the Court of Session. The original jurisdiction of Sheriffs Principal and Substitute is the same. By amalgamations of the less populous counties the number of sheriffdoms has been reduced to twelve. To each a Sheriff Principal, a senior member of the Faculty of Advocates, is appointed, while one or more Substitutes reside in each sheriffdom, and administer justice in the principal towns. There are about fifty such judges. As a court of original jurisdiction in civil causes the Sheriff Court has, in general, concurrent jurisdiction (without monetary limitation) with the Outer House of the Court of Session. A Sheriff can grant interdict or decree specific implement; he can deal with judicial separation, custody and aliment. Other actions involving status, however, such as declarator of marriage, divorce and bastardy are reserved to the Court of Session, as are actions for setting up or setting aside documents and certain company matters. Moreover, if an action begun in

the Sheriff Court is to be tried by jury, it must—subject to one anomalous exception—be remitted to the Court of Session. If the cause does not exceed £50 in value the Sheriffs have privative jurisdiction, and a special procedure applies in the Small Debt Court, *i.e.*, where the claim does not exceed £20. Actions involving many thousands of pounds and intricate questions of law may originate before the Sheriff. Though no decision of a single judge establishes a binding precedent in Scotland, Sheriff Court cases are reported. Strangely enough, however, as yet no promotion to the Bench of the Court of Session has been made from the ranks of the Sheriffs Substitute; while in England a number of successful promotions have been made to the High Court from the county court Bench, which has attracted the talents of many able lawyers. Yet in the field of contract and tort, for example, their jurisdiction is surprisingly restricted compared with that of the Scottish Sheriffs, and the decisions of county court judges are not generally reported. In Scotland as in England, to use Professor Plucknett's words, the Crown had an "incurable fear of the Sheriff"—but after the roots of that fear had been eradicated the policy in Scotland has been to develop the role of the professional territorial judge, while in England devolution of judicial powers in civil causes has been recent and limited.

### *House of Lords*

Before I turn from civil jurisdiction, I must comment briefly on the part played by the House of

Lords as an appellate tribunal.<sup>21</sup> Strictly, I doubt whether this is a Scottish court—and consider it rather as a United Kingdom court applying Scottish, English or Northern Irish law, according to the forum in which the cause originated. The implications of this conclusion cannot be argued, but include, for example, the proposition that their lordships may *ex proprio motu* express views on Scots law in an English appeal (or English law in a Scottish appeal) without formulating a precedent binding on the courts of the system which was under discussion. Moreover, their lordships' decisions on construction of a statute or of a general principle in a Scottish appeal may justify the Court of Appeal in England following the Scottish precedent rather than their own previous view. Similarly, the Court of Session in like circumstances may elect to follow the precedent established in an English appeal, rather than involve a litigant in the expenses of an appeal which he would almost certainly lose. It is, however, dangerous to assume that a question of general jurisprudence is in issue without full examination of the relevant basic principles of both systems. Formerly, of course, Scots law like other Civilian systems did not recognise the strict doctrine of *stare decisis*, and even today it is probable that the only single decision which the Court of Session could not disregard is a precedent established by the House of Lords in a Scottish appeal. It has never been expressly decided that the House

<sup>21</sup> See generally Gibb, *Law from over the Border*; also by the author "House of Lords Precedents and The Law of Damages," 1956 S.L.T.(News) 13.

of Lords is bound by its own precedents in a Scottish appeal. Nevertheless, during the past century and a half, largely due to the influence of the House of Lords, a modification of the English approach to precedent has infiltrated generally into Scottish practice.

Moreover, over the same period the same august tribunal has been the main influence, apart from legislation, assimilating the two legal systems. Today its judges are men of courtesy and profound learning, but sometimes in the eighteenth and nineteenth centuries a policy of anglicising Scots law was pursued in a deliberate and indeed offensive manner. The more familiar technique, however, has been for eminent English lawyers, confronted with a Scottish appeal and protesting ignorance of Scots law, to translate the problem into terms of English law and then draw the conclusion that the solution in English law must obviously be a principle of universal justice—hence also to be applied to Scotland. Thus, in *Bartonshill Coal Co. v. Reid*<sup>22</sup> the House of Lords, reversing the Court of Session, imposed the doctrine of common employment on Scotland. Lord Cranworth's approach illustrates the technique of assimilation: "In England the doctrine must be regarded as well settled; but if such be the law of England, on what ground can it be argued not to be the law of Scotland? The law as established in England is founded on principles of universal application. . . . I think that it would be most inexpedient to sanction a different rule to the north of the Tweed." Ninety

<sup>22</sup> (1858) 3 Macq. 266 at p. 285.

years<sup>23</sup> later, when sufficient dissatisfaction with this "universal principle" had been generated in England, statute restored the law of Scotland to the *status quo*. In fairness, I should add that the reinforcement of the House of Lords with one or more Scottish Lords of Appeal after 1876, though ensuring that a judge experienced in Scots law is available, has not invariably ensured that its principles will be regarded. The main objections stated in 1852 by Lord Cockburn to the project of sending a Scottish judge to the Lords were, first, that he would have disproportionate influence with his English colleagues on questions of Scots law (thus in effect outvoting all the judges of the Court of Session, though he might have no previous judicial experience) and, secondly, that he would be doing so little Scottish appellate work that he would tend to lose his sense of Scots law.<sup>24</sup> "Nothing oozes out of a man so fast as law." His fears, though exaggerated, have not proved altogether unfounded. The Occupiers' Liability (Scotland) Act, 1960, was required to annul the law as laid down by the House of Lords in two decisions reversing the views of the Court of Session. In each case it was a Scottish judge who gave the leading judgment. In the first of these decisions<sup>25</sup> Lord Robertson (a Scottish judge) introduced the doctrine of *Cavalier v. Pope*<sup>26</sup> which refused to a member of a

<sup>23</sup> Law Reform (Personal Injuries) Act, 1948 (11 & 12 Geo. 6, c. 41).

<sup>24</sup> Cockburn, *Journal*, II, p. 278.

<sup>25</sup> *Cameron v. Young*, 1908 S.C.(H.L.) 7.

<sup>26</sup> [1906] A.C. 428.

tenant's family any remedy in delict against a landlord who had leased defective premises: in the second <sup>27</sup> (Homer again nodding) Lord Dunedin superimposed the categories of invitee, licensee and trespasser on the principle of *culpa*.

I cannot call to mind any House of Lords appeal from Scotland in recent years in which the Scottish Law Lords have been outvoted on a question of Scots law, or in which their lordships have ignored a Scottish doctrine which was fairly set before them. The difference in result between decisions over Crown privilege in the cases of *Duncan v. Cammell Laird* <sup>28</sup> and *Glasgow Corporation v. Central Land Board* <sup>29</sup> are very much in point. In England, ministerial objection to the production of documents on grounds of public interest was held to be conclusive; while the House of Lords upheld the view that the Scottish Courts have inherent powers to override such objections if other aspects of the public interest so require. Nevertheless, I can think of numerous occasions upon which Scottish counsel have gained support for their contentions by conceding quite unwarrantably that the laws of Scotland and England were identical on the question in issue—and this is a very popular fly with which to fish in troubled waters. It must be remembered, however, that an advocate's concern is to maintain his client's interests rather than the purity of jurisprudence. Except in a very clear case, it would be desirable that these concessions were not made, and, in particular, that their lordships would

<sup>27</sup> *Dumbreck v. Addie*, 1929 S.C.(H.L.) 51; [1929] A.C. 358.

<sup>28</sup> [1942] A.C. 624.

<sup>29</sup> 1956 S.C.(H.L.) 1.

not ask counsel in Scottish appeals whether the relevant rules of Scottish and English law were the same. Relatively few advocates practising in the Scottish courts have made a detailed study of English law, and cannot be aware when superficial similarity obscures difference of principle or method. Thus, as I have said before, no one who had studied the development of the English law of tort could assent to the proposition that the tort of negligence corresponded to the concept of *culpa* in the Scottish law of delict, though their solutions often overlap. The danger of conceding that they are identical is that technical limitations restricting the English tort may be imposed *per incuriam* on the Scottish principle of fault—which is not restricted, incidentally, to negligent wrongdoing. Significantly, counsel in English appeals are seldom, if ever, asked the question whether the English law is the same as that of Scotland. Even fewer of them, of course, have studied or practised law in Scotland.

The Royal Commission on Scottish Affairs which reported in 1954, made no firm recommendations on the proposal urged by the Law Society of Scotland that, on grounds of relative convenience and cheapness, the Appellate Committee of the House of Lords should sit in Scotland. This proposal was not, however, supported by evidence given on behalf of the Faculty of Advocates. There are precedents for the Appellate Committee of the House of Lords sitting outside the Chamber, and personally, I consider that from time to time it would be an excellent idea to

make welcome the Appellate Committee in the Parliament House at Edinburgh. Not only would this be more economical for litigants, but such an arrangement could bring home more cogently than argument the fact that their lordships sit as successors to the Three Estates of Scotland, and as ultimate arbiters on the principles of a national and cosmopolitan system. Until the Administration of Justice (Scotland) Act, 1933, any judge appointed to the Bench of the Court of Session had as a preliminary to undergo trial or examination of his qualifications. Indeed, he first sat as Lord Probationer. I wonder whether a revival of the system for the benefit of distinguished English judges destined to hear Scottish appeals would appeal to them. A doctorate *utriusque juris* might be added for good measure!

Though the official views of the Scottish legal profession favour retention of the right to appeal to the Lords in civil causes, there is no desire to invoke this jurisdiction to deal with criminal matters—and, if I may say so without disrespect, the reasons for keeping the ultimate decision in Scotland seem to have increased rather than diminished. Scottish criminal law and procedure are substantially different from the system which operates in England and Wales.

### *High Court of Justiciary*

While I think that criminal justice in Scotland is very fairly and efficiently administered today, the system is not necessarily suitable for export. Much depends on certain conventions which have developed within the Crown Office and by the etiquette of a

small profession, which I shall discuss in my next lecture on "Patterns of Criminal Justice." Let us, however, just look very briefly at the organisation of courts of criminal jurisdiction in Scotland today. The High Court of Justiciary is Scotland's supreme criminal court, exercising both original and appellate jurisdiction. Since 1887 all Senators of the College of Justice—that is sixteen judges—are by virtue of their appointments also Lords Commissioners of Justiciary. They may sit in Edinburgh or go on circuit to the various towns in Scotland to try the gravest crimes. (There are four circuits, North, West, South, and Home.) As a rule one judge only sits at the trial of an accused, but in complicated cases two or even three judges may sit. Moreover, if some question of exceptional difficulty emerges at a trial, the presiding judge may certify the case for the opinion of the whole court. Fundamentally the court is a collegiate body. Any matter involving the *nobile officium* or "criminal equity" of the High Court must be dealt with by a Bench of judges, and not by one alone. If the traditional power remains to declare a new crime *sui generis*, or to consider the legal validity of a doubtful defence, such power can only be exercised in this way. Thus in *Sugden*<sup>30</sup> the whole court sat to determine whether the rule of Roman law, that crimes could not be prosecuted after twenty years from the date of wrongdoing, was part of the law of Scotland. In *Kirkwood*<sup>31</sup> sentencing policy in dealing with cases of diminished responsibility was considered by all the judges.

<sup>30</sup> 1934 J.C. 103.

<sup>31</sup> 1939 J.C. 36

Though the High Court has always exercised control over criminal proceedings in the lower courts, it was not until the Criminal Appeal (Scotland) Act, 1926, came into force that there was jurisdiction to hear appeals from conviction and/or sentence after trial on indictment. In fact, Oscar Slater, who in 1909 had been found guilty of murder, had his conviction quashed in 1928 after completing a life sentence.<sup>32</sup> It is largely as a result of this appellate jurisdiction that the criminal law of Scotland is developed in modern times, since the opinions of single judges do not bind their brethren. Decision between conflicting precedents pronounced by quorums may be achieved by convening a Full Bench—usually of five or seven judges. It is a moot point whether the Whole Court could repudiate an earlier precedent by the Whole Court—but is probably entitled so to do.<sup>33</sup>

### *Sheriff Court (Criminal) and Inferior Courts*

The Sheriff has long exercised a very wide criminal jurisdiction indeed, though he may not try certain crimes such as murder, attempt to murder, rape or incest. His powers of punishment are, however, limited. If he is exercising solemn jurisdiction—when the accused is tried by a jury of 15—after conviction the Sheriff himself can generally impose no heavier punishment than two years' imprisonment. On the other hand, he may remit the accused to the High Court for sentence; and this procedure is frequently

<sup>32</sup> *Slater*, 1928 J.C. 94.

<sup>33</sup> T. B. Smith, *Doctrines of Judicial Precedent in Scots Law*. p. 30.

adopted these days to secure speedy trial. If the Sheriff is exercising summary jurisdiction he sits alone, and, unless statute has prescribed a heavier penalty, cannot normally impose a sentence of more than three months' imprisonment. His decision may be appealed by way of stated case.

The Sheriff's criminal jurisdiction is universal, subject to certain crimes being reserved to the High Court. Other inferior courts, however, only have such jurisdiction as is conferred on them by statute or necessary implication. Moreover, the Sheriff has concurrent jurisdiction with every other court within his sheriffdom. Such courts may be Justice of the Peace Courts, Burgh Courts or the Court of the Stipendiary Magistrate in Glasgow. The powers of these courts are restricted to awarding up to 60 days' imprisonment or a fine not exceeding £10. Appeal lies to the High Court by way of stated case. A high proportion of offenders are tried each year in these courts for relatively trivial offences. There are only four specially constituted juvenile courts in Scotland, and thus most young offenders are dealt with by the Sheriffs under a special procedure.

### *Résumé*

May I in conclusion summarise the interaction of Scots law and English law so far as judicial machinery is concerned. Scots law showed England the advantages to be gained from fusing Law and Equity in the same courts, granting the same remedies and relief. Moreover, the Sheriff Courts in Scotland provided a pattern for the decentralisation of civil jurisdiction,

which the county courts might well follow even more closely. English influence, mediated mainly through the House of Lords, introduced to Scotland doctrines of strict precedent, civil jury trial, the elimination of judicial collegueship as normal in cases of importance, and the investing of the single judge with something approaching the jury's *mystique* regarding questions of fact. These may be set largely on the debit side. On the credit side, however, it was beneficial to subdivide the Court of Session for ordinary business, and to encourage more oral evidence and pleading. These changes in pleading had the unfortunate side-effect of weakening the *rapport* between practical lawyer and jurist, which had been close in Scotland. If this was due to examples and techniques borrowed from the English, they are now giving a lead in healing the breach. Though academics are not, as in America, appointed to the Bench, many judges would make admirable academics. Sheriff C. de B. Murray has proclaimed: "No one in his sober senses would say that a law professor had the ability of a Master of the Rolls or a Lord Chief Justice—even supposing a professor had the brains of a Lord Chancellor, he could not give an opinion of much value!"<sup>34</sup> The proportion of first-class honours men in the House of Lords is impressive, and they not only write for, but even read, the learned journals—especially *The Law Quarterly Review*—to discover what the "school solutions" to their problems were. In Scotland, though of course in the past the Universities have strengthened the Bench, I look forward to

<sup>34</sup> 1950 S.L.T. (News) 2.

an era when we shall recruit professors from the cream of the judiciary, and remunerate them comparably. Perhaps the Lord Chancellor, when he finds the Woolsack too soft a seat, might consider a Chair.

## CHAPTER 3

### PATTERNS OF CRIMINAL JUSTICE

#### SCOTTISH CRIMINAL LAW

SCOTTISH criminal law did not reach maturity until the late eighteenth century. The Romanistic approach of Mackenzie's time (late seventeenth century) had been followed by a period of selective borrowing from English practice, until by the time of Hume an articulate synthesis had been achieved. Since that time there have, of course, been progressive developments in Scottish criminal justice, which today is not only well suited to the needs of Scotland, but also inspires liberal reforms in England. A comparative lawyer may note that in the field of criminal law—by striking contrast to that of private law—English influence was on the whole accepted only after proper comparative evaluation and scrutiny. It was not imposed by the House of Lords, which had no appellate jurisdiction in criminal matters; nor did the legislature seek to assimilate established Scottish and English laws defining the graver forms of crime. (When, of course, new conditions required the enactment of criminal sanctions—as for road traffic offences—legislation was often extended to Britain as a whole; and today, there are now myriad statutory offences.) I suspect that Scottish criminal law enjoyed immunity from interference after the Union because the Establishment of those days were not

greatly interested in how the criminal classes—the murderers, thieves and swindlers—were suppressed, provided the means were effective. The one crime which might tempt gentlemen and imperil the state was treason; and, as we have seen, the Treason Act, 1708, was forthwith passed to impose the protean English law upon Scotland. In Scotland the criminal law is not codified, and relatively few, even of the graver crimes, are defined in statutory form. Though much of English criminal law is set forth in a number of consolidating Acts, no similar policy has been advocated for Scotland—perhaps through apprehension that the more liberal principles of Scottish criminal law would be submerged in a British Criminal Code or complex of consolidating statutes. Thus the late Lord Cooper, who favoured the idea of a Scottish civil code to preserve the basic principles, was opposed<sup>1</sup> to the idea of a criminal code. The fact that Scottish criminal law avoided premature rigidity and has retained its flexibility—through the power retained by the Justiciary Court to review and develop its precedents, and through the discretionary powers exercised in the Crown Office—weigh the balance against the potential benefits of codification in leonine partnership.

Sir Thomas Taylor has summarised the content of Scottish criminal law admirably—“Apart from legislation, the sources of the criminal law are to be found in the practice of the criminal courts, influenced to some extent by the civil (Romanistic) and canon law,

<sup>1</sup> Evidence to Royal Commission on Capital Punishment, H.M.S.O. 18th Day, q. 5406, 5434, 5442.

and mediated through the institutional writers and the *Justiciary Reports*.” Thus today, apart from legislation and reported decisions, the main repositories of Scottish criminal law are to be found in the works of the institutional writers—Hume in particular.

Scots law knows no division between felonies and misdemeanours. Though the terms are sometimes used in a comprehensive as well as in a limited sense, the graver forms of delinquency are designated “crimes,” and the lesser forms “offences.” For present purposes I may be permitted to refer to “crimes” in the comprehensive sense. For a person to be convicted of crime in Scotland, the prosecutor must in general establish (a) a breach of the criminal law; (b) a blameworthy state of mind—technically known as “*dole*”; and (c) conduct in which that mental state (whether it be “intention” or “criminal negligence”) is manifested.

#### *Breach of the Criminal Law and the Power to Declare New Crimes*

Normally the indictment or complaint will specify by name the crime with which an accused is charged, but this is not essential. In developing the criminal law of Scotland, the High Court of Justiciary exercised the power to declare and punish new crimes. Thus Hume asserted<sup>2</sup> “Our Supreme Criminal Court have an inherent power to punish . . . every act which is obviously of a criminal nature; though it be such

<sup>2</sup> *Commentaries*, p. 12.

which in time past has never been the subject of prosecution.” This power, which can be exercised only by a bench of judges, has seldom been invoked in modern times, except, perhaps, under cover of asserting that the act falls within an already recognised principle. Clandestine borrowing of a motor-vehicle was recognised as a crime<sup>3</sup> in 1926, without expressly deciding whether *furtum usus* was part of Scots law. In 1933, however, Lord Justice-General Clyde observed<sup>4</sup> that “It would be a mistake to imagine that the criminal law of Scotland countenances any precise and exact categorisation of the forms of conduct which amount to crime. . . . I need only refer to . . . Baron Hume’s institutional work in which the broad definition of crime—a doleful or wilful offence against society in the matter of ‘violence, dishonesty, falsehood, indecency, irreligion’ is laid down. . . . In my opinion, the statement in Macdonald’s *Criminal Law* that ‘all shamelessly indecent conduct is criminal’ is sound.” Thus in his view, indecent practices between consenting male adults would be criminal at common law. On the other hand, not all acts which we may consider morally reprehensible justify judicial intervention to create new crimes; and in 1937 Lord Justice-Clerk Aitchison said<sup>5</sup> that it was for the legislature, if so minded, to treat as criminal the supplying of abortifacient drugs for use by a woman who was not pregnant. Hume’s statement of the law seems much

<sup>3</sup> *Strathern v. Seaforth*, 1926 J.C. 100.

<sup>4</sup> *McLaughlan v. Boyd*, 1934 J.C. 19 at p. 22.

<sup>5</sup> *Semple*, 1937 J.C. 41.

too broad to describe the modern law, and the various heads mentioned by him are facets of immorality, which have justified treating various acts as particular crimes, rather than crimes in themselves. It is perhaps not self-evident that the acceptance of certain general principles in criminal law (*delicta publica*) need be more harmful than the acceptance of general principles in the civil law of delict, nor perhaps should all *mala in se* be anticipated and catalogued in detail *ab ante*.<sup>6</sup> The graver crimes are already catalogued and defined, and it would be difficult to envisage a type of conduct, hitherto unknown—as contrasted with a new way of committing a recognised crime—which was as offensive morally as fire-raising or robbery. It is in respect of less heinous anti-social behaviour that pressure is brought to bear on the courts to extend the criminal law—in particular where sexual morality and administration of justice is concerned.<sup>7</sup> Such behaviour may be anti-social without being so grossly immoral and mischievous as to merit the sanctions of criminal punishment, and it may be hoped that the development of such crimes as “hindering the course of justice” will be strictly controlled and will not be construed to include just “bothering the police.” For an individual not yet cited as witness at a trial to disappear so as to avoid citation shows a sad lack of civic responsibility—but

<sup>6</sup> See Smith, *The United Kingdom* (Scotland), British Commonwealth Series, Vol. 1, pp. 701, 703–707 (hereafter called *Smith*); (1957) *Rev.Int.de Droit Penal*, 292–293; Elliott (1956) 1 *Jur.Rev.* 22.

<sup>7</sup> *Young v. Heatly*, 1959 S.L.T. 250.

it may be doubted whether such conduct should be made criminal except by statute.<sup>8</sup>

As in delict, so in crime, Scots law still probably supplements the categories which are clearly recognised with broader principles of liability, dependent on the facts proved. Indeed in Scotland it is not necessary to specify in the indictment any particular *nomen juris* (technical name) for the crime alleged. It will suffice to state facts which would constitute a crime in law; and it may then be debated which recognised crime has been proved or whether any crime known to the law is disclosed. Even a criminal code does not eliminate the need for interpretation, and some of the crimes specified in a code may be stated in terms of broad principles like the *crimen falsi* under the *lex Cornelia*. Dr. Glanville Williams has written<sup>9</sup> “although *nullum crimen (sine lege)* is now supported by the strong weight of professional opinion, it is not so plainly right that no two opinions are possible about it.” Two opinions are represented in Scotland, but for over a hundred years few, if any, responsible judges or advocates would have been prepared to urge that Hume’s statement of the law represents the modern attitude; nor has the policy of the Crown Office—which is very important for Scottish criminal jurisprudence—favoured developments beyond recognised principles of liability. Nevertheless, some recent cases in Scotland suggest the desirability for a considered and authoritative statement

<sup>8</sup> Compare *Martin*, 1956 J.C. 1, and *Mannion*, *Glasgow Herald* and *Scotsman*, February 10, 1961. The view of a single judge in the latter case is, of course, not conclusive of a matter concerning the *nobile officium*. <sup>9</sup> *Criminal Law* (1953), p. 460.

by the Justiciary Court as a whole regarding declaratory power.

It was of particular interest to observe that in a recent English appeal<sup>10</sup> to the House of Lords the majority asserted a power very similar to that claimed in the past for the High Court of Justiciary in Scotland. The English judges held that the English courts as *custodes morum* of the people exercised a residual power to superintend those offences which were prejudicial to the public welfare. Accordingly they held that the accused, by publishing a "Ladies' Directory," advertising the services of prostitutes, was guilty of a conspiracy to corrupt public morals. They did not reject the proposition that the element of conspiracy was unessential. Paradoxically Lord Reid, a former Lord Advocate, and the one Scottish Lord of Appeal in Ordinary sitting, dissented strongly from the majority view, and asserted that the English courts cannot in modern times create new criminal offences.

#### *Dole and Guilty Mind (Mens Rea)*

There is no fixed mental state applicable to all forms of wrongdoing. So far as most crimes are concerned, no more may be implied by "guilty mind" than that the accused has intentionally done an act which the law prohibits, or has failed to take such care as the law requires in the circumstances. Ignorance of the law is no excuse. For certain graver crimes, however, the guilty intention of the accused is related to his knowledge of facts which are essential

<sup>10</sup> *Shaw v. D. P. P.* [1961] 2 W.L.R. 897.

elements of the offence. Thus a man who in good faith, believing his wife to be dead, goes through a form of marriage with another woman, is not guilty of bigamy.

The mental state which is an essential element of guilt may be excluded or reduced in culpability by certain defences. The older authorities, though not uniform in their conclusions, agreed in fixing the minimum age for criminal liability as much higher than eight years which, to conform with English law, statute has now prescribed. This is a blemish in our jurisprudence, and does not correspond to the realities of penal policy. Other defences include error—as where a man takes another's property believing himself to be owner; also cases of necessity, or compulsion—as where a surgeon terminates pregnancy to save a woman's life or a soldier shoots in obedience to an apparently lawful order. Again, it is a good plea in exculpation that death or injury was caused to another in the course of lawful defence—as where a man to save himself or another from attack, which cannot be evaded otherwise, overcomes it without resort to immoderate force. Provocation is to be distinguished from lawful defence. Provocation never excuses guilt, but merely operates in mitigation. Thus it may reduce the degree of guilt from that required for conviction of murder to that appropriate to culpable homicide. That indeed seems to be the only clear case where the effect of provocation is actually to alter the category of the crime itself. The reason for this is, presumably, because only for the crime of murder is the minimum penalty fixed by

law. In other cases provocation is taken into account to palliate punishment. Nevertheless, though the courts in England have taken a different view,<sup>11</sup> it seems proper to include provocation among general defences in the sense I have explained. The Homicide Act, 1957, has now extended to English law the presumed principle of Scots law that provocation as a defence is to be tested by determining whether a reasonable man would have lost his self-control in the circumstances—without discriminating between provocation by acts or words.<sup>12</sup> This leaves unsolved the question of how the standard of the reasonable man is to be set. How far can factors affecting the particular accused be taken into account? In English law the House of Lords has decided<sup>13</sup> that, if the accused suffers from some peculiarity of body, such as club foot, or special sensitivity of mind, as might be expected in an impotent man, this may not be taken into consideration when assessing the effect of provocation on him. The Scottish courts are not bound to follow this somewhat arbitrary rule, and may take into account the subjective element. Though the average Scot on a jury might feel that he himself as a reasonable man would be unmoved by such vulgar abuse as “dirty nigger,” a visitor from Alabama or Ghana might be expected to react differently.

Scots law also recognises that there may be cases short of mental illness where a person may not be

<sup>11</sup> *R. v. Cunningham* [1959] 1 Q.B. 288.

<sup>12</sup> But see *Dodson, Scotsman*, July 28, 1961.

<sup>13</sup> *Bedder v. D. P. P.* [1954] 1 W.L.R. 1119.

responsible for harm which he has caused—on the principle of dissociation. This may result from fatigue, carbon monoxide poisoning from a leaking exhaust pipe and so forth. In a recent English murder trial,<sup>14</sup> the accused, Boshears, an American serviceman, was acquitted, after explaining that he had strangled the deceased girl while asleep, and awoke to find his hands round her throat. Two days later he disposed of the body in a ditch. The trial judge asked if there was any record of such a defence. There had been in Scotland. In the case of *Fraser*<sup>15</sup> (1878) it appeared that the accused, while asleep, and believing himself to be attacked by a wild animal, had killed his eighteen-month-old child. He was discharged on undertaking to sleep alone in future. This precedent might have been useful to Mr. Justice Glyn Jones in the English case—though I do not think that the courts in England, except on grounds of insanity, have powers to assert the public interest even after acquittal. It may be regretted that Boshears' discharge was therefore not, as in *Fraser's* case, conditional on his undertaking to sleep alone. Mental dissociation through drunkenness—if the state has been induced voluntarily—is not, however, a valid defence. The older law took account of intoxication through the defence of diminished responsibility. In modern law the legal consequences of drunkenness on criminal responsibility are very similar to those laid down in the leading English case

<sup>14</sup> *R. v. Boshears*, *The Times*, February 16 & 17, 1961.

<sup>15</sup> (1878) 4 Coup. 70.

of *D. P. P. v. Beard*.<sup>16</sup> Thus if the accused is incapable of forming the particular intent required for a specific crime, he must be acquitted of that crime, but may be guilty on a lesser charge. If drink has merely caused the accused to give way more readily to his passions, this factor is disregarded. However reprehensible the voluntary inducing of drunkenness to reduce self-control may be, I myself should regard it as more properly treated as an aspect of diminished responsibility—in the broad sense of that expression.

### *Insanity and Diminished Responsibility*

If it is proved that the accused was insane at the time he did an act which, if done by a sane person would have been criminal, this constitutes a complete defence. The illogical verdict “guilty but insane” has no place in our system. In fact this defence is rare in Scotland, because an accused who was insane at the time of the crime is usually found unfit to plead at the time of trial; while in cases where there has been aberration or weakness of mind short of insanity, the defence will usually found on “diminished responsibility.” There has thus been in the past a striking contrast between the attitudes of the Scottish and English courts towards mental illness or instability in connection with criminal prosecution, and contrasts can still be made.<sup>17</sup> The M’Naughten Rules are not part of the law of Scotland. In Scotland courts of law which are bound to follow, so far as they can, the discoveries of science and the results

<sup>16</sup> [1920] A.C. 479; *cf. Kennedy*, 1944 J.C. 171.

<sup>17</sup> Refs. *Smith*, pp. 716 *et seq.*—published before current legislative provisions on Mental Health.

of experience, have altered the definitions and rules along with the experts. When insanity is raised as a defence, the jury is charged in the circumstances of the case, having particular regard to the evidence led by specialists in mental illness. The question of insanity is, however, much more likely to arise in bar of trial. The issue of the fitness of the accused to plead may be raised by defence, prosecution, or by the presiding judge; and is seldom in practice a matter for contention. If the experts report that an accused is insane, he will not be tried. Since the recent English case of *R. v. Podola*<sup>18</sup> the relevance of hysterical amnesia to plea in bar of trial has been much discussed by lawyers. In that case the accused, who was convicted of capital murder, claimed that due to hysterical amnesia he had no recollection of events at the time of the crime. His counsel argued that in the circumstances he was unfit to plead. The jury did not believe that the accused had lost his memory, but the relevance of loss of memory to plea in bar was considered by the Court of Criminal Appeal, which applied the rule laid down in the Scottish case of *Russell*<sup>19</sup>—the only authority directly in point. It had been held by the High Court of Justiciary that loss of memory covering past events—without other evidence of mental disorder—was not a bar to trial. Through drink or the consequences, say, of a vehicle accident caused by his reckless driving, an accused may often have no recollection of conduct whereby he caused death or injury to others.

<sup>18</sup> [1959] 3 W.L.R. 718; 1959 S.L.T. (News) 242.

<sup>19</sup> 1946 J.C. 37; see also (1952) 37 *Grotius Soc. Transactions* 114.

The defence of "diminished responsibility" was imported from Scotland into the law of England—but for murder only—by the Homicide Act, 1957—rather as a compromise between abolition of capital punishment and retention of the M'Naughten Rules. In Scotland the earliest traces of the doctrine of diminished responsibility can be traced back as far as Mackenzie in the seventeenth century and Braxfield in the eighteenth; but the modern development begins with its application by Lord Deas in *Dingwall* in 1867.<sup>20</sup> All three sponsors, I may add, had a reputation for harshness in their sentencing policies. The "Bloody Advocate," the model for Stevenson's "Weir of Hermiston," and "Auld Deas" of many an anecdote, were certainly not opponents of capital punishment; but they had a sense of proportion. If the insane are exempt from punishment, it seems reasonable that those who suffer from mental weakness or aberration should not suffer the full pains of the law. The principles first clearly enunciated by Lord Deas have been in operation for nearly a century, and the courts have wisely refused to restrict the doctrine by narrow definition. Presumably the courts, while not surrendering their control of the doctrine to psychiatrists, will develop it, taking into account the consensus of expert opinion. So far "psychopathic personality" has not been accepted in the Scottish courts as justifying a plea of diminished

<sup>20</sup> 5 Irv. 466. For Scottish refs.: Lord Keith (1959) 27 *Medico-Legal Journal* 4. Smith, p. 721 and [1957] *Crim.L.R.* 354; cf. J. Ll. J. Edwards, *Essays in Criminal Science*, p. 301; Glanville Williams, "Diminished Responsibility," 1 *Med.Sci. & L.* 41; Lady Wootton (1960) 76 *L.Q.R.* 224.

responsibility, but they are not precluded from accepting in the future some cases of character disorder as within the scope of the doctrine. The effect of a successful plea of diminished responsibility is in some ways very similar to that of provocation. If the indictment was for murder, the quality of the crime is reduced to culpable homicide—which permits the exercise of judicial discretion as to punishment. The Royal Commission on Capital Punishment was wrong in supposing that in Scotland the defence of diminished responsibility was relevant only in murder cases. It has been invoked in cases of theft by house-breaking, fire-raising, and assault. In these cases, as in cases of culpable homicide, the doctrine is relevant to punishment.<sup>21</sup> However, unlike sentencing policy in cases of provocation, a convicted person whose responsibility has been diminished may, in the public interest, be sentenced to life imprisonment—from which he can be released when the Executive deems proper. It is not a question of “punishing the bad and excusing the mad.”

### *Criminal Conduct*

As I have said, the mental element in crime must concur with a “material” element—criminal conduct. The accused may, of course, not have achieved what he set out to do. If, however, his intention was to kill an enemy, and through error he kills a stranger or friend, the crime will nevertheless be murder. If the full crime is not accomplished, there may be conviction for the attempt. The distinction between

<sup>21</sup> See *Keith* and *Smith* for leading Scottish cases.

mere preparation and attempt is narrow. Perhaps the test may be put this way—"Had the accused put it beyond his power to prevent the consequences of his plan by his own voluntary act?" Lady Macbeth went, dagger in hand, to the chamber of the sleeping Duncan—but recoiled. "Had he not resembled my father as he slept, I had done't." In theory she was not guilty of attempted murder, but, had she been arrested in the King's room, her story might have failed to convince a jury. Unlike the position in England, where conspiracy has been given very wide scope—so as to make criminal agreements to do acts which would not be unlawful if done by an individual—in Scotland conspiracy seems to be merely an extension of the law regarding attempts. Formerly the declaratory power of the High Court was also used to strike at attempts to commit crime<sup>22</sup>—though now, of course, statute law makes general provision for the punishment of attempts to commit crimes and offences.

In dealing with questions of principal and accessory, Scots law has adopted a simple and uncomplicated approach. There are no principals in the first and second degree. In short, generally speaking, no distinction is made between the criminal consequences of actual commission and accession. Indeed the indictment or complaint need not specify in which capacity the accused participated. It is quite possible that the accessory, as in the case of Fagin, would be punished more severely than the principal whom he

<sup>22</sup> Lord Walker, "The Growth of the Criminal Law," 1958 *Jur. Rev.* 230, 236.

had instigated and influenced. (Now, however, by the Homicide Act, 1957, certain distinctions between principals and accessories have been made in cases of murder.) Accession may be before the fact—by counsel, instigation, or by the giving of practical assistance; or accession may be given in the actual perpetration of the crime—but “accession after the fact” is not recognised, except for treason where English law applies.

It would be impossible to explain here the elements even only of the graver crimes in Scotland. The most I can attempt is a few comments of general interest to illustrate for the most part the flexibility of the system in modern times. During the present year legislation was introduced to remove suicide from the categories of crime in England, and it was pointed out that in Scotland no such crime is known. There is no doubt, however, that “self-murder” was regarded as criminal in Hume’s time, and the rules as to escheat or forfeiture continued well into the nineteenth century. Those with a taste for the macabre may read in the pages of Maclaurin<sup>23</sup> of the callousness of the Edinburgh mob in 1777 to the body of Mungo Campbell who had killed himself while awaiting execution for the murder of the Earl of Eglinton. They dug his body up from the grave near Arthur’s Seat “and tossed it about till they were weary.” “However just,” says the author, “their abhorrence of self-murder may be; yet surely they ought to have compassionated the hard fate of that man.” The control over matters criminal exercised

<sup>23</sup> *Criminal Cases*, p. 532.

by the Crown Office and operation of the doctrine of desuetude presumably accounted for the disappearance of self-murder from the modern criminal law of Scotland. The same may be said with regard to the disappearance of what in England would be called criminal libel. The Roman delicts had a penal aspect, while also providing compensation for private citizens. Thus real and verbal injury (injury—*injuria*—having the specialised Roman law meaning of insult) were formerly both within the compass of Scottish criminal law. Real injury covered insult by physical means, such as assault; contumely by verbal injury might in gross cases also be criminal, and one aspect survives in theory under both common law and statute, namely “murmuring” or insulting of judges. To some extent but not completely this merges into contempt of court. I believe that the last time prosecution for “murmuring” of judges was contemplated was in respect of an article written for the *Juridical Review* by N. J. D. Kennedy in 1896,<sup>24</sup> entitled “The Second Division’s Progress.” Instead of being prosecuted, however, Kennedy was appointed Professor of Law at Aberdeen University, and subsequently took his seat on the Bench as Lord Kennedy.

Among crimes of dishonesty, theft was regarded as most heinous, and, when capital punishment was more in vogue than today, it might be a matter of serious consequence whether the crime proved amounted to theft or only to embezzlement or the *crimen falsi* (swindling). Today this is no longer of great importance, because of statutory provisions which authorise

<sup>24</sup> (1896) 8 Jur.Rev. 268.

conviction for dishonesty, though the exact crime alleged in the indictment is not established; and further because the prosecution is not bound to state *ab ante* which crime of dishonesty is appropriate to the facts alleged. I may mention that *plagium*, the stealing of a child under puberty, is aggravated theft, and also that clandestine "borrowing," as of a motor-vehicle, is punishable quite apart from statutory provision. Though the Roman law definition of *furtum* was applied to Scots law in 1838, it does not necessarily follow that "clandestine borrowing" falls within the category of *furtum usus*.

The declaratory power of the High Court of Justiciary has been important in the recognition of sexual offences. While rape was a capital crime, the tendency was, naturally, to restrict its scope. Accordingly, rape was confined to cases where there had been not only connection without consent of the victim, but also actual violence. Thus, except where statute has altered the common law, Scots law treats as assault aggravated by indecency cases of clandestine injury to women—where access to a woman has been achieved by guile or by her own inability to resist—as when she is found stupefied by drink.<sup>25</sup>

The law regarding murder and culpable homicide has developed considerably during the past century in particular. So far as murder is concerned, Scots law was fortunately free from those doctrines of "constructive malice" which, until the Homicide Act, 1957, came into force, might in England result in the

<sup>25</sup> 1932 J.C. 40.

prosecution for murder of a person who had no intention of causing death or serious injury. The late Lord Justice-General told the Royal Commission on Capital Punishment, "in Scotland we have practically reached the position where only intentional killing is murder." Recently, however, there have been indications of what might possibly be construed as judicial support for a stricter rule. Thus in *Miller and Denovan*<sup>26</sup> the High Court of Justiciary upheld a direction withdrawing from the jury the competency of returning an alternative verdict of culpable homicide in a case where a robber had struck his victim a single blow on the head with a piece of wood. This case was, however, very special, and the presiding judge could have had no doubt that the accused had no inhibitions as to the consequences of his acts. Clearly to strike one such blow with reckless disregard of whether death were to result or not, could be murder; but the intent is—short of perverse disregard of the evidence—a question of fact for the jury and not of law for the judge. If a verdict of culpable homicide (provocation and diminished responsibility apart) is only to be competent where death has occurred "by mischance," the Scottish doctrine would be more severe than that laid down for England by the House of Lords in *D. P. P. v. Smith*.<sup>27</sup> An interpretation such as that reached by the South African courts may ultimately be recognised; namely,<sup>28</sup> "intention is now present only

<sup>26</sup> November, 1960, unreported.

<sup>27</sup> [1960] 3 W.L.R. 546.

<sup>28</sup> Burchell in Hahlo and Kahn, *South Africa* (British Commonwealth Series), p. 297.

where it is proved that the accused foresaw the consequences of his act. It is not sufficient that, although the accused did not foresee, as a reasonable man he ought to have foreseen those consequences." Though Part I of the Homicide Act does not apply to Scotland,<sup>28a</sup> the statute extends to Scotland the unhappy compromise based on expediency which specifies which murders shall be regarded as "capital." In short, a murderer is only to hang if he kills a man in blue, makes a loud noise, intends theft (but not other crimes) or contracts the habit of killing. The Act cuts across established Scottish principles regarding "art and part" (accession), and introduces terms such as "grievous bodily harm," which have a technical meaning in England but are used in a popular sense in Scotland. Perhaps no appreciable difference in the numbers of murderers executed in Scotland will result. If this is so, it would have been preferable to have preserved the Scottish law of murder from statutory alteration until such time as the death penalty for this crime is done away with. I may as well, however, declare myself a convinced abolitionist, except for military crimes or treachery in war—and even in such cases I feel revulsion against the practice of hiring a hangman. Between the years 1929–1944 (inclusive) we in Scotland had no need to borrow his services from England.

Culpable homicide comprises cases of deliberate killing—where, however, there are mitigating factors such as provocation or diminished responsibility—cases of killing as the result of a wrongful act which

<sup>28a</sup> Because it is assumed to be Scots law already.

was not intended to endanger life; and cases where death was caused through gross negligence in the performance of an otherwise lawful act. It is clear that Crown Office policy has for some time tempered the rigour of former practice, by treating as cases of culpable homicide crimes where formerly the indictment would have been for murder, as when a mother kills her child soon after birth or when death follows illegal abortion. Over the past century, moreover, the degree of negligence required to support conviction for culpable homicide has been raised considerably. The reluctance of juries to convict drivers of motor-vehicles of this crime resulted ultimately in the introduction of a statutory offence of causing death by dangerous driving—where the burden of proof on the Crown is less exacting. This prompts the reflection that when Alison wrote his work on criminal law in 1833, it was competent for a private prosecutor to demand not only the punishment of a wrongdoer, but also reparation for the damage he himself had suffered, though long before this time public prosecution had become the general rule in Scotland. The advantages of disposing at one trial of questions both of criminal and civil liability are obvious, but while such very different standards of care operate in the criminal and civil law today, it would probably be unsafe to ask the same jury to decide both on guilt and civil liability—especially in motoring cases.

#### THE ADMINISTRATION OF CRIMINAL JUSTICE

##### *Crown Office and Public Prosecution*

The real pivot of criminal justice in Scotland is the

Crown Office. Ultimately—subject to one exception—all criminal prosecution in Scotland is now under the control of the Lord Advocate, assisted by a small number of Advocates-Depute, appointed by him from the Scottish Bar, and by the permanent officials of the Crown Office in Edinburgh. In the sheriffdoms the public interest is represented by Procurators Fiscal who are responsible to the Lord Advocate for prosecution, preliminary investigation of crime, and inquiries into sudden death. (There are no Coroner's inquests in Scotland.) Though considerable discretion is delegated to these Procurators Fiscal in handling offences, all matters of difficulty or importance are reported by them to the Crown Office for decision and advice.

The Lord Advocate, directly or through his representatives, has very wide powers. He decides whether to prosecute or not; he decides what crime shall be charged in the indictment, *e.g.*, murder or culpable homicide (*anglicé* "manslaughter"); he determines whether trial shall be in the High Court or Sheriff Court and (if the latter) whether by solemn or summary procedure. He may "desert the diet" (abandon the prosecution) even after trial has begun, or may accept a plea of guilty on a lesser charge. Even after verdict has been given, the prosecutor may decline to move for sentence, or "restrict the pains of the law"—that is, not ask for sentence of death though competent. In modern times, however, the power to restrict punishment has usually been exercised either in drafting the indictment or before verdict. The use of discretionary powers in the Crown

Office is comparable to some extent to the exercise of the prerogative of mercy by the Secretary of State for Scotland or by the Home Secretary in England after sentence—in that the practice is largely determined by rules laid down by successive Lords Advocate which are screened from public scrutiny. Thus in deciding whether or not to prosecute, or whether to prosecute for murder or culpable homicide, the Crown Office may take into account such factors as the public interest, diminished responsibility, provocation, insanity, and so forth. In Scotland murder has for many years been restricted in effect to cases of intentional killing or of infliction of savage injury reckless of the consequences. Because of the wise exercise of this discretion no Infanticide Act was required in Scotland to prevent the prosecution for murder of women who killed their children shortly after childbirth, and genuine cases of “mercy killing” have been regarded with like sympathy. Not only has the defence of diminished responsibility been accepted by the Scottish courts as a general defence, but the Crown Office has often taken it into account when framing indictments and accepting pleas of guilty to culpable homicide.

Except where statute empowers some body to prosecute in respect of a minor statutory offence (say) concerning school attendance or quality of milk supplied, the private prosecutor in Scotland is virtually unknown. It is theoretically possible for a private citizen to prosecute an indictable crime; but, unless the Lord Advocate concurs, a bill for criminal letters

must be obtained from the High Court of Justiciary, which can grant the request despite the Lord Advocate's objection. To succeed, however, the complainer must show some substantial and peculiar personal interest which, notwithstanding the Lord Advocate's refusal in the public interest to concur, would justify the court in allowing proceedings. Moreover, the court declines to review the reasons for the exercise of the Lord Advocate's discretion not to prosecute in the public interest. Though private prosecution was thought by many to be obsolete in 1909, leave was given then to a private prosecutor to proceed in respect of fraud, and I may add that this procedure might have been a more economical and satisfactory solution than the setting up of a Parliamentary Tribunal of Enquiry in respect of an alleged assault by the police on the Thurso boy, John Waters.<sup>29</sup> The only other modern attempt to obtain "criminal letters" this century was in February 1961, when a private citizen presented a bill for criminal letters to the High Court of Justiciary seeking to prosecute a book seller for exposing for sale and selling the book *Lady Chatterley's Lover*. This attempt failed.<sup>30</sup> Having considered the public interest, the Lord Advocate refused concurrence, and since the complainer could show no special personal interest in the matter beyond that of other members of the public, the High Court of Justiciary refused to grant criminal letters. It may be noted in passing that to ensure that no prosecution of this kind should be brought in a court

<sup>29</sup> Cmnd. 718 (1959).

<sup>30</sup> *McBain v. C.*, 1961 S.L.T. 209,

where he had no direct control over the prosecutor (such as a burgh court or J.P. court) the Lord Advocate had at an earlier stage directed that any proceedings concerning this publication should be taken only in a court where he had such control.

In the Sheriff Courts, as has been said, the Procurator Fiscal prosecutes in the public interest. The police have a duty to assist him in his investigations as he requires, but they have no control over the prosecution. The decision whether to prosecute is a matter for those alone who are concerned with the public interest. A Memorandum of Evidence submitted this year by the Inns of Court Conservative and Unionist Society to the Royal Commission on the Police expressly recommends for England (Recommendation 13) "that consideration be given to the possibility of introducing a system similar to the Scottish system of the procurator-fiscal for the conduct of prosecutions." The Law Society of England in its Memorandum also expressed dissatisfaction with the present practice of police prosecution in England. In particular they considered that police officers should not discuss with the accused what plea should be made. They recommended that all prosecutions should be brought in the name of the Crown, and conducted by solicitors. England is a country much larger in size and population than Scotland, and it may well be that the close links which exist between Procurators Fiscal and the Crown Office in Scotland could not be reproduced exactly in English practice. Some form of decentralisation might be necessary or a substantial

increase in the staff of the Director of Public Prosecutions. Nevertheless the Scottish example is well worth consideration.

Private prosecution has been defended by some as one of the valued and traditional rights of Englishmen. I do not share this enthusiasm, and observe that in other systems based on English law the modern trend is to entrust prosecution to a responsible public prosecutor.

### *Arrest to Trial*

After arrest—and usually no later than the morning following his apprehension—an accused is brought before a judge (in cases of serious crime usually the Sheriff) for judicial examination. In modern practice this is, for practical purposes, a formality, but does ensure judicial supervision of pre-trial procedure. Though the Sheriff commits an accused to be kept in custody, or liberates him on bail, he does not in modern times decide whether a *prima facie* case has been disclosed by the prosecution. The Scottish attitude to bail is liberal, but wider considerations are taken into account than in English or American practice.<sup>31</sup> There is a general review of the public interest, and considerable weight is given to the attitude of the prosecutor, who alone is adequately informed of the various factors involved—such as the danger of witnesses being intimidated. Inadequacy of means will not prevent the grant of bail in a proper case, but, on the other hand, a suspect who can lay

<sup>31</sup> See generally "Bail before Trial. Reflections of a Scottish Lawyer" (1960) 108 U.Penn.L.R. 305.

down a high price cannot compel release. Release on bail no longer depends on "the presumption of innocence"—a presumption which is really relevant only for the trial court, and applies to all accused persons. The current Scottish view is that the courts have a general discretion to grant bail in all cases unless satisfied that this would be contrary to the public interest and the ends of justice. Supervision of detention in custody and bail procedure in Scotland does not involve invocation of habeas corpus. Any person in custody who has not been committed for trial may petition the High Court of Justiciary for release; while there are statutory provisions to expedite the trial of persons committed to custody. The limit of incarceration without trial is 110 days from commitment, unless factors outside the control of the prosecution—such as illness—justify extension of the period.

### *Pre-trial Procedure and Publicity*

The Inns of Court Memorandum to which I referred earlier further observed that "if a system of prosecution similar to that which operates in Scotland were to be introduced in England, the cost of the reform might be offset by making preliminary hearings before magistrates more economical." The present writer is tempted to go further, and to suggest that, if England introduced a prosecuting system comparable to that of Scotland, the same officials, responsible to a higher authority, could carry out the preliminary inquiry, as is done in Scotland, without the need for a pre-trial hearing at all. The one advantage to the

accused which clearly attaches to the English procedure of pre-trial hearing before magistrates is that the accused is thereby informed of the evidence to be adduced against him. This end is achieved in Scotland by supplying the defence before trial, not only with the indictment, but with a full list of the Crown's witnesses and productions, and in appropriate circumstances—including all cases of murder—by disclosing to the defence the Crown's precognitions (*anglice* depositions) of witnesses. In England, for the privilege of hearing what case he has to meet, the accused must usually pay by exposing himself to prejudicial publicity at a stage when the defence is not usually in a position to offset by evidence the impact of the prosecutor's allegations. In Scotland, as in certain other countries, pre-trial procedure is quasi-inquisitorial—in no pejorative sense. The accused himself is not a participant in the Procurator Fiscal's investigation—except for his formal appearance before the Sheriff, usually not later than the morning of the day after arrest; there is no confrontation of prosecution witnesses nor questioning of them by the defence at the pre-trial stage. Evidence from other sources is sifted by the Procurator Fiscal and a dossier on the case prepared. In appropriate cases the Crown Office will advise, supervise, and take over control. Only if, bearing in mind the general Scottish requirement of corroboration, the public authorities are satisfied that a prosecution should succeed will an accused be brought to trial. This is a more exacting test than showing a *prima facie* case as in England. The public authorities may be wrong: a frightened witness to a

gang murder, for example, may go back on evidence which he gave on precognition (which in any event he can require to have destroyed before testifying). The problem of whether the public should pay the expenses of the defence in criminal proceedings when the accused is acquitted is not of the same magnitude in Scotland as in England. So far as graver crime is concerned, few are tried in Scotland unless there is an objective assessment of at least a strong probability of guilt. It may be a legitimate criticism of Scottish procedure that too many guilty persons escape trial.

The main objection, from an outside observer's point of view, to the English system of pre-trial hearing before magistrates is their publicity. Originally, the fact that the public had access to such proceedings was a protection to the accused against abuse of power to his prejudice. Today, publicity is more likely to be a curse than a blessing to him. If a suspect is socially prominent or notorious, or if the crime alleged against him is of a type which excites public interest or indignation, the evidence adduced at the pre-trial hearing will nevertheless as a rule be made accessible to members of the trial jury long before they are called on to serve. The right to publish such evidence is defended as one of the immemorial privileges of Englishmen to repudiate "justice behind closed doors." A Scotsman may consider that justice will be better served if the *pre-trial* inquiry is behind closed doors, and if the accused, when he appears before the Sheriff in Chambers, so that judicial cognisance may be taken of his arrest, is safeguarded by the presence of his legal adviser.

In Scotland as in England, once an accused has been apprehended, the function of the Press in commenting upon the guilt of a suspected person or the nature of the charge against him is suspended under severe sanction of law. This in Scotland is not a right solely of the accused, nor is infringement necessarily an aspect of contempt of court; interference with the administration of justice can take many forms. Thus no comment is permitted which might influence the mind of the public in favour of an accused awaiting trial—as by attacking the merits of the prosecution. Scottish protection against injurious publicity goes further. Publication of statements by witnesses before they testify at the trial is absolutely forbidden, as is publication of photographs of persons under suspicion, especially after arrest, since this might influence the reliability of evidence of identification. The overriding purpose is that the accused should be tried by a jury which comes to its duty without any preconceptions whatsoever regarding guilt or innocence.<sup>32</sup> After arrest—in one view, as soon as the official investigation has started—and before trial of an accused, the Press in Scotland is permitted to publish only the bare facts that a named person has appeared before the Sheriff, charged with a particular crime and that he has been committed for trial. This contrasts sharply with the situation in other parts of the United Kingdom.

In Scotland, of course, the co-operation of the Press in reporting fully and fairly the vindication of justice at the actual trial of a suspect is encouraged both

<sup>32</sup> (1958) 32 *Tul.L.R.*, 249; *Howard Journal*, 1961 (in press).

in the interest of the individual and the public. Experienced reporters, who have specialised in court work, have made a much greater contribution to the administration of justice in this country than has ever been recognised. It may be added that pre-trial publicity cannot in Scotland, as in England, prejudice an accused if the jury fail to agree. In England retrial must follow: in Scotland conviction or acquittal is decided by the majority vote of a jury of fifteen. The problem of the "hung jury," to use the American expression, does not arise and experienced criminal lawyers in England have on occasion regretted the unanimity vote which operates there.<sup>33</sup>

### *Trial*

Trial takes place in two stages when trial is on indictment. At the "pleading diet," in the Sheriff Court, the accused pleads to the indictment, and any preliminary pleas are noted. The second "diet," according to the gravity of the crime, takes place either in the High Court or in the Sheriff Court. Before trial both Crown and Defence must have exchanged information regarding the witnesses and productions on which they intend to rely, and, moreover, the defence must have given notice of "special defences" such as alibi, self-defence, insanity or "impeachment" (that another specified person committed the crime). This may deprive a Scottish criminal trial of some of the dramatic interest of the *Perry Mason* series, where the prosecution is often taken by surprise, but our methods assist in the

<sup>33</sup> [1954] Crim.L.R. 502.

ascertainment of truth. The accused is "remitted to the knowledge of an assize"—in other words is tried by a jury of fifteen, who may return their verdict by a majority, and have the choice of three verdicts—"Guilty," "Not Guilty," and "Not Proven." These last two are verdicts of acquittal. The imputation often made in England that a "Not Proven" verdict reflects unfairly on a person who has been acquitted, is not in my view justified. In most of these cases the accused would have been found guilty in England, and thus the not proven verdict operates in favour of the accused. In particular, it must be remembered that by the Scottish law of evidence corroboration is a general requirement, and accordingly a jury is not entitled to convict if the accused is linked with the crime by the testimony of only one witness, no matter how trustworthy. Formerly, following the Scriptures and Roman law, the Civilian jurisdictions of Europe applied, as Scots law does today, the rule *unus testis nullus testis*. In such cases as that of John Donald Merrett, who in 1927 was found not proven to have murdered his mother,<sup>34</sup> the doubt has been justified by the event. In 1954 the West Middlesex Coroner found him guilty of the murder of his wife and mother-in-law. By this time Merrett *alias* Chesney had died by his own hand.<sup>35</sup>

In a Scottish criminal trial, there is no "opening" by prosecution or defence, so that the jury hear the evidence as given, not as counsel hope that it will

<sup>34</sup> *John Donald Merrett* (Notable British Trials Series); also cit. note 32.

<sup>35</sup> *Ibid.*

be given. There is often a material difference. As in most countries outside the Anglo-American tradition, counsel for the defence has the right to make the closing address. Thereafter the judge "charges" the jury, summarising and analysing the facts, and directs them on law—before they consider their verdict.

*Evidence from the Accused at First and Second Hand*

I may be permitted to add some observations on the admissibility of evidence elicited from the accused himself—a topic of special interest while the English "Judges Rules" regarding confessions are under review.

In determining whether a statement made by an accused and prejudicial to his interests should be admitted as evidence, the overriding principle laid down in a long series of Scottish Judiciary Cases is "fairness to the accused." As the accused is not compelled to give evidence at his trial, it is considered contrary to principle that he should be compelled or induced to supply such evidence at second hand as a result of police interrogation. When a crime has been committed, the police will, as a rule, be the first official investigators—seeking to trace the culprit. It is expected of responsible citizens that they will assist in the detection of criminals, and the police may question whom they please in the course of their initial investigations. If, before anyone has been detained or charged, the person who ultimately comes under suspicion (even as a result of his own disclosures) incriminates himself by answers to police questioning, there is no reason in law to exclude the

statement from evidence at his trial. On the other hand, the police cannot compel any person to respond to their interrogation, though the Procurator Fiscal, who is independent of the police, can require an individual to appear for precognition or examination; and, except on the grounds that his answers would tend to incriminate him, he must reply to questions relevant to his knowledge of a suspected crime, under sanction of imprisonment.

A suspect who has actually been arrested is entitled by law to certain safeguards made specifically for the protection of his interests. He cannot be interrogated, and must be told that he is entitled to the services of a law agent before appearing before the Sheriff for "judicial examination." An anomalous category has also been suggested—those who, though not arrested, have been "invited" to remain at the police station while under suspicion to assist the police in their inquiries. In such cases, it has been said judicially that the courts should be more jealous to safeguard the rights of the reluctant "guest" than in cases where a charge has actually been made. Strictly, however, it is suggested, no person who has not been arrested and charged can be lawfully detained "on suspicion." Once an accused has been taken into custody and has been cautioned and charged, and his answer (if any) to the caution and charge noted, the police are regarded as having completed their official function. They are not entitled to testify as to what an accused said in answer to questioning after arrest, and even an invitation to speak without actual interrogation will exclude from

evidence a statement made to the police by an accused while in custody. It is sometimes said that the police may not question a suspect in custody. The more correct view is that *no evidence* of what a suspect said as a result of questioning while in custody is admissible. The distinction may be important. If, after a suspect has been taken into custody, the police ask him certain questions, *e.g.*, as to where a certain knife may be found, the prisoner is not bound to answer, but the police officers do not necessarily act improperly in asking the question. If the suspect tells the police officer where the knife may be found, and the police find it with his finger-prints upon it, there would seem to be no objection in law to putting in the knife and the finger-prints as productions at the trial. Unlike the position in English law, however, the production could not be linked with the accused's statement—which would be inadmissible in evidence.

Until 1898 the accused had not been a competent witness at his trial either in Scotland or in England, but this situation was changed by the Criminal Evidence Act, 1898, which made the accused a competent, but not a compellable, witness. That is, he may elect to testify on oath, or he may remain immune from cross-examination by declining to give evidence. It may, however, be stressed in passing that in Scotland it is unusual for a judge to comment on the fact that an accused did not elect to give evidence; while, if the accused does testify, he does not expose himself to cross-examination as to credit or as to previous convictions to the same extent as under the English interpretation of the 1898 Act. If

a substantive defence involves challenge of the prosecutor's evidence—say by alleging that a policeman charging the accused with assault was himself drunk and the aggressor, this does not justify cross-examination as to credit if the accused gives evidence. The statutory change, by which an accused was made a competent witness at his trial, affected the practical implications of the older Scottish practice, whereby an accused within forty-eight hours of arrest was brought before the Sheriff for judicial examination and to emit a declaration which was put in writing. Formerly, in the presence of his law agent, he was questioned before the Sheriff; and the questions put and the suspect's answers thereto could later be read to the jury at the subsequent trial. He could always decline to answer particular questions on the ground that his answers might tend to incriminate him, but his objections would also be placed before the jury, who might draw certain inferences therefrom. As a result of the 1898 Act, the accused, since he can testify at his trial, is not judicially examined, in the sense of being questioned, at the pre-trial stage unless he so desires. As he has had opportunity to consult a law agent before appearing before the Sheriff, he practically never elects to emit a declaration. The inquiry, therefore, no longer requires his active participation, even though he may later decline to give evidence at the trial.

Though my views are probably not shared by most of the profession in Scotland, I think that there was much to be said in favour of the former Scottish practice of *compulsory* pre-trial judicial examination

of the accused, subject to the suspect's right to refuse to answer incriminating questions. It is not self-evident that justice is best served if a suspect is permitted to remain altogether silent throughout the pre-trial and trial stages of investigation into his guilt or innocence. Thus I would favour the restoration in Scotland of the practice of compulsory judicial examination (in its traditional sense) before a judge (the Sheriff) with the safeguards attached to this procedure—including the right to refuse to answer particular questions if the answers would tend to incriminate. The accused's statement would be competent evidence, especially if he declined to testify at his trial. If this procedure were restored, it is suggested that the main inducement to the police to secure "voluntary statements" of doubtful spontaneity would be removed.

In the leading case of *Chalmers* in 1954<sup>36</sup> a Full Bench of the High Court of Justiciary quashed a conviction of murder, and reviewed the law regarding the evidence of alleged confession by an accused. Although the judges thought it impossible to lay down comprehensive rules which would cover every situation, they made it clear that, if at any stage—even before arrest—suspicion has become centred on a particular individual as the likely perpetrator of the crime, further interrogation by the police becomes dangerous from the viewpoint of admissibility of evidence. If questioning is carried too far, as by extracting a confession by cross-examination, the confession will be excluded. After an individual has

<sup>36</sup> 1954 J.C. 66.

come under serious consideration as the likely perpetrator of a crime, only his voluntary statement is admissible; this must be a statement made without pressure or inducement and not under cross-examination.

A declaration made by a suspect before a Sheriff, they suggested, would be free from the suspicions which, justly or unjustly, may attach to allegedly voluntary statements made in a police station in the presence only of police officers. If an accused wishes to volunteer information, he should preferably be permitted to emit a declaration before the Sheriff in the presence of his solicitor. The court added, that if property is recovered as the result of questioning which would be inadmissible for the foregoing reasons, it is incompetent to link the finding of such property with statements made by the accused. Evidence of what the accused did, obtained as the result of improper questioning, would not be admissible. Thus in *Chalmers* it was held that the trial judge had wrongly admitted evidence that the suspect, after police interrogation, had led the police to a place where the wallet of the murdered man was found. On the other hand, if there is no linking of the finding with an inadmissible confession, it would be competent for the prosecution to produce the article found which might, for example, bear the finger-prints of the suspect.

So far as "real" or "material" evidence obtained by illegal search is concerned, the rules of exclusion in Scotland are not so severe—possibly because real evidence is less suspect than alleged oral confessions

and involves the person of the accused less closely.<sup>37</sup> Evidence secured by improper or unwarranted search will not be excluded in all circumstances. The High Court of Justiciary has stated that each case must be decided on its own facts, having regard to the gravity of the crime and the gravity or triviality of the irregularity by which the evidence was obtained. Two principles, in the view of the Scottish courts, are relevant, neither of which can be insisted on to the utmost: first, the interest of the citizen to be protected from illegal or irregular invasion of his liberties by the authorities, and, secondly, the interest of the State to secure that evidence bearing upon the commission of a crime should not be withheld from the court merely on technical grounds.

After *Chalmers* it was for some time doubtful to what extent statements made by an accused in custody to the police—and not to a magistrate such as a Sheriff—could be admitted as evidence at trial. However, in *Manuel*,<sup>38</sup> a case in which the accused was convicted of one non-capital murder and six capital murders, it was held that evidence of the accused's written statements (made while in police custody) and evidence of his conduct in leading the police to where he had admitted to concealing a body and shoes was admissible evidence at his trial. The crucial passage in the opinion of the Lord Justice-General (Clyde) was as follows: "The law of Scotland goes further than many other legal systems in protecting a person who is detained by the police from

<sup>37</sup> *Lawrie v. Muir*, 1950 J.C. 19; *Fairley*, 1951 J.C. 14.

<sup>38</sup> 1958 J.C. 41, at p. 48; 1959 S.L.T. 23.

any risk of being driven or cajoled or trapped into admissions of guilt, even though this may complicate the quite legitimate detection of crime by the authorities. So anxious is our law to secure that such persons get fair play under our system of criminal administration, and so firmly rooted in our law is the principle that no man is bound to incriminate himself. Although this is all true there is nothing to prevent a man who is so detained by the police or who has even been charged with a crime from making a voluntary statement to the police, if he chooses to do so." The court were satisfied in this case that the accused had not been questioned by the police; that he had been actively discouraged by the police from committing himself to paper; that they had warned him of the dangers involved; and that they had gone out of their way to try to get a solicitor for Manuel before he made the incriminating confession to the officer whom he had asked to see. It may, however, be observed that they did not offer to take him before a Sheriff so that, to quote the Lord Justice-General, he could "unburden his soul of the dark deeds which he narrated with such convincing detail." So far as I am aware the police in Scotland have never adopted the late Lord Justice-General's suggestion, which would put the spontaneity of such confessions beyond all doubt. A learned justice in the Supreme Court of the United States has cited with approval<sup>39</sup> a comment on this situation. "The opportunities for exerting pressure on a suspect to confess are greatest

<sup>39</sup> Justice Douglas in *Crooker v. State of California* (1958) 78 S.Ct. 1287.

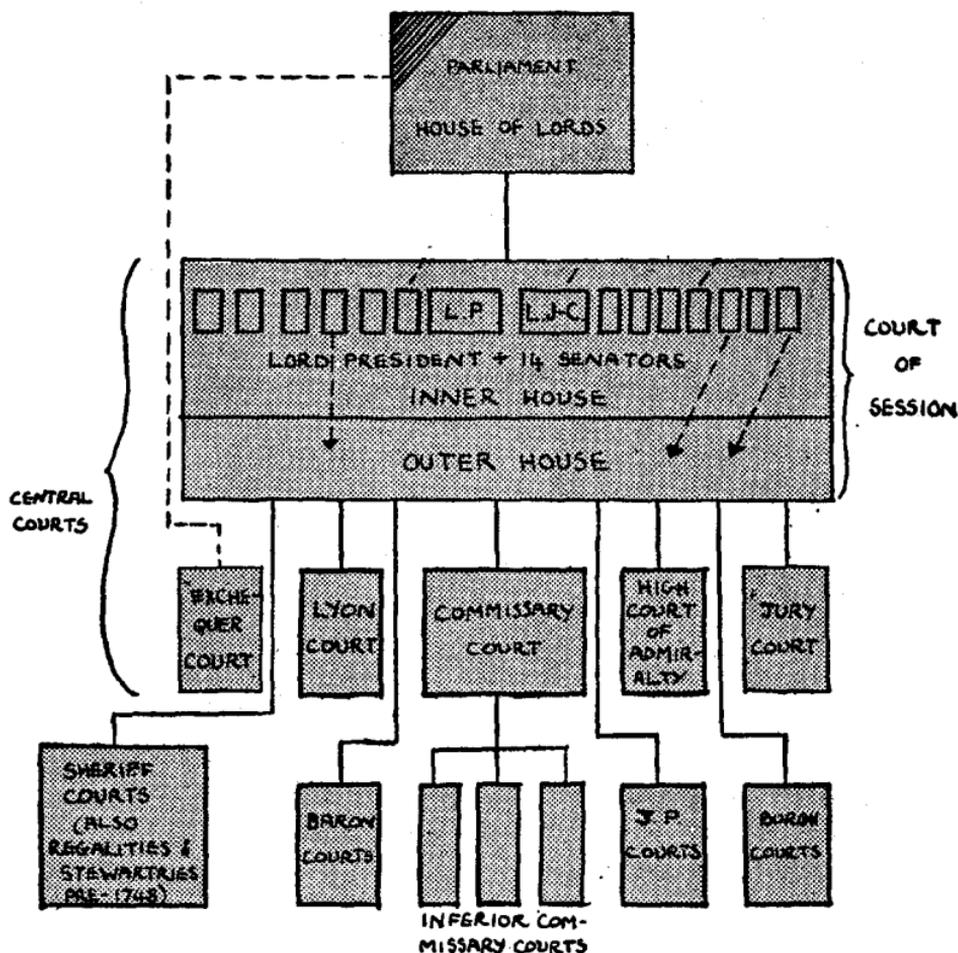
when there is no judicial supervision, no legal representation and no public scrutiny. If an accused at his trial seeks to retract a confession allegedly extorted by third degree methods his word will stand alone against several police witnesses who may be expected to deny improper pressure." It must, however, be stressed that there is no such danger, as in English law, of an accused in Scotland being convicted solely upon his own confession. A confession of guilt short of a formal plea of guilty will not suffice for conviction. The doctrine of corroboration applies generally<sup>40</sup> in Scottish criminal evidence, and it is a fundamental rule that no one can be convicted on the evidence of one witness, and that each material link in the chain of evidence against an accused must be derived from two separate sources.

To sum up briefly, I shall venture to assert that comparative study of various doctrines developed in Scots law has resulted in the improvement of criminal law in England through legislation. There are, however, many aspects of Scottish procedure which are equally deserving of consideration on their merits. I suggest in particular that our system of public prosecution, our standards of fairness to the accused and our rules regarding pre-trial disclosure of defences might well make a wider contribution to British justice. Even the architects of the Army Act might have second thoughts. I am making no boasts, however, regarding the "end product" of criminal justice—rehabilitation of the offender. The Scottish

<sup>40</sup> A course of criminal conduct may, however, be proved by single witnesses speaking as to the several crimes in the series.

## CIVIL

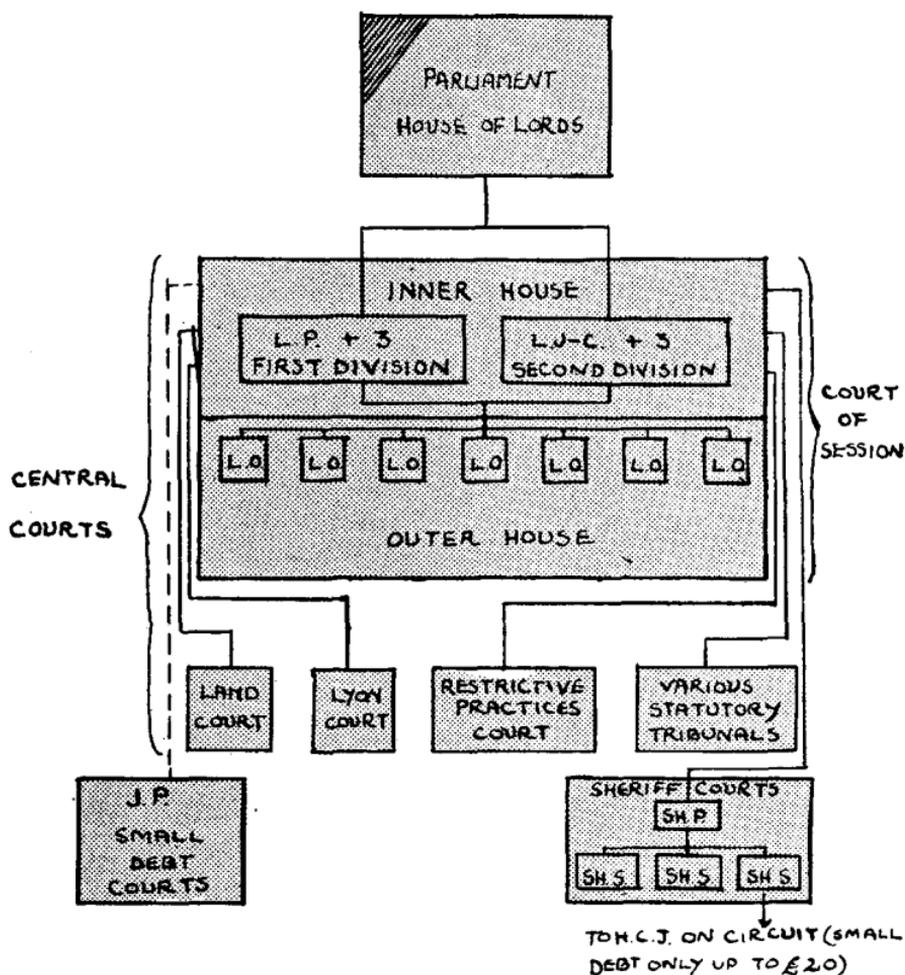
BEFORE REORGANISATION  
16<sup>th</sup>-19<sup>th</sup> CENTURY.



— indicate hierarchy of appellate or  
- - - supervisory jurisdiction

# COURTS

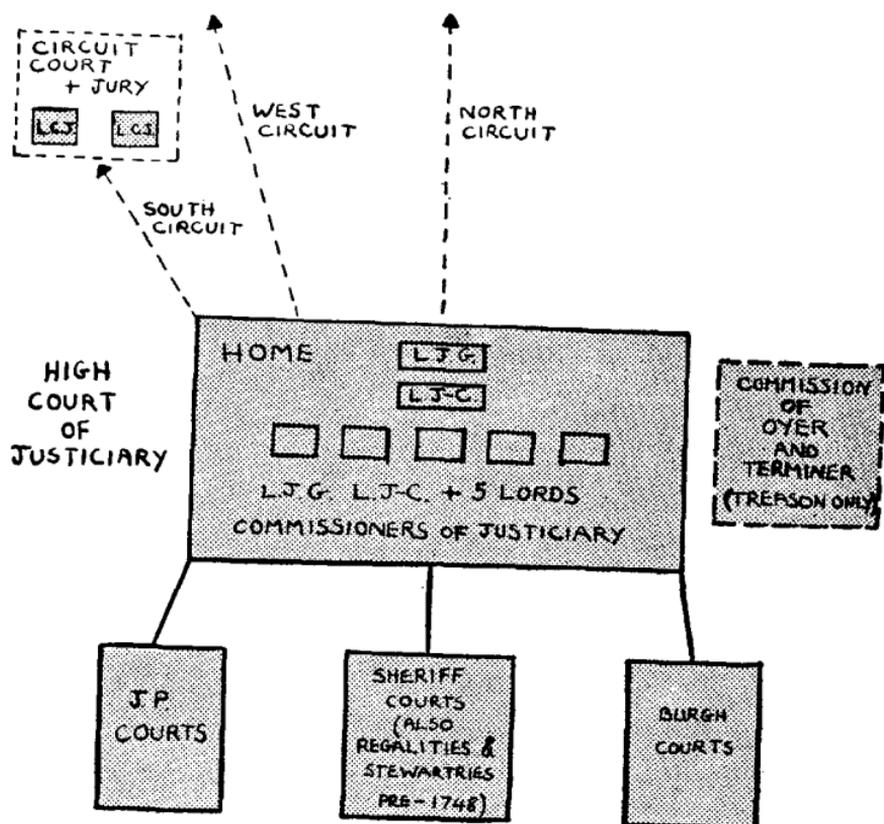
MODERN ORGANISATION.



NOTE: An additional judge was appointed to the Court of Session in October 1961.

## CRIMINAL

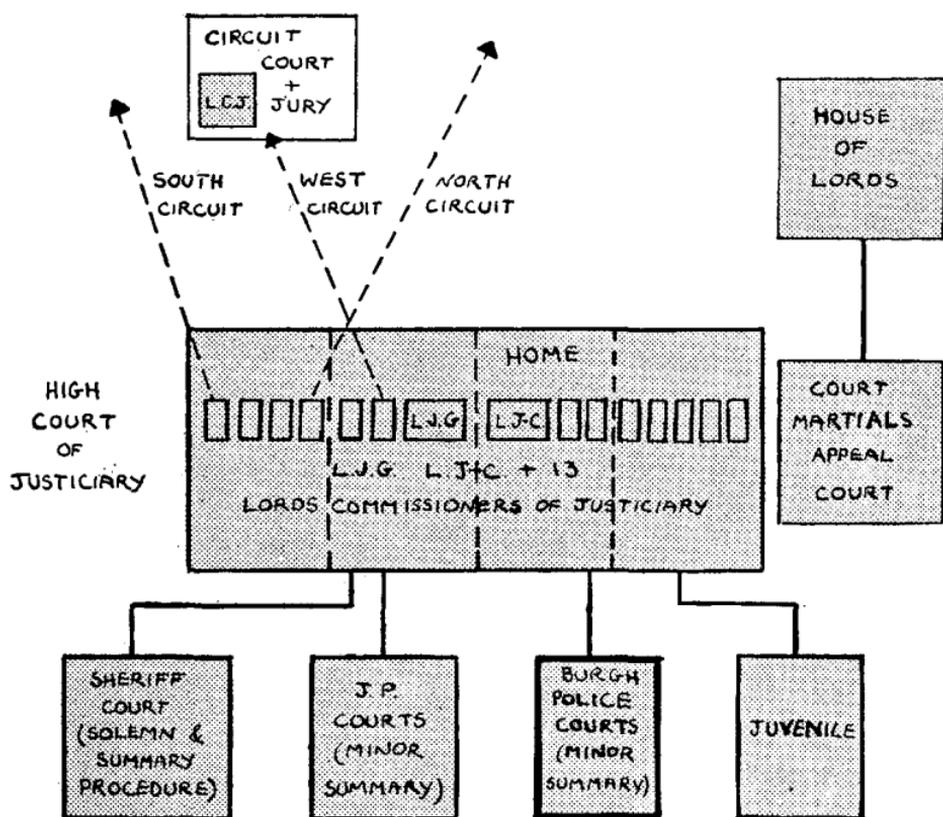
BEFORE REORGANISATION

(17<sup>th</sup> - 19<sup>th</sup> CENTURY)

— indicate hierarchy of appellate or supervisory jurisdiction

# COURTS

## MODERN ORGANISATION



NOTE: An additional judge was appointed to the Court of Session in October 1961.

contribution in this field is so far very meagre, though a promising start has been made. One may reasonably expect a lead from the universities—where various disciplines can combine their experience and knowledge. Hume, as Professor of Law at Edinburgh University, laid the foundations of our modern criminal law. There is a vacant pedestal waiting for an institutional writer on criminal science.

## CHAPTER 4

### THE PATRIMONY OF PRIVATE LAW

By the title of this lecture I wish to emphasise that the only aspects of private law which I can hope to touch on concern the core of essential principles which would find their place in a civil code in other systems. It is probable that the greater part of many a practising lawyer's time in Scotland is devoted to such matters as estate duty, income tax, town and country planning and so forth—all of which provide lucrative and important business, and some of which have an esoteric intellectual appeal. A good deal of modern legislation, however, to adopt Lord Cooper's phrase, has no better title to be recognised as "part of our system of jurisprudence than the current issue of the railway timetable" would be to recognition as part of English literature. The analogy is apt: no one can deny the practical importance of such printed matter, but few find it a stimulus to reflection or comparative evaluation. My remarks will therefore be confined to "lawyer's law," the basic principles we have received—though they may have been modified by statute.

#### PERSONS AND FAMILY LAW

Among legal systems which resemble each other generally, the most substantial divergencies will usually be found in such chapters as family law and

succession. Even in countries which have drawn largely on Roman law, rules dating back to older customary law may continue. Moreover, the influence of canon law may be reflected in such matters as marriage, legitimacy and succession to moveable property. As a result of these various factors Scottish and English law have reached markedly different solutions, though by statutory reforms, largely inspired by comparison with Scots law, English law has latterly moved closer to ours.

### *Children*

*Status.* A child in its personal status may be legitimate, illegitimate, or adopted. Scots law, here influenced by the canon law, always favoured the conferring of legitimate status whenever possible, and granted it in circumstances where formerly it was denied by the law of England. Thus a child born out of wedlock is legitimised by the subsequent marriage of his parents, provided they were free to marry at the time of his conception. Again, by the doctrine of "putative marriage," a child may be declared legitimate, even though his parents' marriage was in fact void, provided that one parent had reasonable grounds for believing that a valid union had taken place. This type of case may arise when, for example, a man goes through a marriage ceremony with a woman who does not know that he already has a wife. These two benevolent doctrines of Scots law in large measure inspired the Acts of 1926 and 1959, which brought English law into line with the European tradition. The barons of England by the Statute

of Merton, 1236, had declared emphatically "*Nolumus leges Angliae mutare*"—and they had their way for some seven centuries.

In many respects the status of an adopted child is assimilated to that of a legitimate child, but in Scotland the anomaly continues that adoption does not, as in England, confer the same rights of succession to adopting parents as are enjoyed by those born into a family. This is due to anachronisms in the Scottish law of succession to land, which are long overdue for statutory reform. Time and again successive governments have been urged to legislate—and legislation was even promised in the Queen's Speech two years ago—but no action has yet been taken on the grounds or pretext that parliamentary time is not available. *Volumus leges Scotiae mutare* is a cry which falls on deaf ears.

The misfortune of illegitimacy has been mitigated to some extent by United Kingdom legislation over the past century, but there is no general support for abolishing all distinctions between legitimate and illegitimate status in Britain. In this connection I may note that the majority of the Feversham Committee in their Report on "Human Artificial Insemination"<sup>1</sup> published last year reached the sound conclusion that children thus conceived are born illegitimate, and that to make an exception to this rule only in favour of an A.I.D. child whose mother was married would be illogical and undesirable. The Feversham Committee was set up as a result of public discussion following the decision by Lord Wheatley<sup>2</sup>

<sup>1</sup> Cmnd. 1105/1960.

<sup>2</sup> 1958 S.C. 105.

in *Maclennan v. Maclennan* that artificial insemination with the seed of a donor did not constitute adultery according to the law of Scotland, and the consequent assertion of a contrary view by the then Archbishop of Canterbury.

The legitimate parent-child relationship involves rights and duties regarding custody, education, aliment or maintenance and succession. By statute the welfare of the child is the paramount consideration in questions of custody, and the father's overriding claim has been cut down; but unless his authority is superseded or relinquished, he alone exercises *patria potestas* (paternal power over a child under years of majority) which cannot be transmitted to another. This "power," if the child is over puberty, is to counsel, rather than to direct. Stair thought that a father had a right to control his children after majority and appropriate their earnings. This is certainly not the law today, and even with regard to his minor children the father can probably only use his child's earnings for maintenance purposes. The hard-pressed parent who fathers a teen-age pop singer featuring in the "Top Ten" can at least levy contribution for bed and board—though he could not indulge himself with a Rolls Royce and winter at Cannes. The duty to aliment in Scotland is reciprocal between parent and child and is life-long, so that, if children over majority are disabled from earning their livelihood, or parents fall upon evil days, they may look to the family for support in maintaining within reason the standard of life to which they have been accustomed.

*Capacity*

English law makes little distinction between the legal capacity of children aged ten and twenty—and classifies all those under twenty-one by the inappropriate category of “infants.” An important division, based upon Roman law, is recognised in Scots law—both in matters of capacity and guardianship. Pupils, that is children below the age of puberty (twelve in the case of girls, fourteen for boys) have no legal capacity. Not only are they under the personal control of a guardian, but a guardian must act for them in all legal matters. Over puberty and under the age of twenty-one, however, a child becomes a “minor,” and enjoys quite substantial legal capacity, especially if the father is dead and if no curator has been appointed. Though by will a father may appoint his wife after his death as curatrix of their minor children, she does not automatically succeed to guardianship as in the case of a pupil child; and other guardians may be nominated. The curator to a minor child does not exercise the *paternal power* of a father over the person of his ward—in such matters, for example, as to fix his residence—but is solely concerned with advising on or concurring in legal transactions entered into by the minor. Thus the general assumption that in Britain a person under twenty-one cannot change his domicile would seem to be erroneous, so far as a Scottish minor is concerned, after his father’s death. I should, however, add that certain provisions of statute law, which supplement without abrogating the common law, impose personal control over some minors up to the age of sixteen.

Apart from cases where factors such as care and protection or delinquency are involved, orders relating to custody and control cannot be made in Scotland after a child has reached the age of sixteen, and probably cannot be enforced against the wishes of a minor. English law takes a very different view. A person under the age of twenty-one who happens to come within the jurisdiction of the English courts may readily be subjected to control as a ward in Chancery. Moreover, there have been regrettable instances<sup>3</sup> of the assertion by these courts of powers in custody proceedings generally which pay scant regard to principles of comity or to the courts of the young person's domicile.

Though a minor may make reasonable purchases in ready money transactions and may in general incur personal liability for necessities, according to his station in life, if he has a guardian most acts of legal consequence require the guardian's concurrence if they are to be enforceable against the minor. In any event, however, a transaction which is clearly to the prejudice of a child—whether entered into by a tutor for a pupil, or by a minor acting with or without his curator—may be set aside by the courts within the *quadriennium utile*, that is, if the party concerned takes steps before he reaches the age of twenty-five. Restitution on these grounds is less likely if the minor acted with a curator, and thus (unless the minor is

<sup>3</sup> *Babington v. Babington*, 1955 S.C. 115, and subsequent unreported English proceedings; cf. *McKee v. McKee* [1951] A.C. 352.

trading on his own account) people will be reluctant to deal with him unless a guardian concurs.

It is perhaps not generally known that a minor in Scotland may make a valid will of his moveable estate—a reflection which may not cheer fathers who, to avoid death duties, have transferred money or shares to teen-age sons whose lives are at risk on motor cycles. The ecclesiastical courts before the Reformation were largely concerned with wills affecting moveables, and their influence is also apparent today in Scottish marriage law. In a matter as closely concerned with spiritual wellbeing as indissoluble union for life, the Church declined to require parental consent as an essential requirement for marriage either of adults or minors. The temporal power in many countries has introduced the element of parental consent to marriage not only in the hope of promoting prudent and desirable matches, but also for reasons connected with family property rights. Thus several countries even require adults to seek approval for marriage. In Scotland the tradition of the medieval canon law has remained as the law of the land, so far as consent to marriage is concerned—though the minimum age of consent is now sixteen. Until 1929 the age of capacity for marriage was that of attaining minority. This rule which might have been suitable for those wafted to maturity by the South Wind in conditions of Mediterranean luxuriance, was most inappropriate for Northern latitudes. The nymphets of contemporary Scotland can no longer opt for matrimony in lieu of secondary education.

*Husband and Wife*

*Marriage.* The Scottish law of marriage long retained doctrines of irregular marriage which survived through an interesting historical accident. The Reformation in Scotland and consequent breach with Rome came in 1560, three years before the Council of Trent swept away the whole fabric of irregular marriage in Catholic Europe, and for a valid union required the presence of a priest and witnesses. The pre-Tridentine canon law which recognised the fact of consent between spouses as sufficient to constitute marriage survived in Calvinist Scotland. It was for this reason, and because parental consent was not a prerequisite either, that eloping couples from England resorted to Gretna—a village conveniently close to the border. There was, in fact, no special magic about Gretna. As from July 1, 1940, however, two of the three forms of irregular marriage were abolished—namely marriage by mere exchange of consent or by intercourse following “engagement” to marry. Irregular marriage can, however, still be constituted by consent proved by prolonged cohabitation—which does not attract the passionate visitor. As Lord Neaves put it in his *Tourists Matrimonial Guide through Scotland*:

“ But you who are here as a stranger,  
 And don't mean to stay with us long,  
 Are little exposed to that danger,  
 So here I may finish my song,

Woo'd and married an' a',” etc.

There are now two forms of regular marriage in Scotland—marriage after certain formalities by a

minister of religion or in the presence of a registrar. The reason why Scotland is still the Mecca for matrimony as Reno is for divorce is because parental consent to the union is not required.<sup>4</sup> If, of course, minors come from a jurisdiction where such consent is indispensable to constitute a valid marriage, a ceremony in Scotland would be null; but few legal systems go quite so far.

### *Divorce and Judicial Separation*

So far as divorce by judicial sentence is concerned, Scotland had at least three centuries start on England, and provided a system for emulation. Divorce for adultery was recognised from the Reformation, and from 1573, also founding on scriptural authority, malicious desertion was accepted as a ground. Divorce for adultery and malicious desertion under the so-called "Pauline Privilege" was recognised by virtually all the Continental reformers; and also by the ecclesiastical commission set up by Edward VI in England. Their labours were frustrated by his death. The Divorce (Scotland) Act, 1938, adds grounds of cruelty, sodomy and bestiality and incurable insanity; and also provides for dissolution on presumed death of a spouse. The consequences of an action in Scotland are not identical with those which emerge on petition for divorce in England—though substantially the same grounds may now be stated. Thus, for example, no question of "recrimination" arises in

<sup>4</sup> See, generally, Anton and Francescakis, "Modern Scots 'Runaway Marriages'," 1958 *Jur.Rev.* 253; Ashton-Cross, "Cohabitation with Habit and Repute," 1961 *Jur.Rev.* 21.

Scotland where adultery is alleged, though there may be cross-actions alleging the same matrimonial offence. The mere fact that a pursuer has committed adultery is no bar to his or her action. There is no Queen's Proctor in Scotland, and the prurient lore of the "discretion statement" is unknown. In deciding whether adultery has taken place, the legitimacy of a child born to the wife may be in issue. The so-called rule in *Russell v. Russell*<sup>5</sup> in England prevented spouses in such cases from giving evidence as to whether they had had intercourse during a particular period. Moreover, English courts have shrunk from hearing evidence on such matters, except when enjoined by statute. In Scotland, however, the courts rejected such pudency in evidence, and also the rule in *Russell v. Russell*. The Lord Justice-Clerk (Thomson) rightly commented that<sup>6</sup>: "There seems no reason why there should be anything more sacred than the ascertainment of truth and the doing of justice." Eventually, in 1949, legislation extended to England the Scottish rule.

For desertion, the three-year period is calculated in Scots law from the date of abandonment; and not, as in England, retrospectively from the time of petitioning for the remedy. Thus the pursuer acquires a vested right which cannot be lost, except by condonation or forgiveness. The English ground of "constructive desertion" has no place in Scottish practice, which would consider desertion an illogical ground for

<sup>5</sup> [1924] A.C. 687.

<sup>6</sup> *Lennie v. Lennie*, 1948 S.C. 466 at p. 475; see also *Burman v. Burman*, 1930 S.C. 262.

a person to assert if he or she had left the matrimonial home. On the other hand, if one concedes the social desirability of divorce, Scots law is defective in that it grants no such general remedy as divorce for intolerable conduct, not *aimed* at the pursuer (such as disgusting personal habits) which would make it unreasonable for a court to require spouses to live together. "Habitual drunkenness" even though it does not involve conduct aimed at the other spouse is, however, cruelty by statute. The Royal Commission on Marriage and Divorce did indeed recommend<sup>7</sup> that "intolerable conduct" generally should be made a ground of divorce in Scotland; but there is little hope of legislation on any new grounds of divorce if this has to be achieved by an Act applicable with variations to the United Kingdom. Certain ecclesiastical interests have it in their power to obstruct the more fundamental recommendations of the Morton Report, and the views of the established Churches in Scotland and England do not coincide on such questions.

Divorce on grounds of cruelty was introduced in 1938 by an Act which imported the law and practice previously recognised in cases of judicial separation. This has had the unfortunate effect of making "future protection" an essential element, which, though reasonable in cases of judicial separation, is quite unreasonable for divorce.<sup>8</sup> A wife who has been frequently assaulted savagely by her husband, later crippled by a stroke before her action is heard, would

<sup>7</sup> Cmnd. 9678/56, paras. 169-170; Recommendation 10.

<sup>8</sup> *Dunlop v. Dunlop*, 1950 S.C. 227.

be denied divorce. It has recently been decided that certifiable insanity is a good defence to an action based on cruelty, though the defender knew his conduct was wrong.<sup>9</sup> When emphasis is laid on guilt volition should be of the essence.

Undermined by exceptions, the idea of "guilt" no longer provides a sound basis for divorce. A Scottish judge, Lord Walker, expressed his dissenting view<sup>10</sup> from that of the majority of the Morton Commission, who would have restricted divorce ostensibly to the doctrine of "the matrimonial offence." However appropriate this may seem for judicial separation, it is a very poor and illogical foundation for their recommendations on divorce. Insanity, most tragic of afflictions changing the human personality, they accepted as justifying divorce; and further unacknowledged inroads on the doctrine of the "matrimonial offence" appear in connection with recommendations regarding mental deficiency and presumed death. Dissolution of marriage whether by death or divorce is to be mourned; but I venture to assert that, though infidelity, cruelty and desertion may undermine marriage, the breakdown which matters in the last resort can only technically be attributed to isolated matrimonial offences. Failure in love wounds more mortally than failure in duty.

Adultery and cruelty (including habitual drunkenness) are also in Scotland grounds for judicial separation, and the decrees can later be used to support an

<sup>9</sup> *Breen v. Breen*, *Scotsman*, July 26, 1961.

<sup>10</sup> *op. cit.*, note 7, pp. 340-341.

action for divorce. It may well suit a middle-aged wife, especially, to choose her remedies in two stages. Apart from cases of divorce for insanity, the successful wife pursuer would on decree of divorce become entitled to that share of the husband's property which she would take had he died at that time. Unlike continuing awards of maintenance in England, which Scots law might possibly be wise to consider, there is a once-for-all settlement. This means that, though an errant husband may earn a large salary or wage, if he has been living up to his income and saving little, the wife's legal rights in his capital will not be worth much. Under a decree of judicial separation, however, the defender can be ordered to make periodical payments of aliment (maintenance). The enforcement of such orders in any legal system is not a simple matter, and can degenerate into wholesale resort to the expedient of civil imprisonment. In Scotland, however, there has long been in use procedure by "arrestment," whereby a person who is due payment of a debt may "arrest" money or moveable property which is owed by a third party to the debtor. Subject to certain deductions, wages may be "arrested" in this way. Though I cannot claim that we have achieved a perfect solution, we have at least produced one which was thought worthy of introduction into English practice, and which reduces to a minimum the sanction of civil imprisonment. In 1959 the number of debtors sent to prison in England amounted to 5,355—a ratio of 1 in 17/18 judgment debtors. In Scotland, largely due to procedure by arrestment of a proportion of a debtor's wages, civil

imprisonment at the instance of private citizens is extremely rare. Between 1948 and 1957 in Scotland those imprisoned annually for wilful refusal to pay aliment (maintenance) varied between a minimum of 10 and a maximum of 34; and those imprisoned for refusal to carry out other orders of the court (as to perform an act) varied between 0 and 3 each year.<sup>11</sup> Now by the Maintenance Orders Act, 1958, inspired by the existing Scottish practice, the English courts have been empowered to "attach" the earnings of defaulters under maintenance orders. We may hope that this reform will result in a marked reduction in the numbers of those committed to civil imprisonment.

#### *Legal Proceedings between Spouses*

The present law as to when husband and wife can bring actions against each other—apart from matrimonial disputes—is illogical and unsatisfactory. Either spouse can sue the other for breach of contract and even, as Lord Wheatley has said,<sup>12</sup> "It is the right of every Scotsman to exclude his wife from his castle." Nevertheless, due to incautious following of English law (where the theory obtains that husband and wife are one person) the rule has been established in Scotland that husband and wife cannot sue each other for delicts (civil wrongs).<sup>13</sup> One alleged justification which has been urged for this policy is that to allow

<sup>11</sup> Report of the Committee on Diligence, Cmnd. 456/1958, para. 127.

<sup>12</sup> *Duke of Argyll v. Duchess of Argyll*, September 17, 1960 (unreported).

<sup>13</sup> *Harper v. Harper*, 1929 S.C. 220; *Smith*, p. 819; cf. *Webb v. Inglis*, 1958 S.L.T. (Notes) 8.

actions for delict would disrupt domestic harmony. In the usual case the converse is true. If the husband by his negligent driving injures his wife and his children, the children can recover damages—which will be paid by the insurance company—while the wife's temper will not be calmed by the law's injunction to suffer in silence. My wife and I now prefer to be driven by our daughter.

#### OBLIGATIONS

A man is said to be under an obligation in the legal sense when he is bound to pay money, or to deliver some thing or to perform (or abstain from performing) some act. In the Civilian systems of Europe, by the eighteenth century, comprehensive principles of liability had been worked out, incorporating some customary law, but mainly based upon rules of Roman law generalised through the influences of canon law and the Natural Law School of Commentators. Scots law shared in this tradition. English law, however, was late in developing general doctrines of contract and tort. The legacy of the forms of action is reflected even today in a large variety of nominate torts, each with its particular rules, while what Winfield<sup>14</sup> called the "contract-tort catena" bedevils the English law of obligations. The English law of contract largely developed from the law of tort, and returned the compliment by grafting onto the law of tort ideas of "particular duty" and "privity of contract." Paradoxically, though adoption of Scots

<sup>14</sup> *Select Legal Essays*, esp. p. 87.

law could have rationalised the English law of obligations in the nineteenth century, through pseudo-comparative methods, restrictive English categories were superimposed on established Scottish principles. This unhappy result I have discussed elsewhere in a paper entitled "The Common Law Cuckoo."<sup>15</sup>

Significantly the law of obligations in other Civilian systems influenced by English law, such as those of Ceylon, Quebec and South Africa, has been distorted more or less in the same way as in Scotland. It is ironical that now in the twentieth century leading English lawyers such as Lord Denning are striving towards solutions which their predecessors attacked in other jurisdictions over which they had appellate powers. They did what was best according to their lights—but these, alas, were refracted through so much medieval glass.

The sources of obligation in Scotland may be classified as follows. First, irrespective of the will of the person obliged, an obligation may be imposed by force of law. Such obligations may be, as Stair put it, "obediential," where law reinforces some moral duty—as to support relatives; or make reparation by payment of damages for harm caused through fault; or to restore the proceeds of unjustifiable enrichment. Hence the categories of aliment, which we have considered, delict (or civil wrongs) and unjustifiable enrichment or quasi-contract. Secondly, the law also creates certain other strict or absolute obligations as

<sup>15</sup> 1956 *Butterworths S.A. Law Review* 147; also "Strange Gods" 1959 *Jur.Rev.* 119.

a matter of public policy, irrespective of moral considerations. This is the field of quasi-delict, using the term properly. Thirdly, however, there are obligations created by the will of the person obliged whereby wider duties are assumed than the law would otherwise imply. These voluntary obligations are either enforceable unilateral promises (*pollicitationes*) or contracts.

### *Delict*

In the era before the Scottish law of delict was rationalised and Romanised, customary remedies were given, as elsewhere in Europe, for various forms of fraudulent or violent wrongs. Moreover, the provinces of criminal and civil liability were not strictly defined. When Romanisation came, broad principles of liability which had been developed in the evolved civil law were introduced without actually abolishing the old particular remedies. However, though there was some grafting of customary remedies onto Romanistic principles, the various customary categories tended to become obsolete and fade away. But for contact in the nineteenth century with the English law of tort—which is, as Lee puts it,<sup>16</sup> “poor in principle, rich in detail” it would have been possible to describe the Scottish law of delict as an outstanding example of the Scottish lawyer’s disposition to use the<sup>17</sup> fewest possible number of tools to do the largest possible number of jobs. This is still true, but the

<sup>16</sup> *Introduction to Roman-Dutch Law* (5th ed.), p. 319.

<sup>17</sup> Cooper, *Selected Papers*, p. 179.

simplicity of the system has been overlaid with a number of exotic categories of English origin.

The two broad bases of liability for delict in Scotland, in my view, are both derived from Roman law, though elements survive from before the "Reception," and further categories have been added from English law. First, as in other Civilian systems, there is the generalised concept of *culpa* or fault, derived from, or inspired by, the *lex Aquilia*.<sup>18</sup> A man is bound to make reparation for harm caused to others through fault. Fault implies both deliberate infliction of harm, and also, which is more usually the case today, negligence—failure to take such care as is reasonable in the circumstances. The second broad principle of liability is derived from the *actio injuriarum*,<sup>19</sup> of Roman law which was the appropriate remedy when seeking redress for insult or contumely. This might take many forms, the main division in Scotland being between real injuries (as in cases of assault) and verbal injuries (as by abusive language).

In the *actio injuriarum*, which is given to assuage wounded feelings, damages are given by way of *solatium*. By contrast, the Aquilian action based on fault came to be a general remedy for repairing actual patrimonial loss—the money value of the damage done—and provides no compensation for hurt feelings.<sup>20</sup>

<sup>18</sup> Digest 9.2.

<sup>19</sup> Digest 47.10.

<sup>20</sup> Judges of eminence have used the expressions *actio injuriarum* and "verbal injury" in a loose and most misleading way, which I hope will one day be corrected by an authoritative statement in the highest courts. In Roman law, killing or injuring a slave was, of course, damage to property, and a matter for Aquilian liability; but there was no general redress

In Scotland the action which is given against a person who kills or injures another is based upon the Aquilian principle of fault, but in addition to a claim for compensation for financial loss, there is usually associated with it a separate head of liability—*solatium* for pain or grief. This has probably been grafted from the old law of assythment onto the Romanistic concept of *culpa*. Though English law was influenced in the mid-nineteenth century by the Scottish example, so as to provide by statute an action to relatives of a deceased person killed by a wrongful act, these were not allowed to claim for the sorrow of bereavement. On the other hand, when English law abolished the rule that a personal action is cut off by the death of the plaintiff, such actions transmitting to executors might include claims for physical pain and loss of expectation of life. Thus statutory provision in England differed considerably from the common law

given for the killing of a free man. Germanic or Celtic customary law, on the other hand, was concerned to deal with cases of killing or injuring free men by enforcing a tariff of money payments—*wergeld*, *crow*, or *assythment*—which had the dual function of compensating victims or their surviving relatives, and also buying off their vengeance. As European countries Romanised their laws of delict they often preserved, nevertheless, the custom of exacting composition for the killing or injuring of a free man. The influence of the Canon law and the medieval glossators had prepared the way. The tendency was to graft onto the Aquilian action for fault an element of *solatium* for pain or bereavement. This element of *solatium*, it will be observed, has nothing whatever to do with the *actio injuriarum*, though in deciding whether rights to claim damages for such personal matters as pain or grief should transmit to heirs and executors of the victim, it was reasonable to impose the same restrictions as already applied under the *actio injuriarum* to claims for feelings wounded by insult. In short, the policy of the law was not to permit such personal claims to transmit after death.

solutions of Scots law regarding the infliction of death or injury.

The principle of liability for *culpa* (i.e., causing damage through failure to take reasonable care in the circumstances) has been illustrated in innumerable cases. Many of these cases—such as *Donoghue v. Stevenson*, which we have already discussed<sup>21</sup>—would be covered by the tort of negligence in England, but confusion will result from any superficial assumption that the remedies are identical. While Aquilian fault covers deliberate as well as negligent wrongdoing in Scotland, English law has an armoury of separate torts, including trespass, trover, and conversion, to deal with such cases. From time to time, unfortunately, some of the specialties of English law, which can be explained or justified only in the context of legal history, have encroached on Scots law—though to some extent Scots law has helped English law to develop broader principles of liability. It was largely through Scottish example that the general concept of negligence gained acceptance in England, and the most recent example of progress in England towards the abolition of anomalous categories is to be found in the recommendation of the English Bar Council this summer that distinctions between “misfeasance” and “nonfeasance” should be abolished, so far as highway authorities are concerned.

The tendency of English lawyers in the past to erect distinctions in fact into artificial legal categories, has at times caused confusion in Scots law. Thus,

<sup>21</sup> See pp. 51, 52, *supra*.

whereas the older Scottish common law treated questions of liability of occupiers of land for persons injured by dangers on the land according to the general principle of fault, and also applied the same principle in deciding on liability for harm caused by animals, or the escape of dangerous agencies (such as accumulated water) from land, English law approached all these matters by applying a pigeonhole technique. The circumstances of the case were not viewed generally to ascertain whether fault had been established but, as soon as certain facts were proved, such as that the person injured was a trespasser, the legal result was predetermined by allocating the case to its appropriate pigeonhole. Through statute and judicial construction many of these arbitrary distinctions made in English law are now being eliminated, but it was the misfortune of Scots law to come strongly under the influence of English law at a time when categorising was in vogue. There is a certain irony in the fact that statutory reform may often be the only possible way of restoring the legal *status quo* in Scotland. Last year the Occupiers' Liability Act<sup>22</sup> achieved that result so far as liability for dangerous premises are concerned. The consensus of informed opinion among Scottish lawyers has recommended similar legislative action to eliminate the limited extension to Scotland of the English rule in *Rylands v. Fletcher*<sup>23</sup> (regarding the escape of dangerous agencies from land) and also the doctrine of *scienter*

<sup>22</sup> See "Full Circle: The Law of Occupiers' Liability in Scotland" in *XXth Century Comparative and Conflicts Law*, p. 128.

<sup>23</sup> (1866) L.R. 1 Ex. 265; (1868) L.R. 3 H.L. 330.

(knowledge of vicious propensity) where liability for animals is concerned. In all these cases it is thought that the test of liability should be fault or negligence, though of course the amount of care to be expected of a defender must depend upon the circumstances of each case. Moreover, there is no objection to the imposition by statute of strict liability—where the public interest so requires.

One arbitrary category of English law will be less easy to eliminate from the Scottish law of reparation—the concept of “particular duty.” Though in Scotland, as in other Civilian systems, *culpa* or fault was tested by ascertaining whether the defender had taken reasonable care in the circumstances, there has latterly been a tendency to require the pursuer to show that the defender owed *him* a duty to take care.<sup>24</sup> Paradoxically, where the defence of contributory negligence is raised, it is not suggested that the defender should have to prove that the pursuer owed a duty to him.

The English tort of negligence seems to afford no

<sup>24</sup> Regarding this “particular duty,” the late Sir Percy Winfield wrote: “I hope that the student of comparative law may find some interest in the investigation of why tortious negligence should be permeated by a conception which was wholly alien to Roman law and of which there is no trace in modern Continental systems.” The student of pseudo-comparative law (a discipline which I commend to appellate judges and legislators in particular) will also be interested to discover that this anomalous concept of “particular duty,” which has been traced to a failure in the past to distinguish clearly between contractual and delictual liability in English law, has been pressed upon the various Romanistic systems to be influenced by English law. See Dias (1956) 30 *Tu.L.R.* 377; Price, 1959, *Acta Juridica* 120; Baudouin, *Droit Civil de la Province de Québec*, p. 760.

remedy in cases where the harm suffered by the plaintiff has not involved physical damage to person or property and where the harm was not inflicted by physical means.<sup>24a</sup> Though damages for harm necessarily involve payment of a sum of money, if the damage suffered is itself loss of money—caused, say, by a negligent report—the plaintiff can only succeed if he proves contract or fraud. American law has, of course, advanced beyond the English position, and Lord Denning attempted in vain to persuade the Court of Appeal in England to grant a remedy for negligent misstatement.<sup>25</sup> There are certain dicta which might suggest that the Scottish courts are equally limited, but there is also older authority from before the era of English influence which would give a remedy for financial loss caused by non-physical means, such as words.<sup>26</sup>

While we are considering liability for words, I may deal briefly with slander or defamation and verbal injury in Scots law. (The English distinction between libel and slander is not followed in Scotland.) Here again contact with English law has muddied what were formerly clear waters, and let me hasten to add that most of the blame has been due to incautious borrowing by Scottish judges and writers. Much of the confusion is due to the fact that the foundations of liability for false and injurious statements differ in Scottish and English law. For insult (*injuria* in its technical sense) redress is given for the affront done to a person's honour and dignity. He receives

<sup>24a</sup> But see *Clayton v. Woodman*, *The Times*, July 6, 1961.

<sup>25</sup> *Candler v. Crane, Christmas & Co.* [1951] 2 K.B. 164.

<sup>26</sup> "*Jus Quaesitum Tertio*" (1956) *Jur.Rev.* pp. 12–13.

*solatium* for his wounded feelings, and *animus injuriandi* (the intention to insult or recklessness so gross as to be treated as intention) is, or should be, regarded as an essential element. This remedy, which is seldom invoked these days, has many potential uses. Though "trespass" in Scotland is a popular, not a technical expression, and no action for reparation is given unless damage is caused by the intruder, the masterful trespasser who indulged in rude pantomime outside the dining-room window of a householder should be liable for "injury" in the technical sense. Moreover, one can conceive of cases where this remedy would be available for other invasions of privacy. Lord Mancroft's Bill <sup>27</sup> may not be so urgently needed in Scotland as in England.

However, most cases of insult have arisen out of the use of insulting words—though actions either for defamation or insult have been very rare in modern Scottish practice. When insulting language is complained of, proof of publication to a third party is not necessary <sup>28</sup>; and before the reorganisation of the courts in the nineteenth century, the appropriate *forum* was usually the Commissary Court. English law does not give any civil remedy for insult, and in theory awards damages in defamation actions for the money value of the reputation lost. Hence there must be publication to a third party. Scots law also gives an action in respect of loss of reputation viewed as an economic asset, and the two elements

<sup>27</sup> His attempt in 1961 to secure "privacy" by legislation was frustrated by lack of Parliamentary time.

<sup>28</sup> *Mackay v. McCankie* (1883) 10 R. 537.

of insult and damage to reputation usually coincide in the same proceedings—as if the defender publishes of the pursuer, a pedagogue, that he seduces his students.<sup>29</sup> This coincidence is not, however, inevitable. Insult addressed to the pursuer may not have been published to anyone else, and therefore his reputation cannot have suffered; while to state falsely of a man that he is bankrupt may injure his reputation and be actionable without implying contumely. Long ago Kames pointed out<sup>30</sup> that while proof of *animus injuriandi*—intention to insult—was necessary in actions for verbal injury, it was sufficient to prove *culpa* or negligence in cases where loss resulting from damaged reputation was in issue. Thus, in effect, the former right of action is based on the *actio injuriarum* and the latter on Aquilian fault.<sup>31</sup>

If I am right in my analysis of the foundations of Scots law, at least two important inferences may be drawn. First, negating of *animus injuriandi* should

<sup>29</sup> As Lee states in *Elements of Roman Law* (4th ed.) at p. 390, "Wherever the Roman tradition exists, as on the continent and in Scotland and South Africa, both (*i.e.*, affront and defamation) are actionable wrongs. But it is not so in English law."

<sup>30</sup> *Select Decisions*, pp. 307–308; *Historical Law Tracts*, p. 242; *cf. Hume Lectures III*, p. 152.

<sup>31</sup> A recent judgment of Hiemstra J. in South Africa 1959 (2) P.H., J. 20 (W.); 1960 (3) S.A. 687 (A.D.), where very similar developments to those of Scots law have taken place, summarises my view—"The original *actio injuriarum* of the Roman-Dutch law has in our courts undergone extensive influence of the English law. I need not trace the history of this process. That has been admirably done by Professor Price (66 S.A.L.J. 4). . . . A defendant is today held liable in our courts for damage to a man's reputation, seen as an economic asset, and he is so held liable purely on the basis of *culpa*. . . . This liability is essentially the same as liability *ex lege Aquilia* in our law. It seems to me that our

be a good general defence.<sup>32</sup> Secondly, if *culpa* or negligence will suffice to support a claim for damages caused by false statements affecting a man's reputation, there seems to be no logical reason why financial loss caused by negligent misstatements should not be recoverable in other circumstances. This might well encourage development of wider principles of liability even in the sister system.

Before I part from delict, let me exhibit yet another weapon in our arsenal which might well be coveted South of Tweed—namely, the doctrine of abuse of rights. In the well-known English case of *Bradford v. Pickles*<sup>33</sup> it was held that “no use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious.” Lord Watson, indeed, was moved to proclaim that this would also be the view of Scots law—a spontaneous and *obiter* utterance which had no regard either for argument

defamation action can regain a true Roman-Dutch foundation if it is viewed as . . . an *actio ex lege Aquilia* and an *actio injuriarum* rolled into one. . . . The effect is that the damages are assessed under the two heads.” This I believe still to be true of the law of Scotland, though I must confess that the situation has been greatly obscured through incautious citation of English precedents on defamation, and references to the protean English term “malice.” Moreover, Lord President Robertson, with the support of the First Division, endeavoured at the end of the nineteenth century to appropriate for the term “verbal injury” a novel meaning, which conflicts with that of every commentator on the civil law—including all Scottish institutional writers. He apparently regarded an action for verbal injury as a remedy for patrimonial loss and not for insult.

<sup>32</sup> See in particular Lord Uthwatt in *Perera v. Peiris* [1949] A.C. 1 at pp. 19–20.

<sup>33</sup> [1895] A.C. 587.

or authority. In fact this view conflicts with the institutional authorities and the ethos of Scots law. This was, however, reasserted by Lord Dunedin and the First Division<sup>34</sup> who held that acts, which might be quite lawful in the ordinary course of fishing, would be unlawful as *in aemulatione vicini* if done with the malicious motive of disturbing the fishing of a neighbour. The doctrine of "abuse of rights" remains available for exploitation in other circumstances than quarrels between landowners—the principle being that, in balancing competing interests, a right may become a wrong if exercised from improper motives. One chapter of the law which would—and may yet—be held appropriate for the application of this doctrine is that of trade competition and industrial disputes. The English law of "conspiracy" maintains the somewhat anti-social and illogical proposition that conduct, which would not be unlawful if done by one powerful agency acting maliciously, may yet be unlawful if two or more individuals combine for the same end. The leading case, paradoxically, is the *Crofter Harris Tweed Case*<sup>35</sup> which originated in Scotland. In the House of Lords the Lord Chancellor (Lord Simon) with every encouragement from counsel participating, proceeded on the basis that Scots law and English law on the matter were identical, and, admitting the illogicality of the English law, he discussed the evolution of the crime of conspiracy in the English Star Chamber. As we

<sup>34</sup> *Campbell v. Muir*, 1908 S.C. 387.

<sup>35</sup> *Crofter Handwoven Harris Tweed Co. v. Veitch*, 1942 S.C. (H.L.) 1; [1942] A.C. 435.

have seen, the Scottish crime of conspiracy did not follow the same line of development at all, and it is difficult to appreciate the relevance for Scotland of Lord Simon's fascinating historical excursus. The simpler approach is through "abuse of rights" which outflanks the technicalities of conspiracy. This approach may be commended to Scottish lawyers, even though they have helped considerably to develop the tort of conspiracy in a jurisdiction where no recognition is given to the doctrine of "abuse of right."

#### *Quasi-Delict* <sup>36</sup> (*Strict Liability*)

There are certain activities which are calculated to cause injury, even though proper care is taken by those responsible. In the public interest, the law permits such activities to be carried on only on condition that, irrespective of fault, those in control will compensate persons injured. One may instance, for example, air navigation and atomic installations and many provisions of the Factories Acts. There might be good reason to include drivers of motor-vehicles among those made liable by law irrespective of fault as if they had been negligent. Compulsory insurance can be made a concomitant of strict liability.

#### *Quasi Contract*

The term *quasi-contract* is a somewhat misleading but convenient category to embrace various aspects of the general equitable principle that restitution shall

<sup>36</sup> This term has sometimes been used incorrectly to imply "negligence."

be made of unjustifiable enrichment and also, in certain circumstances, of what a man has lost on another's account. In maritime law salvage and general average (sharing of loss) give rise to quasi-contractual claims, but cannot be discussed. The principle of *negotiorum gestio* is well established in Scots law. This implies the management of the affairs of another who is absent, or incapacitated from attending to them himself, in the reasonable belief that he would have authorised such intervention. In such cases a claim for payment may succeed, though the services rendered did not ultimately prove beneficial—as if a sick animal were given veterinary treatment, but nevertheless died. I may add that when a surgeon operates on a patient who has been incapable of consenting, his intervention would seem to rest on this same principle; and, as I see it, the consent of relatives, except in the case of a child under puberty, is strictly irrelevant.

The Roman jurists accepted, broadly speaking, the idea that no man should be unjustifiably enriched at the expense of another, but instead of developing general remedies devised a large number of particular actions to deal with certain cases. The later civilians continued where the Romans left off, and formulated rules of general application. In Scotland, though we refer to the nominate Roman actions such as *condictiones indebiti* or *causa data causa non secuta* (*i.e.*, the actions given to recover payments made in error or where the purpose of an agreement has failed) this is merely to indicate the basis of a claim for restitution. The duty to make restitution arises

generally, whenever one person comes into possession of money or property which in equity he cannot justifiably retain—as when he receives money from another who believed mistakenly that it was due; or as an advance under a contract which cannot be carried out due to supervening impossibility, such as the outbreak of war or death<sup>37</sup>; or if he has taken delivery of a second-hand car which turns out to be stolen. As restitution is based on morality or equity (an obediential obligation as the Institutional writers would say) the person bound to repay is entitled to deduct his own outlays incurred before, say, a valid contract was frustrated by events beyond the parties' control.

The principle of recompense applies in certain cases where one person has benefited by the act of another which has involved the other in loss—as where improvements have been made in a house by a man who believes himself to be owner, but whose title is later found to be faulty. In such cases the amount due is assessed, not according to what has been spent, but according to the benefit accruing to the true owner.

English jurisprudence has been particularly confused and, on occasions, unjust in dealing with equivalent problems. As far back as 1760 Lord Mansfield in a case evocative of cosmopolitan atmosphere—*Moses v. Macferlan*<sup>38</sup>—sought to introduce a general equitable doctrine of unjustifiable enrichment into English law,

<sup>37</sup> The leading case is *Cantiere San Rocco v. Clyde Shipbuilding Co.*, 1923 S.C.(H.L.) 105; [1924] A.C. 226.

<sup>38</sup> (1760) 2 Burr. 1005.

but his views subsequently came under heavy fire. Such questions have been overshadowed by the peculiarly English dichotomy between law and equity and by forms of action. From time to time the Scottish judges in the House of Lords sitting in English appeals went out of their way to contrast the justice achieved by the Scottish principles of restitution and recompense with the tendency of English law to let loss rest where it fell. Eventually in 1942,<sup>39</sup> Lord Macmillan was able to express his "gratification" at the fulfilment of Lord Shaw's prophecy in a Scottish appeal<sup>40</sup> that one day the House of Lords would reconsider the English approach. The persuasive effect of Scots law in due course has assisted in rationalising part of the English approach of quasi-contract, both through judicial pronouncements in the *Fibrosa Case* and through the Law Reform (Frustrated Contracts) Act, 1943. There is, however, still ample scope for further persuasion and example. Thus in 1951, Lord Porter observed<sup>41</sup>: "The exact status of the law of unjust enrichment is not yet assured. It holds a predominant place in the law of Scotland, and I think of the United States, but I am content . . . to accept the view that it forms no part of the law of England." The English lawyers have been somewhat reluctant to accept the teaching of *Moses v. Macferlan* and the somewhat self-righteous exhortations of Scottish judges. Perhaps their complete salvation will ultimately depend on the

<sup>39</sup> *Fibrosa Spolka Akcyjna v. Fairbairn, etc., Ltd.* [1943] A.C. 32.

<sup>40</sup> See note 37, *supra*.

<sup>41</sup> *Reading v. Att.-Gen.* [1951] A.C. 507 at pp. 513-514.

enlightening labours of Dawson, Seavey and Scott, who have risen as prophets on the far side of the Atlantic.

### *Voluntary Obligations*

*Promise.* I have spoken of the "obediential obligations," where law reinforces a moral duty, and have also mentioned cases of strict liability based on public policy. Beyond these limits obligation is a voluntary matter. If a man declares his will to be bound, the law—provided his purpose is lawful and the form of his declaration is sufficient—gives effect to his will. In Scots law, perhaps to a greater extent than in any other system, effect is given to voluntary incurring of obligation.<sup>42</sup> This may take two forms—either unilateral promise (*pollicitatio*) or bilateral agreement—contract. If the promisee is actually bound before the time for performance to accept performance, the obligation is contractual—even though the benefit may be in favour of the promisee alone. On the other hand, if the promisee is not so bound, the obligation is constituted by unilateral promise. This remains true, even if to qualify for the benefit the promisee must perform some act to fulfil a condition—such as reside in a particular county or have a painting accepted by the Royal Scottish Academy. Unlike the situation in English law performance does not convert "promise" into "contract." A man in most systems can declare his last will in unilateral form, so that it will be given effect after his death.

<sup>42</sup> See refs. "Pollicitatio—Promise and Offer," 1958 *Acta Juridica* 141; also 1956 *Jur.Rev.* 3; Ashton-Cross, 1957 *Jur.Rev.* 147.

The legatee or beneficiary, unless he renounces the testator's bounty, acquires an enforceable right without the prerequisite of acceptance. So also in Scots law, but in few other systems, a man may bind himself generally by unilateral promise to confer some benefit during his lifetime. Here Stair differed fundamentally from Grotius, who, through Pothier, influenced most Continental systems to repudiate promise, and to accept contract as the one source of voluntary obligations enforceable against living persons.

Latterly, however, the advantages of what are called technically "unilateral juristic acts" have gained recognition in other civilian systems—especially where advertisements of reward for services are concerned. Thus a promise to keep an offer open for a stated period creates a valid obligation, as if the would-be vendor writes to a prospective purchaser saying: "I offer such and such property to you for £5,000, and shall keep this offer open until next Friday." Such a letter contains an offer, which, by acceptance, would create a valid contract of sale; but it is also forthwith a binding unilateral promise covering the period of option. Again, if A contracts with B that B shall pay or perform something for the benefit of C, this confers no right on C under the English law of "privity of contract," because there is no contract between B and C. Under Scots law, however, there can be two valid obligations—a contract between A and B, and an enforceable unilateral promise by B to C. Not only can C sue for failure to perform, but also, despite *dicta* uttered by lawyers

nurtured in English doctrines of "privity of contract," he can also sue for faulty performance.

Further, in cases where there is advertisement to the public of a reward upon condition that some act is performed by a member of the public—*e.g.*, finding and returning a lost cat—the proper approach in Scots law (now emulated by French jurists) is to regard the advertisement as a binding conditional promise. If the condition is fulfilled, the reward can be claimed. The English approach, as in *Carlill v. Carbolic Smoke Ball Co.*,<sup>43</sup> is to construe the advertisement as an offer turned into a contract by performance of the condition construed as acceptance and also as "consideration." Though some Scottish cases have been also thus construed, founding on English precedents (and the distinction between offer and promise is sometimes very narrow) the basic principle of the enforceable unilateral promise—which may be conditional—has never been superseded. It must be admitted that contact with English law has encouraged the tendency to torture words and acts into the pattern of offer and acceptance where the sounder construction would have been conditional promise. Those who have gone awhoring after strange gods may have a change of heart when they see foreign pilgrims frequenting the ancestral altar.

### *Contracts*

The other category of voluntary obligations is "contracts"—which are created by the concurrence of two wills. In an earlier series of Hamlyn Lectures,

<sup>43</sup> [1892] 2 Q.B. 484; affirmed [1893] 1 Q.B. 256.

my friend the Professor of Comparative Law at Oxford University,<sup>44</sup> dealing with contract law, maintained "Scots law as a standard of excellence," and said, "I would even be rash enough to say that England would gain much and lose very little if it merely substituted for its own law of contract that of the sister nation." These are generous words and on the whole not unjustified, though I must in due course note a few blemishes in the Scottish system. Meanwhile, however—considering the system on its merits—we have already noted that in Scots law third parties may benefit by the contracts of strangers. Moreover, it is fortunately free from the doctrine of consideration or *quid pro quo*, which in England is the badge of enforceable agreement. Generally speaking, "every paction produceth action," as Stair asserted. Pledged faith is the basis of voluntary obligation. Lord Mansfield in the eighteenth century endeavoured in vain to secure recognition in England of proof by writing as a sufficient foundation of contract, apart from consideration.

The development of Scottish contract law owed much to Roman law, except that it discarded the formal *stipulatio*, and accepted the efficacy of informal declarations of will to deal with matters outside the range of the usual "type contracts." These "type contracts" might be based merely on consent, such as sale or hire; or they might come into existence by delivery of a thing, as in deposit. In the case of the "type contracts," once the parties have agreed on

<sup>44</sup> Lawson, *The Rational Strength of English Law* (Hamlyn Lectures, 1951), p. 43.

certain fundamental matters such as price, the law proceeds to make the rest of the contract for them, and implies various terms which the parties are bound to observe, unless they expressly exclude them. If parties wish to contract for results not provided for in the ready-made categories of contract, they must rely on their own ingenuity to secure fulfilment of their mutual expectations. Today, however, a new variety of "type contract" has come into vogue—known in French as the *contrat d'adhesion*—the "take it or leave it contract." In many situations today in which men contract, the offeree is not free to bargain. He has the option of accepting a "standard form" contract set out already in print, or not doing business at all. In Scotland he may have the added irritation of finding that, even dealing with Government departments, the standard form has been conceived according to the forms and terminology of English law. The consequences of agreeing to a "standard form" of contract may be very serious where high-pressure advertising and salesmanship stimulate cupidity, and the parties are of unequal bargaining power. Therefore the Legislature has intervened in the case of hire-purchase contracts to offer some protection to the hirer. The contemporary practice of excluding liability for damage and injury by conditions printed on tickets or notices has gone to great lengths. I have not checked with the undertakers and morticians, but those who offer most of the essential services in this life seem to have the users at their mercy. In Scotland the late Lord Cooper indicated that the

courts might not be powerless to intervene to protect victims of unreasonable contracts of adhesion. In *Mackay v. Scottish Airways*<sup>45</sup> he commented adversely on certain "ticket conditions" as of "amazing width," tending to "create a leonine bargain under which the aeroplane passenger takes all the risks, and the company accepts no obligations. . . . It was not argued that the conditions were contrary to public policy, nor that they were so extreme as to deprive the contract of all meaning and effect as a contract of carriage; and I reserve my opinion upon these questions." One can but hope that his Lordship has not trailed his coat in vain.

Mention of the power of the court to supervise contractual relations brings me to another reflection of potential importance. The English approach to contract was through bargain—and the "sacred" nature of bargain was often proclaimed. In Scotland obligation was based on will and good faith. Scots law took over the doctrine of bona fides from the Roman law of contract and applied it generally—with a few exceptions. Thus unconscionable conduct in general affecting a contractual relationship was under the supervision of the court. Though such conduct might not be so gross as to justify an action for damages for delict, it might well be regarded as "fraud"—in the broad sense of being inconsistent with good faith—so as to justify reduction of a contract and restitution of the parties. The categories of English law such as "undue influence" and "innocent misrepresentation" would in Scots law

<sup>45</sup> 1948 S.C. 254.

have been regarded as aspects of conduct inconsistent with good faith. There is nothing, incidentally, which to my mind seems "innocent" about seeking to enforce or maintain a bargain which one well knows was induced by one's own false representation—however "innocent" the original misrepresentation may have been.

The general doctrine of good faith (*bona fides*) in Scots law seems to have suffered at least a temporary eclipse<sup>46</sup> due to contact with English law, which accepted no such general concept. English law did indeed recognise a few contracts, *e.g.*, insurance, as *uberrimae fidei* (of exuberant faith) though I have yet to find that the superlative adjective means more than good faith, which in civilian systems imports a general duty of disclosure graduated according to the circumstances and species of agreement. The replacement during the nineteenth century of Scotland's Romanistic contract of sale by a statutory version based mainly on English law has had serious consequences for contract generally. In most systems, sale is the great master contract from which one argues by analogy when dealing with other contractual situations. In Scots law sale of goods is now an anomalous contract in several respects, yet the tendency to argue by analogy continues. The Sale of Goods Act, 1893, has left a legacy of unsolved and virtually insoluble problems. Many of these are highly technical<sup>47</sup> and I must pass them by. I can only pause to mention

<sup>46</sup> See Powell, *Good Faith in Contracts* (1955), p. 15.

<sup>47</sup> See, *e.g.*, Gow, 1960 S.L.T.(News.) 109; 1961 S.L.T.(News.) 101.

that sale is the only bilateral contract in Scots law, except compromise, which is not in theory governed by general principles of good faith; that property in sale passes by agreement (not as in pursuance of other contracts by delivery); and that the warranty of Roman law against latent defects rendering the thing unfit for ordinary use is no longer implied. The chain consequences of these changes have never been fully appreciated. They have, however, involved confusion in the law relating to “vices of consent”—that is to say, when a contract may be set aside or declared null because the consent expressed by a contracting party was not a full or true declaration of his will. Formerly, the doctrines of good faith and the implied warranty against latent defects avoided difficulties which now tend to be discussed in connection with error or fraud—or that *demi-vierge* category “innocent misrepresentation.” The effects of fundamental ambiguity, or of offer and acceptance failing to meet each other, are that no contract comes into existence. Other cases of essential error—where parties are agreed on the subject-matter but one party errs reasonably, *e.g.*, regarding quality or price—may entitle the courts to order reduction of the obligation and restitution on terms.<sup>48</sup>

The primary remedy for breach of obligation in Scots law has always been “specific implement”—that is, the party in default is required by judicial decree to carry out his undertaking. Since the fusion of law and equity in England the policies of the two jurisdictions have come closer in this respect. Where,

<sup>48</sup> For general discussion and refs. see (1955) 71 L.Q.R. 507.

however, damages are sought for breach, English law has influenced Scottish practice. If parties have stipulated for a money payment in the event of default, the institutional writers permitted the parties to fix a sum which would both cover the loss and punish a recalcitrant party. The courts always had a discretion to "modify" this sum if it turned out that the loss actually suffered was substantially less than the penalty agreed. This followed the Roman law. Through English influence, however, this kind of provision has been superseded by the concept of "liquidated damages." This implies that, if the parties at the time of contracting genuinely try to guess what the financial consequences of breach will be, that sum only will be exigible whether the loss which actually results is greater or less—but, in theory, no agreement which contemplates penalising the party in breach is recognised. This solution diverges from that of most civil law systems, and it may be observed that steps are being taken in South African law, on which the English doctrine was imposed by the Privy Council,<sup>49</sup> to restore the *status quo*. The relative advantages of the two solutions depend on burden of proof, and in these days of fluctuating money values and uncertain economic conditions, it seems not unreasonable to leave the debtor to prove (if he can) that the stipulated penalty was excessive in the light of hindsight.

### *Proof of Obligations*

Proof or evidence is the last topic which I wish to

<sup>49</sup> *Pearl Assurance Co. v. Govt. of S.A.* [1934] A.C. 570.

mention in discussing voluntary obligations; and it is one which calls urgently for legislative reform in Scotland. It is only within the past century or so that Scots law has relaxed that suspicion of oral testimony which is characteristic of civilian systems generally. Today certain obligations, such as those concerning land, must still be constituted by formal writing, and others such as gratuitous obligations and those which are unusual and outside the categories of recognised named contracts must be proved by writing. Through operation of the doctrine of desuetude and contrary use, however, many obligations which would formerly have required written proof may be set up today by oral evidence. Moreover, *rei interventus* (analogous to part performance) and reference to the defender's oath retain their relevance if other means of proof are lacking. Nevertheless, there is need for extensive and radical reform of statute law ancient and modern dealing with authentication of documents and proof of obligations. Neither judges nor text writers are complacent about the present state of the law.<sup>50</sup>

## PROPERTY

### *Landownership*

In discussing, however briefly, the law of property in Scotland I must start by noting a basic distinction which has been well expressed by Bell<sup>51</sup>: "A double system of jurisprudence in relation to the subjects of

<sup>50</sup> Professor Gow, most brilliant of Scottish critical writers in this field, has given chapter and verse. See *Scots Law Times* and *Juridical Review*, 1960-1961, *passim*.

<sup>51</sup> *Principles*, § 636.

property, has thus arisen in Scotland, as in most European nations—the one regulating land and its accessories according to the spirit and arrangements of the feudal system; the other regulating the rights to Moveables according to the principles of Roman jurisprudence which prevailed before the establishment of feus.”

In short the land law of Scotland remains perhaps the most feudal in the world. Since *Quia Emptores*, 1290, subinfeudation has been forbidden in England, but is quite competent in Scotland today. French feudal law, which had great influence in Scotland, in its fall brought down feudalism on the Continent of Europe. A vast amount of ingenuity and erudition has been devoted to the development of feudal law in Scotland over the centuries. The basic theory is that all land is held for a “service” due from vassal to a superior, who in his turn holds of a higher subject superior, and so on, until at the top of the feudal pyramid one finds the Crown as ultimate superior of all feudal land. No longer, of course, does “service” take the form of soldiering for so many days in the army, or taking the tractor over a superior’s ploughland, or dumping a wagon load of turnips at his door. The unromantic cheque has in most cases ousted the trappings of chivalry. Our feudal system now exists in the main to secure annual payments of money, and to maintain a complex of continuing rights and duties affecting land. For centuries a system of registration of writs affecting land has maintained public confidence in the titles of property owners. This system of land law served Scotland well. Practical and

equitable solutions were worked out—as in the concept of “common interest”—to deal with situations where separate owners, as in flatted buildings, were bound by mutual responsibilities as neighbours. Where feudalism was swept away by the flood of the French revolution, and the doctrine of absolute ownership was asserted rigidly, there was a tendency to forget that flexibility is required to give effect to the many interests which may merit recognition in respect of one piece of land.<sup>52</sup> It must, however, be conceded that much in the theory and practice of Scottish feudal conveyancing is ripe for reform in the twentieth century. In particular, cadastral methods of registration of title to land, which simplify and facilitate transfer, have been introduced successfully into most modern legal systems. At present a Committee presided over by Lord Reid is considering whether we in Scotland should adopt “registration of title.” If this reform is to come, as well it may, I hope that the preliminary step will be taken of abolishing anachronisms of the feudal system generally, and introducing allodial land ownership. If this is not done, any system of registered title will preserve anachronisms like mastodons caught by the Ice Age. I must not forget to mention, however, that in the Orkneys and Shetlands udal landownership has survived. This is based on occupation and not on feudal grant. The recent discovery in Shetland of the Saint Ninian

<sup>52</sup> Vera Bolgár (1953) 2 *Am.J.C.L.* 204; *XXth Century Comparative and Conflicts Law*, p. 453.

Treasure—which is held in trust by Aberdeen University in berserker defiance<sup>53</sup> of feudal claims—has provided a timely reminder of the Norse tradition in Scottish affairs.

### *Moveable Property*

The law of Scotland regarding moveable property conforms very much to a pattern encountered in other civilian systems, and derives most of its basic rules from Roman jurisprudence. An original title may be acquired by “occupation” of things which have never had an owner before, or by creating a new thing even out of another’s materials, though in this case that other has a claim against the manufacturer for the value of the property he has lost. If the new species cannot be restored to its original state and has been disposed of, say, by a thief to an innocent third party for value, difficult questions can arise. In Scots law a good title to stolen goods cannot be transferred as in the English doctrine of “market overt” or the French doctrine *possession vaut titre*. If, however, that which was stolen has been changed into something altogether new, the old ownership is destroyed; and the thief, though he can be sued for damages, will usually be a man of straw. The “cannibalisation” of parts of stolen motor-vehicles has recently drawn attention to this branch of the law. In one recent decision,<sup>54</sup> which was concerned with the joining together of halves of two different vehicles, Lord

<sup>53</sup> By Principal Sir T. M. Taylor; see *Glasgow Herald* and *Scotsman*, June 17, 1961.

<sup>54</sup> *McDonald v. Provan*, 1960 S.L.T. 231; Henderson, 1961 Jur. Rev. 61.

Clyde in effect applied the judgment of Solomon. It is suggested, with respect, that it is not helpful to inquire whether the *specificator* acted in good faith or in bad faith, and that in either case he should be able to pass good title. Perhaps if Solomon had been confronted by five women claiming the baby, or if the Lord President had been concerned with the problem of a vehicle built from parts of five others, both would have delivered different judgments.

To transfer an effective right over moveables, assignation in writing is appropriate where the property is not corporeal—such as rights under an insurance policy; but, generally speaking, delivery is necessary in the case of corporeal goods, such as furniture. In the case of assignation, the assignee may be met by defences, such as fraud, which could have been raised against the assignor or cedent; but where there has actually been delivery of goods, a person taking in good faith may retain his right even though the transferor acquired them in pursuance of a contract which could have been set aside because of his fraud. If there is the intention to pass ownership, this should be effective even though it was motivated by a contract which could be impugned. If the transferee disposes (say) to a sub-purchaser, he passes an indefeasible title. Sale, as we have seen, is an exception to the general rule that a “real right” (a right in the thing itself) passes only by delivery, since now by statute property may pass by agreement.

Scots law does not recognise the validity of arrangements whereby a man raises money on the security, say, of his furniture, but, without delivering it to his

creditor, continues in possession. Because of the uncertainties of title and opportunities for fraud involved, the tradition of Civil law systems in post-Roman times has been generally opposed to such arrangements, though Roman law itself recognised many hypothecs without possession, and modern commercial practice has compelled the courts or legislatures of most countries to accept modifications of the law regarding credit. Now, it is practicable to secure registration of charges over the assets and stock-in-trade of mercantile enterprises, and the Scottish Law Reform Committee has proposed<sup>55</sup> that floating charges should be permitted over company assets. The solutions of several systems had been studied comparatively, and particular attention had been paid to English methods. So far as these depended on distinctions between legal and equitable ownership, of course, they could not be copied. It was not recommended that individuals should be enabled to finance themselves by loans secured over moveables in their possession—though the present prevalence of hire purchase has largely ousted the former presumption that the person in possession of domestic moveables is their reputed owner. He who trusts in the credit of a man of great possessions, in the end of the day is quite likely to go sorrowful away with his account unpaid.

### *Trusts*

Every mature legal system has to evolve machinery to deal with cases where ownership, enjoyment and

<sup>55</sup> Cmnd. 1017/1960.

control of property may be separated. This may be done either by conferring exclusive managerial powers on a person who is not owner or by requiring an owner to exercise his powers of control for the benefit of others. The manager of property of another, who is superseded in control either because of incapacity or at his own request, is in a position of trust. If ownership is transferred to persons by will, trust deed or settlement (upon terms that the property is to be used in whole or in part for the benefit of public purposes or of specified private individuals, or of some commercial enterprise), clearly they receive the property in trust. "Trust" is the only word in the English language which covers conveniently the many situations where ownership, enjoyment and control of property may be separated, and "trusts" had been known in Scotland long before contact with English lawyers revealed the idiosyncrasies of the English trust concept.

The English trust is based upon the dichotomy of law and equity, so that the "trustee" has "legal ownership," which he must exercise for the benefit of the *cestui que trust*, who has "equitable ownership." The fraudulent trustee can pass good title, as on sale of trust property, to a purchaser in good faith without notice of the trust; but the property can be "traced" and recovered if he puts the proceeds in his own bank account or buys mink for his mistresses. A high standard of diligence and single-minded concern for the benefit of the beneficiaries is expected of trustees. Through the doctrines of "tracing" and of constructive and resulting trust, moreover, English

law provides for many situations which a civilian system can handle through the doctrine of restitution; while by use of trust machinery English law can overcome some of the inconveniences which arise from its doctrine of privity of contract. (Parenthetically, I may add, the *stipulatio alteri*—the contract in favour of a third party—is referred to as a trust in South African law, though no one doubts the contractual nature of the arrangement.)

I have digressed on the English trust because so much of a *mystique* has been built up concerning it that one might be misled into believing that the idea was as essentially English as the plays of Shakespeare, and that wherever the trust is found, it was planted by pioneers of Anglo-American jurisprudence. The basic ideas are, however, much more general. That which is specifically and characteristically English is the differentiation between legal and equitable property, which the civilian cannot readily understand. Moreover, so far as family settlements are concerned, the system of fideicommissary substitution of a series of heirs, formerly much used in Europe, was eliminated in codifications based on the Napoleonic model—and thus a further basis for comparative understanding has been removed.

Various explanations of the origin of trusts in Scotland have been offered. In my personal opinion a number of independent sources contributed to the evolution of our modern law. The *fideicommissum* of Roman law had its main effect in Europe in the form of fideicommissary substitution whereby property was left to descend to a series of heirs in such a way that,

if the heir in possession tried to exploit his position by alienating the property, his interest was immediately forfeited, and the next substitute succeeded. In Scotland the terms "trust" and "fideicommiss" were often used as synonyms, but the main influence of fideicommissary substitution, largely mediated through French doctrine, was on the law of tailzies or entails rather than on what we should now term trusts. Again, from the early fifteenth century we have records of "mortifications," gifts made *ad pios usus* for public or charitable purposes which were given effect to in the ecclesiastical courts. Likewise these courts superintended distribution of defuncts' estates for the benefit of their close relatives. Express trusts between living persons were so frequent in the seventeenth century that in 1696 statute had to regulate proof. Such trusts have often been described as combinations of the contracts of mandate and deposit, with the specialty that ownership passed to the depositary. So far as fiduciary duties were concerned, judicial factors and guardians appointed to incapable persons to manage their property have long been under the control and supervision of the courts. By statute such persons are "trustees" and their appointment creates a "trust," though they only exercise managerial powers over the property of others. Where there is a trust deed in favour of creditors, the owner is only divested of his property so far as necessary to fulfil the trust purposes, and he retains a "radical right" in the surplus remaining when the creditors have been paid.

Whatever the antecedents of Scottish trusts,

however, contact with English law from the end of the eighteenth century has had very considerable influence on the development of Scottish principles, and decisions of the English Chancery court have frequently pointed the way to solutions of doubtful questions.<sup>56</sup> The scope of fiduciary duty has been elaborated very much as in England, and trust property can be "traced" to a similar extent though not necessarily upon the same theoretical basis. The doctrines of "resulting" and "constructive" trusts have been received in the Scottish law of private trusts, while that of *cy près* (approximation) has been introduced to enable public trusts to function, even though the immediate object of their creation can no longer be carried out. Certain substantial distinctions do, however, exist between Scottish and English law as far as trusts are concerned. Thus, for example, the existence of a trust may be noted on a Scottish company register, and there is no need in Scotland to invoke the concept of trust to cover situations which are already dealt with adequately through contract or quasi-contract. In particular, however, there is no dichotomy between "legal" and "equitable" property, though a beneficiary in Scotland has more than a mere personal claim against the trustee, and can claim restitution of the trust property, wherever and in whatever form it can be traced, except from a purchaser in good faith. In modern times the trust in Scotland fulfils a wide variety of purposes, and its use for mercantile and financial ends has grown

<sup>56</sup> See refs. Walker, "Equity in Scots Law" (1954) 66 Jur. Rev. 103.

greatly in importance. Meanwhile the traditional testamentary and marriage contract trust has retreated before the remorseless depredations of the Revenue.

## SUCCESSION

### *Legal Rights*

Whenever British rule has been extended to a territory with an established legal system, that system has been maintained, with certain modifications to eliminate doctrines shocking to English ways of thought. Thus subject peoples have been liberated from such practices as the burning of widows, and in other jurisdictions from the necessity of providing for them. The concept of freedom of testation was spread with missionary zeal. A man must be left free to cut off wife and children with or without a shilling, and to benefit in lieu the local Hunt or the fair but frail comforter of his declining years. Thus it was that in Ceylon, Quebec and South Africa the established rules which secured to close relatives legal rights in the estate of a deceased were abolished. Paradoxically, by the Inheritance (Family Provision) Act, 1938, and by the Intestates' Estates Act, 1952, English law has now permitted certain close relatives to petition the courts for reasonable provision. Perhaps Scottish practice has made a contribution to British justice by its constant repudiation of the doctrine of complete freedom of testation, and by its recognition of the legal rights of surviving spouse and children in the estate of the deceased.

These legal rights are not strictly speaking rights in succession—as well appears from the fact that, if a

wife died before her husband, her representatives, until 1855, were entitled to claim from the "goods in communion." Thus the rights of the surviving spouse and children are in the nature of a debt owed by estate of the deceased, though their claims are postponed to those of other creditors. A widow is entitled to her terce—the liferent benefit of one-third of her deceased husband's "heritable" estate (roughly equivalent to land); while the widower may have the right to "courtesy," the liferent of his deceased wife's heritage. More important, however, are legal rights over moveables. If the deceased left a surviving spouse and children, one-third of the moveable estate is due to the surviving spouse, as *jus relictæ (relictæ)*, and another third is divided among the children as *legitim*. If there are children, but no surviving spouse, or a surviving spouse but no children, legal rights are due over half the moveable estate. The dead's part may be disposed of freely by will. Moreover the testator's family, or some of them, may choose to accept a provision made under a will, dealing with the whole estate, rather than claim legal rights.

### *Testate Succession*

Legacies not exceeding £100 Scots (£8 6s. 8d.) may be bequeathed verbally. Otherwise a will must comply with certain basic requirements. It may be formally executed before two witnesses; or be written and signed by the testator; or, if typed or written by someone else, must be "adopted as holograph" and signed by the testator. Whether wills are prepared

professionally or by the amateur after dinner, their eventual construction provides scope for much legal theorising and ingenuity—too much for discussion in the present context. Ascertaining the intentions of testators takes up a good deal of judicial time and of testators' money.

### *Intestate Succession*

The law of intestate succession is not satisfactory in Scotland. Though recognition of claims to legal rights alleviates the situation, and now a surviving spouse, where there is no issue, has an additional claim up to £5,000, the present rules regarding intestate succession achieve results which no responsible person would desire. At the root of the matter is the distinction made between heritable and movable property in questions of succession. The medieval rules apply that, in succession to land, males are preferred to females, and that among males of the same degree of kinship the eldest is heir. There are circumstances when it is desirable that a farm (say) should not have to be sold up at the owner's death, to distribute the proceeds among his descendants. On the other hand, there is little justification for a situation whereby on the death of a citizen, who has just paid up the last instalment to the building society, the family home should pass to the small son, excluding widow and daughters. There are many more anomalies, and for years persistent but unavailing efforts have been made to secure legislative reform along the lines of—but not identical with—the Birkenhead legislation in England. Detailed proposals regarding the law of

succession generally were set forth in the Report of the Mackintosh Committee in 1949.<sup>57</sup>

### *Executors*

Though at present heritage descends on intestacy to heirs, the Mackintosh Committee has recommended that heritage and movables alike should pass to an executor dative for administrative purposes. In cases of testate succession executors nominate are usually also appointed trustees. The system of "confirming" executors, and charging them with the ingathering and distribution of deceaseds' moveable estates, was well established in medieval Scotland, through the influence of the ecclesiastical courts.<sup>58</sup> Neither the Reformation nor the increase of Roman law influence (which favoured administration by heirs) disturbed this system; and thus both Scottish and English law have independently chosen generally similar methods for distributing the estates of deceased persons.

### CONCLUSION

In concluding this short appreciation of the patrimony of Scots private law, I shall venture to claim that it records a substantial contribution to British Justice and a considerable impact on English law. No claims to perfection are made, and, indeed, I have stressed the urgent need for several reforms—even in the most characteristically Scottish aspects of our jurisprudence. We have also noted instances where Scots

<sup>57</sup> Cmd. 8144, reprinted 1958.

<sup>58</sup> See in particular Anton, (1954) 66 *Jur.Rev.* 129.

law has benefited, or could benefit, from the experience of other systems—in particular in those chapters of the law where only the great personality of Birkenhead succeeded in breaking down the opposition of legal conservatism in his own country. I cannot conceal from you, however, my regret that, at a period when English law was relatively underdeveloped in the various aspects of obligations, it exerted so strong an influence on the Scottish system. After considering the experience of different countries which play the game, a committee of golfers might agree to improve certain laws of golf. If, however, a committee, comprising only or mainly players of cricket, were put in a position to arbitrate on the game of golf, they would be unlikely to improve it. In cricket the team which scores most runs wins; in golf the player who takes fewest strokes. The English law of obligations, like cricket, achieved results by playing many strokes; the Scottish law, like golf, triumphed through using skilfully a few rational principles. Mixing the techniques did not prove satisfactory, and deflected Scots law to some extent from the proper course of development. Latterly progressive English lawyers have become partial converts to the Scottish approach. Indeed, the final irony would be if, after American coaching, they drove through us while we were still searching in the rough.

## CHAPTER 5

### CONSTITUTIONAL QUESTIONS

#### *The Basic Freedoms*

Much constitutional law in Britain though common to Scotland and England is of English origin. My concern is with Scotland's contribution to British justice, and I therefore feel justified in mentioning only selected topics of particular relevance for a Scots lawyer. Personal freedom rests on the common law. There is a popular superstition that in *Sommersett's* case<sup>1</sup> the English courts vindicated personal liberty and condemned slavery generally. This was not the case. Lord Mansfield held that contracts for slaves were quite valid in England, but that a slave who was actually in England could not be sent back to a colony for punishment. In Scotland, however, as early as 1757 the Court of Session had ordered full argument on the question whether the law would countenance the institution of absolute slavery of negroes, but, unfortunately, the slave died during the hearing by the Whole Court.<sup>2</sup> Thus it was not until *Knight v. Wedderburn*<sup>3</sup> in 1778 that a judicial pronouncement was made on this matter. The Scottish courts went much further than Lord Mansfield. They held "that the dominion assumed over this Negro, under

<sup>1</sup> (1772) 20 St.Tr. 1.

<sup>2</sup> *Sheddon v. Negro* (1757) Mor. 14545.

<sup>3</sup> (1778) 33 Mor. 14545.

the law of Jamaica, being unjust, could not be supported in this country to any extent." Further, they expressly approved the Sheriff's interlocutor "that the state of slavery is not recognised by the laws of this kingdom, and is inconsistent with the principles thereof." I regret to add, however, that at this time, by the doctrine of "necessary service," those who entered employment as colliers and salters in Scotland were thereby bound in perpetuity. The last vestiges of this status were not abolished until 1799—the necessary legislation being introduced at the instance of coal owners, who found that the virtual monopoly of the miners in servitude enabled them to earn higher wages than would free labour. In Scotland the general remedy against arbitrary or unjustifiable detention is not, as in England, by invoking habeas corpus. Apart from cases where an accused has been committed for trial (where safeguards against undue delay in trial are provided by statute), the appropriate procedure to secure release is by presenting a petition for liberation to the High Court of Justiciary, exercising the *nobile officium* or special equitable jurisdiction.<sup>4</sup>

Rights to free expression of opinion and also of public meeting rest upon the ordinary law, and are recognised so long as they do not infringe other interests protected by law. As we have already seen, Scots law is particularly strict in forbidding publication of matter which might affect fair and impartial trial of suspected persons. The expression of opinion

<sup>4</sup> (1960) 108 U. of Penn.L.R. 305; McNeill, 1960 S.L.T.(News.) 46.

by obstruction is not, of course, lawful—a proposition amply vouched for by proceedings taken against demonstrators, mainly from England, at the American Polaris submarine base in the Holy Loch.

### *Rights to Sue the Crown*

Traditionally English law was reluctant to grant ordinary redress to a subject for wrongs inflicted by the Crown or Crown Servants—holding that “the King can do no wrong” and that he cannot be sued in his own courts. This was not the view of Scots law. We have the record of an action brought against the Crown as early as 1261, while in 1542 an Act of Sederunt was passed by the Senators of the College of Justice providing for the summoning of the King’s Comptroller or the Lord Advocate to answer in actions brought against the Crown. This, it was tactfully pointed out, was for the welfare of the King’s soul. Nevertheless, at the very end of the nineteenth century the English rule that the King can do no wrong was applied in a Scottish reparation action.<sup>5</sup> This retrograde step is now, however, only of historical interest to the student of pseudo-comparative law, since the Crown Proceedings Act, 1947,<sup>6</sup> has extended to both England and Scotland practically all the benefits of earlier Scottish practice. This Act can, indeed, be regarded as one of Scotland’s contributions to British justice. Scottish practice is still more favourable to the subject in several respects. In particular, the Scottish courts, unlike those of

<sup>5</sup> *Smith v. L. A.* (1897) 25 R. 112.

<sup>6</sup> 10 & 11 Geo. 6, c. 44.

England, decline to accept as conclusive an objection taken on behalf of the Crown that the production of evidence would be contrary to the public interest.<sup>7</sup> Moreover, in controlling quasi-judicial and administrative acts, the Scottish courts have tended to proceed—not, as in England against a background of prerogative writs—but on principles of natural justice unrestricted by form. As Kames observed<sup>8</sup>: “No defect in the constitution of a State deserves greater reproach than the giving licence to wrongs without affording redress . . . it is the province . . . of the sovereign and supreme court to redress wrongs of every kind where a peculiar remedy is not provided.”

#### *Church and State*

By the Union Agreement of 1707, the fundamental law of the Kingdom, the Presbyterian system of church government was established in Scotland, and Episcopacy was established in England. Within its own jurisdiction, the Church of Scotland is free to legislate and adjudicate on legal matters without secular sanction or interference, and indeed the independence of the Church in matters of doctrine, worship and Church Government are further expressly recognised in the Articles Declaratory included in the Church of Scotland Act, 1921. Other Churches in Scotland are regarded as voluntary and lawful societies, but are not established by law. As an elder of the Established Church I may, however, be permitted to add that, while I value its heritage, I

<sup>7</sup> See p. 87, *supra*.

<sup>8</sup> *Historical Law Tracts*, p 228; Mitchell, 1958 Jur.Rev. 19.

rejoice at the growth of an oecumenical spirit in Scotland. But for Charles I's efforts to force the pattern of the Church of England upon his northern kingdom, and but for the Patronage Act, 1711 (now repealed), whereby, shortly after the Union, the English majority in Parliament forced "lay patronage" on Scotland (*i.e.*, the right of local landowners to appoint clergy to churches), we might long since have given a more united witness. It is, moreover, with shame that I recall past legal persecution of Roman Catholics in Scotland. The country has owed much to this section of the community, and the very foundations of the Scottish courts were largely laid in pre-Reformation times by enlightened prelates of the Roman Church. A Scotsman may record with some pride that Lord Normand's contemporary, Cardinal Heard, was recently appointed Dean of the Sacred Rota, the highest ecclesiastical judge for the whole Roman Catholic Church. Courts of the Church of Scotland at all levels include lay elders as well as ordained ministers, and it is perhaps significant that in the General Assembly, which legislates on many matters concerning the nation as a whole, so many of the elders should be lawyers. Yet that very element is virtually excluded by circumstances from contributing to the work of Parliament at Westminster.

One word on a topic, which would not need mention at all had not national newspapers of the status of the *Observer* disclosed widespread misconceptions. Though the Queen is Head of the Church of England, she is not Head of the Church of Scotland—which,

indeed, has no Head except Christ, and has no ecclesiastical hierarchy. There is, of course, a hierarchy of courts from Kirk Session to General Assembly. Queen Victoria regarded herself as a communicant member of the Church of Scotland, and her royal successors worship in the Established Church while in Scotland. On accession, one of the Sovereign's first duties is to swear an oath to maintain the privileges and presbyterian form of government of the Church of Scotland. The Queen in person or her Lord High Commissioner is loyally welcomed at each General Assembly, but neither Sovereign nor Minister of the Crown has any official voice in the affairs of the Church. I may add that in the Episcopal Church of Scotland (which is not "established") there is no equivalent to the *conge d'élire* in England, whereby the Dean and Chapter of a cathedral are instructed by letter missive to elect to a vacant archbishopric or bishopric the individual pre-selected by the Crown.

#### *The Fundamental Constitution and Judicial Review*

Perhaps, however, the most notable of Scotland's contributions to British justice has been her indispensable participation in the creation of the state of Great Britain, which came into being on May 1, 1707. We have had over quarter a millennium to reflect on this, yet controversy continues regarding the implications and consequences of the Union Agreement. The constitutions of all members past and present of the British Commonwealth of Nations have inherited some of the consequences, and have avoided some of the defects.

The Common People of the United Kingdom to whom I am bound to address myself, do not in general seem to be at all clear as to the steps by which the two former kingdoms of Scotland and England ceased to exist, and, in dying, gave painful birth to a new kingdom—that of Great Britain which, in its cradle, seemed sickly and unviable. It does not seem to be very widely realised that the basic constitution of this new kingdom was the prototype of written constitutions which expressly limit the powers of organs of government in relation to each other—in particular which, by restricting the powers of the legislature which makes laws for the whole country, protect the interests of a permanent minority from the danger of their interests being overridden by a permanent majority. British justice, like charity, should surely begin at home; and the legal foundations of Great Britain should be as well known to all of us as are the terms of the Declaration of Independence to our American cousins. Yet, it is the very Uncommon Man indeed (or so it seems to me) particularly in South Britain—who can speak with reasonable information or intelligence about the Union of 1707. It is rare to encounter an educated Scotsman who is unaware of the general terms of Union, but few have a sound understanding of its contemporary implications.

During the period of Personal Union (1603–1707) though neither Scotsmen nor Englishmen were aliens in each other's countries, the countries themselves were separate independent States, and indeed shortly before the Union, the English Parliament made provisional statutory provision to treat all Scots as aliens.

After May 1, 1707, however, Scotland and England were no longer separate countries—linked only by the fact that they shared the same King or Queen. From the viewpoint of public international law, a new international state, that of Great Britain superseded the two former states; yet, by the constituent agreement under which they are governed, these two former states remained quasi-foreign, so far as the administration of justice and ecclesiastical matters were concerned. The Union of 1707 did not create “British law” except perhaps in that very field where practically all English lawyers and many Scottish lawyers have most clearly failed to perceive it—at the very heart of the Constitution itself.

Of the Union, Lord Normand has said <sup>9</sup>: “Scotland made for the sake of the better future of our island as a whole, a complete sacrifice of her national sovereignty to the new-formed Kingdom of Great Britain. England, no doubt, necessarily made the same sacrifice, though English historians are curiously reluctant to claim that honour.” Though I could not accept all Lord Cooper’s reasoning in *MacCormick v. Lord Advocate* <sup>10</sup> (The EIIR Case), he was clearly right in stressing that the Union created a *new* Parliament of *Great Britain*; the situation was not that “all that happened in 1707 was that Scottish representatives were admitted to the Parliament of England.” Great misunderstanding has resulted from two equally misleading interpretations of the Union agreement—one fathered by Scotsmen, and the other by most

<sup>9</sup> Report 46th Conference International Law Association (1954), p. 10.

<sup>10</sup> 1953 S.C. 396.

English constitutional lawyers. The Scottish fallacy is to argue as though the Treaty of Union were still in force as an executory treaty, and to rely on the *Treaty* as a safeguard against infringement of the Union Agreement today. (Even Lord Cooper was led by the argument to think in terms of treaty obligations.) On the other hand, the English fallacy is to assert that the Union was based on the legislative Act of a sovereign Parliament; that Parliament cannot bind its successors; that, therefore, the so-called "Act of Union" can lawfully be repealed or amended. In other words, they approach the constitutional position as if Great Britain had been brought into being by an Act of Parliament—much as the United Kingdom Parliament during the nineteenth century established the Dominion of Canada. The supporters of the Scottish "treaty fallacy" are right when they conclude that the Union Agreement is more than ordinary legislation; but they are on hopeless ground when they seek, as in *MacCormick's* case, to defend the entrenched clauses by reliance on an international treaty which has been "executed" since May, 1707. The very parties to the Treaty ceased to exist at that time. Like bronze, or whisky polluted with soda, previous separate elements had been superseded by a new species altogether.

The English "Parliamentary Sovereignty" fallacy flows from the assumption that an ordinary legislative Act of the pre-Union English Parliament—or even ordinary legislation passed independently by the two Parliaments of Scotland and England—could bring

into being a new international state; a new Parliament (limited as to its powers in certain respects); and also provide for certain basic constitutional factors which transcended the jurisdictions for which the pre-Union Parliaments were entitled to legislate, such as provisions regarding membership of the new British Parliament. (I may note in parenthesis that the English "Act of Union" as legislation has no legal status in Scotland; nor would the equivalent Scottish measures be accepted as *legislation* binding on an English court.)

As I have discussed in detail on another occasion, the complex of documents exchanged by the Parliaments of Scotland and England have, in my submission, a threefold significance.<sup>11</sup> *First*, they constituted a treaty *jure gentium*—concluded, not by the two Parliaments, but by Anne, Queen of Scotland, with Anne, Queen of England; *secondly*, the Acts of the respective pre-Union Parliaments operated as ordinary legislation, binding the subjects within their respective jurisdictions; *thirdly*, the Union Agreement took effect as a skeletal, but nonetheless fundamental, written constitution for the new Kingdom of Great Britain when it came into being.

If this submission is justified, as I believe it is, you have before you a unique political experiment—the implications of which are still being worked out. England's interest in the Union was to secure permanently that, after Anne's death (when the personal Union might dissolve), Scotland should never pass into

<sup>11</sup> See T. B. Smith, "The Union of 1707 as Fundamental Law" [1957] *Public Law* 99.

the control of rulers disposed to favour French rather than English interests. For this security England was prepared to pay a price, and to negotiate within certain limits. She could, moreover, use powerful arguments in the economic field; and, in the last resort and at great inconvenience, military intervention would have been preferable to total failure in negotiating Union. Scotland was concerned to secure in perpetuity certain vital concerns of a permanent minority; and in particular to safeguard her fundamentally different legal system, the Presbyterian form of Church government, and certain other matters. It is of some interest that the original Scottish proposals suggested that her interests could best be protected within the framework of a federation or confederation—solutions which have been subsequently relied on frequently to secure the protection of racial, provincial and other interests of minorities in modern constitutions. When the time came to write the Constitution of the United States a high proportion of the delegates entrusted with this task were Scotsmen. These, no doubt, had clearer ideas than their forbears in Scotland as to what federation and confederation implied. The negotiators of 1706 had in mind the example of the United Netherlands—the international and constitutional situation of which has generated almost as much controversy as has the nature of the British Union of 1707. The English negotiators were, however, adamant in their insistence that the new state of Great Britain should be a *unitary* state with one Parliament and one government—yet they agreed to separate national legal systems and separate

national Churches and certain other safeguards for Scotland. In both Houses of the new Parliament of Great Britain, Scottish representation was to be scaled down to approximately a population ratio. No body, like the United States Senate, or other safeguards in the legislative machinery itself, secured the interests of the permanent regional minority. How then were they to be secured? The full answer has yet to be given; and the Mother of Parliaments may yet receive instruction from her progeny as to how eggs should be sucked.

In the first place, however, let me stress certain relevant considerations. Scotland surrendered her sovereignty—not to England, but to the new Kingdom of Great Britain—in reliance on a fundamental written constitution. Had the Lords and Commissioners of the pre-Union Scottish Parliament considered that the Union Agreement rested merely on ordinary legislation, capable of repeal in the first session of the Parliament of Great Britain by the overwhelming English majority, the Scots would never have perilled the future of their country on such security. The Scottish negotiators were not romantics but realists—who, whatever their shortcomings, probably drove the hardest bargain possible in the circumstances; but they were entitled, and on the whole history has justified their belief, in forbearing to regard the English negotiators as hypocritical swindlers. The contrary, however, is in effect what many English constitutional lawyers would have us believe. Thus Mr. J. W. Gough, for example, while acknowledging that both parties to the Union intended certain

conditions to be essential and permanent, concludes<sup>12</sup> that “such phraseology, however well intended at the time, or even necessary to satisfy jealous interests, was legally only a pious fraud.” Mr. Gough, however, seems to assume that the basis of the Union was an Act of the now long-deceased English Parliament. He does not venture to suggest how such a body could have acquired capacity to regulate matters transcending the jurisdiction of the English courts, as, for example, representation of Scottish constituencies in the new Parliament of Great Britain, or the administration of justice in Scotland—far less how an English Act could bring into being the new Kingdom of Great Britain. His conclusion that the present Parliament at Westminster could never bind itself regarding the future ignores the fact that, whatever the powers of the former Parliament of England, the new Parliament of 1707 had within limits a written constitution. Whether the former English Parliament was “sovereign” by Dicey’s definition is not really relevant—nor is it very helpful to inquire whether the former Scottish Parliament was “sovereign” in this sense. Stair indeed states explicitly that the pre-Union Scottish Parliament within its jurisdiction could not bind itself not to repeal legislation. But both these organs were superseded on May 1, 1707. In procedural matters, and in its bicameral and party organisation, the new Parliament followed earlier English practice, but had a different constitutional foundation. If (*per impossibile*) the new Parliament had sat (say) at Berwick or occasionally

<sup>12</sup> *Fundamental Law in English History*, pp. 179–180.

in Edinburgh instead of constantly at Westminster, many constitutional lawyers and historians—ay and politicians—would have been spared the error of assuming that the new British Parliament of 1707 was the old English Parliament writ large.

So far as the written Constitution of 1707 was concerned, no express provision was made for amendment of the Constitution. Those who drafted it were only too familiar with changes made in the constitutional order by revolution. They could not expect all their arrangements to last until Doomsday; and presumably left to revolution—preferably bloodless—the achievement of necessary constitutional reform. Moreover, if Scotland were to opt to surrender eventually even a fundamental provision expressed in her favour, this need not necessarily be regarded as “revolution,” in the legal sense. Essentially English interests were assured by sheer weight of numbers, resources and political influence and were not of a nature which required protection through judicial scrutiny. The converse was true of Scotland.

The Constitution did not expressly provide for the contingency that Parliament itself might exceed the constitutional powers conferred. It is possible, as Lord Cooper seems to have implied in *MacCormick's* case and as Centlivres C.J. envisaged in the *South African Coloured Voters* case<sup>13</sup> that legislation may be illegal and unconstitutional without necessarily being subjected to scrutiny and restraint by the judiciary.

<sup>13</sup> *Harris v. Min. of Interior*, 1952 (2) S.A.(A.D.) 428; 1956, Butterworths S.A.L.Rev. 3.

Where judicial scrutiny of legislation is incompetent the forms of law may be used to achieve ends which are unlawful according to the Constitution.

But is it not as justifiable to contend that in Britain, as in the United States, the courts should be regarded as guardians of the Constitution? Such a notion might receive little encouragement in England for historical and practical reasons. The ultimate court in England for civil and criminal causes is the House of Lords, as was the corresponding body in the pre-Union English Parliament, and Parliament was the Grand Inquest of the Nation. Until quite modern times, it would have been difficult for an English lawyer to regard the House of Lords as qualified to act judicially as guardian of constitutional legality, since the judicial and political functions of the House had not been separated. Again, the historical tradition accepted by most Englishmen viewed Parliament as the champion of liberty against the tyranny of the King and the Executive. (This was also the first reaction of European countries when their legislatures were emancipated from an over-powerful executive tyranny; but they have had second thoughts.) Even in England today, however, it may have been realised—from a study of party politics—that the dictatorship of a legislative majority could establish a tyranny of the legislature or of the executive. A legislature as such is not beyond reach of the corrupting effects of power. An all-powerful legislature may be most exposed to that danger. Liberty involves, not only freedom under the law, but also

in some matters freedom from the *lawmaker*. A distinguished American has observed,<sup>14</sup> viewing the world scene: "In our time, individual freedom without judicial review seems unthinkable."

What of Scotland? After the Union the supreme courts assumed additional jurisdiction when the Privy Council was abolished; since, as Kames observed, it would be a defect in the Constitution if there were wrongs without remedies.<sup>15</sup> The same argument would be relevant to judicial review of legislation contravening the Constitution. As yet the Scottish courts have not expressly accepted or declined to act as guardians of the Constitution, and, in the few cases where fundamental law has been pleaded, actual decision on the competency of reviewing legislation has not been necessary. The answer may be that of Chief Justice Marshall of the United States Supreme Court, when as late as 1803, though no express power to review legislation had been conferred on the Supreme Court, he took the decisive step of declaring an Act of Congress void because of its incompatibility with the Constitution. The Judiciary, as the weakest of the organs of government, is unlikely to usurp excessive power in a country, and is therefore the safest to exercise ultimate control. It is only indirectly that in Britain today general fundamental rights and liberties, such as freedom of speech, are underwritten by the Constitution. Certain specifically

<sup>14</sup> Dietze, "Decline and Emergence of Judicial Review" (1958) 44 Virginia L.R. 1233; (1959) 76 S.A.L.J. 399.

<sup>15</sup> Note 8, *supra*. Appeal to Parliament from the Scottish courts was not contemplated at the Union, and is incompetent, so far as the High Court of Justiciary's proceedings are concerned.

Scottish interests are, however, expressly guaranteed, though it is seldom that a private citizen can have title to sue to enforce them.<sup>16</sup> So far no Scottish court has ever ruled that a statute made by the Parliament at Westminster is invalid. The precedents are neutral, but if the Scottish Judiciary assume this jurisdiction they could fortify themselves with the realisation that, throughout the civilised world, the trend today is to accept judicial review of legislation; and indeed within the United Kingdom scrutiny of the legislation of the Parliament at Stormont is already familiar. Even more important is the fact that the judges, on installation, swore to administer the laws of this country; and, if there be laws of this country superior to ordinary legislation (as I believe, though few, there are), the judges may accept the hazards of safeguarding them.

Lord Russell in *MacCormick's* case did not really provide any solution to the problem of the entrenched provisions regarding the "private rights" of Scotsmen. These by Article XVIII of the Union Agreement may only be varied for the "evident utility of the subjects within Scotland." The will of the people as expressed by the ballot box does not provide, as Lord Russell suggested, a solution. In the first place, one of the presumably unforeseen effects of the Reform Act of 1832 is to enable every Scottish Constituency to be represented by a Member with no stake in the country at all—carpet-baggers, in American terminology. Secondly, as in the present Parliamentary situation, the majority party in Britain represents

<sup>16</sup> Hence the decision in the *EIIR* case—note 10, *supra*.

the minority of Scotsmen. I have no party axe to grind—but if political parties do really represent the interests of their constituents—then the “evident utility of the subjects within Scotland” is presumably better assessed by the Opposition in Parliament than by the Government. Judicial scrutiny would be a less Gilbertian check on legislation alleged to violate the Constitution. If the Supreme Courts in Scotland accept this role, one would hope that they would construe the Constitution with that flexibility which this function requires. As I have already said, the Union Agreement is more than Treaty, and more than legislation. It is a constitutional document; and, as such, to be interpreted by liberal rather than literal canons of construction.

#### EPILOGUE: THE DESTINY OF SCOTS LAW

A Scots lawyer can justifiably express pride in his legal system, viewed in its historical context and compared with the jurisprudence of other countries. It was cosmopolitan and in its most rational chapters Civilian; it shared in the two great legal traditions of the West; it was philosophical and rich in principle; and flourished by constant use of comparative techniques, expounded by legal scholars of exceptional quality and invoked by a Bench and Bar educated in what Stair called “the common law of the world.” During the past century and a half Scots law has been brought into close contact with English law, and some authors, such as the Swiss Professor Schnitzer, have gone so far as to treat Scots law as he did in his classic work in the chapter “Anglo-Amerikanisches

Recht." It is therefore very relevant to consider what the destiny of Scots law is to be, perhaps at the end of this century. No latter-day Tarquinius Priscus has bid high for my prophecies, nor do I claim the prescience of the Sibyl. Nevertheless, I shall venture to forecast the future, on the assumption that the potentialities of our jurisprudence are given proper scope.

In my opening lecture I mentioned the importance of Scots law for the student of comparative jurisprudence and the suggestion, made by Lévy-Ulmann in 1924, that Scots law, combining elements of the Civilian and Anglo-American legal traditions, presented a picture of what the legal systems of the world might be by the end of the present century. Though this is certainly a flattering exaggeration, there may well be a considerable measure of prophetic truth in that statement, and I prefer its implications to those of an alternative prescription. More recently, Lord Denning has suggested<sup>17</sup> that it would be for the good of Scottish and English law that intermingling of ideas should go forward "so that we no longer have two separate systems of law but have the best of them both. Let the English law contribute to the Scottish law, just as the Scottish law has contributed to the English until they become one." Moreover, from time to time various well-meaning persons write to the Press suggesting amalgamation forthwith of the Scottish and English legal systems. A third view, which has never lacked supporters in the South, is that Scots law is an irritating anomaly, and should be superseded

<sup>17</sup> *Glasgow Herald, Scotsman, The Times*, May 6, 1961.

by English law. Lord Maugham, a Lord of Appeal in Ordinary until 1946, during a visit to Ottawa, spoke for not a few English lawyers when he referred<sup>18</sup> to "those interesting relics of barbarism, tempered by a few importations from Rome, known to the world as Scots Law."

The destiny or fate of Scots law then seems to be either to develop again into a more cosmopolitan system, to fuse into a system of British law, or to sink its identity in English law retaining a few local customary rules. My own belief is that ultimately, whatever the intermediate stages for Scotland and England—short of some cataclysmic event shattering the whole legal and political order as we know it—the world, and in the first place, the Western world, is bound to move towards substantial unification of legal solutions in many fields. The trend is away from legal parochialism — what Emeritus-Dean Roscoe Pound of Harvard<sup>19</sup> has called "Mainstreetism," his translation of Beseler's term *Kleinstaatismus*. In our own time Europe is being reforged, and even wider unities may emerge. When in Washington as guest of the American Bar Association in 1960, I was impressed by the passionate interest of practical American lawyers—not the academics alone (in this country I should have said "just the academics")—in problems of foreign and comparative law as live issues. When we ask today as Lord Atkin did in the snail in the bottle case the lawyer's question "who is my neighbour?"—the person who may be harmed

<sup>18</sup> Cit. Evershed (1948) 1 J.S.P.T.L. 171.

<sup>19</sup> *XXth Century Comparative and Conflicts Law*, p. 3.

by my careless acts or omissions—we must conclude that he is not necessarily the man across the street. A defective tool made in a Scottish engineering works may blind a worker in an Italian factory; if (which Heaven forbid) care is not taken, Scottish Tweed may transmit dermatitis to the fashionable ladies of Paris, or noxious whisky may poison an American senator. Migration of skilled workers and professional men—the harsh annual tribute which Scotland pays to the Minotaur of modern economic pressures—and emigration of the Scottish maidens who lose their hearts to Latin lovers or Saxon squires, leave behind in their homeland problems of family law and succession. The wines we drink have trapped perhaps the sunshine of Bordeaux or the Rhineland—but, if they have trapped also something less salubrious, it is no respecter of frontiers—nor do possible defects in the silks of Lyons or Milan. As international transport and communications develop, the world grows smaller; and commercial men do not care to change their laws at each airport or dock. These factors do not, however, necessarily imply that a general world law is in prospect, any more than that our grandchildren will be monolingual. In every legal system, certain chapters such as criminal law, family law and succession, tend to reflect particularly a national ethos, while a “common core” of legal principle may well be found in such fields as Obligations.

Scots law has had particular importance, apart from technical considerations, because in a certain sense the *nation* has survived through a legal system. On the other hand, the essential tradition of Scots law

has been cosmopolitan and comparative, and if that tradition fails, as Lord Cooper has discerned, the system will surely die. There are aspects of our law which we have perfected for our own use, and should not readily change; there are other aspects which we could improve if we looked forward and looked around us.

How far, however, should we look around us? Lord Denning's suggestion as quoted—and let me stress that I have not seen the full text of his lecture—seems to imply that between them Scots law and English law comprise all the best solutions, which we could fit together eclectically into a perfect pattern. Even were that theoretically true, it would be contrary to the whole experience of “mixed systems” that this result would be achieved, and that the best solutions would necessarily be adopted. Too often the English rather than the more rational view has prevailed. Lord Denning is, of course, much more realistic than the advocates of amalgamation by codification. He contemplates, if I understand him aright, that statutory law reform might introduce into one country a particular doctrine or device which had worked well in the other; or that the House of Lords, as the ultimate appellate court, might apply both to Scottish or English law a particular solution previously worked out by the courts of one country. This process already operates. So far as judicial assimilation is concerned, however, the theory is that the rules of both countries always have been the same, though for centuries judges may have proceeded on the basis that they were not. Indeed there would

be a considerable outcry, if (as happened in Scottish appeals of the last century) the House of Lords stated expressly that they were changing the law of one system to make it conform to the other. Similarly with regard to legislative change: there is a certain sensitivity which can still be aggravated by linking law reform expressly to assimilation of Scottish and English law.

As a matter of dispassionate observation I have to state that in general the English lawyer of position has such a tremendous pride in his native jurisprudence that, though he may even recognise the possibility of its improvement, his attitude to reform is hostile to foreign patterns—especially if they are Scottish. On this delicate matter I shall confine myself to English sources. Paterson, a barrister of the Middle Temple, who published his *Compendium of English and Scotch Law* in 1865, wrote in his preface<sup>20</sup>: “The law of the one country is still a sealed book to the other. England rather glories in her ignorance; and Scotland confidently rebukes this insular pride by counting over the adaptations from her own code which have now and then been paraded by her neighbour under new names as original reforms. English lawyers do not profess to know anything of the law of Scotland.” The next attempt at such a comparative study was the *Comparative Principles of Brodie Innes of Lincoln’s Inn*, published in 1903. He observed ruefully in his preface,<sup>21</sup> “I would fain hope that this work may be of some service to those

<sup>20</sup> pp. vii–viii.

<sup>21</sup> p. xi.

concerned with amending and improving the law and the practice thereof in both countries. The number of instances of reforms first introduced in Scotland, and afterwards adopted without acknowledgment in England, where, strange to say, lawyers somewhat pride themselves on their ignorance of any system except their own, has been more than once commented on from the Bench. . . . It is clear, however, that whoever would intelligently attempt to suggest, or carry out, any reform in any branch of either system, would do well to have as good an acquaintance as possible with the other, though experience suggests that in recommending any change to his brethren he should carefully conceal its source."

And what do our contemporaries say? Has the climate changed? The Vinerian Professor of English Law, Professor Hanbury, wrote only last year<sup>22</sup>: "Those English lawyers who would undertake a systematic study of Scots law could be counted on the fingers of one hand." This year Professor Wade, Downing Professor of the Laws of England, noted<sup>23</sup>: "It has long been the common experience of law reformers in England that authority pays little or no attention to the law of other countries." Thus in effect when, on another occasion, Lord Denning urged various reforms with the cry: "Are we for ever to be behind Scotland?"<sup>24</sup> he may have been scuppering his ship before she was launched.

How childish and parochial all this seems, but it

<sup>22</sup> (1960) 76 L.Q.R. 316.

<sup>23</sup> (1961) 24 M.L.R. 8.

<sup>24</sup> "The Way of an Iconoclast" (1959) 5 J.S.P.T.L.(N.S.) 77 at p. 83.

does not encourage the Scots lawyer to deliver himself bound into the hands of the Philistines. I have already given one item of personal testimony on this matter <sup>25</sup>—mention in Parliament of my suggestion that, in codifying offences, defences and trial procedure in the Army Act, the best solutions of Scots law as well as of English law should be considered at each stage; and the better, or indeed an improvement on both, should be incorporated. Implicit in this suggestion were such radical proposals as that the accidental killing of a policeman by tripping him up should not be murder; that diminished responsibility and provocation generally should count in mitigation; that those representing the accused should give notice of any special defence such as alibi; and that counsel for the defence should have the right to address the court after the prosecution. At the very mention of Scots law, Honourable Members of both parties immediately joined in a discreditable exhibition of scorn and intolerance.

This brings me to a further reflection on Parliament as a medium for codifying or amalgamating considerable sections of Scottish and English law, which may be technical in character—"lawyers' law." No system of national jurisprudence has less adequate representation than Scotland, so far as legislation, particularly on "lawyers' law," is concerned. All the other "mixed systems" have their own legislatures, and the Parliaments of most countries have a high proportion—some might think too high a proportion—of professional lawyers among the lawmakers.

<sup>25</sup> pp. 31, 32, *supra*.

There is one Scottish advocate—the Lord Advocate—in the House of Commons; and the present system is unlikely to enable any, or many, more to serve their country as legislators. This is all the more regrettable since in the Legislature of the Church of Scotland, the contributions of professional lawyers have been notable. It is a paradox that in the Parliament of Northern Ireland over one-fifth of the membership of Senate and House of Commons are legally qualified. At Westminster, in the House of Lords, Scots law is potentially better represented by Lords of Appeal in Ordinary, in office or retired, but these are primarily occupied with judicial duties. The Earl of Selkirk, one of the Scottish peers, is an advocate, but is at present High Commissioner in South East Asia. Perhaps when reform of the House of Lords is under review, attention should be given to the importance of securing adequate representation of Scottish legal wisdom in Parliament, through creation of life peers to sit as legislators when matters of law reform are under consideration. They could, but need not necessarily, also exercise judicial functions. At Westminster at present there is a galaxy of English legal talent; and the contrast in quality between debates on Scottish and English legal questions is regrettably obvious.

I am not, however, concerned to propound solutions, but to note facts; and among these certainly are that Parliament, as at present organised, is not well equipped for handling Scottish affairs, and that the Scottish Standing Committee has not proved in practice an adequate forum for debate or decision. So far as I am aware, the only other political unit in

the world so handicapped in legislative matters is the District of Columbia, where Washington, Capital of the United States, is situated. It has no State legislature, and therefore depends on the Federal Legislature to enact measures for its domestic concerns—much as Scotland depends on the imperial Parliament at Westminster. When Congress or Parliament is pressed with great issues of national or supra-national importance, it is not surprising that local interests get low priority. If parish pump matters are discussed in a busy assembly of wide competence, this is the inevitable consequence of the present organisation of business. The inhabitants of the District of Columbia have an advantage over us, however, in that they can bring direct pressure to bear on the legislators within their range. For too many years the Scots have lacked opportunity to “pebble” their legislators—who, moreover, since 1832, have no longer been required to have a stake in the country. Formerly Scottish parliamentary candidates were restricted to those entitled to vote in their constituencies.

From what I have said already it will be reasonably clear that, though Scots law and English law will continue within limits to coalesce through judicial decision and legislation, especially on common economic or social problems, I neither foresee nor desire a solution such as Lord Denning has propounded. Still less would I support the sky-blue idealists who have propounded the solution of codifying British law as an amalgamation now of Scots and English law. They are, alas, not aware of the facts of life. From

the time of James VI there have been such advocates of a policy of immolation—for that would be the inevitable result. Though legislation would be necessary to promulgate such a code, the preparatory work would have to be done by a small committee directed by a master mind; and that committee should comprise men deeply learned and widely experienced in both legal systems. Moreover, they would have to be withdrawn from their present important functions for a period of many years. Sufficient such men just do not exist. I think perhaps I could name the five just Englishmen contemplated by Professor Hanbury, who would be prepared to undertake a systematic study of Scots law. They would not necessarily be among the codifiers. Any purported codifying commission for British law (if *per impossibile* such were appointed) would be heavily overweighted by formidable English legal talent, naturally predisposed in favour of solutions with which they were familiar. Scots law may contend with English law any day on the basis of respective merits—but it is relevant to inquire who are to expound them, and who are to judge.

If I discard the solution of immediate unification of British law it is not because I advocate legal parochialism. Such an attitude would be quite out of keeping with the cosmopolitan and comparative outlook of Scotland's leading jurists over the centuries. Nor am I a lover of the archaic, who would necessarily assess the value of a legal doctrine according to its antiquity. If one were to seek the spiritual home of jurisprudential isolationism and archaism, it would not be North of Tweed.

We are, I believe, embarking on a new phase in the world's legal history. Each nation has certain valued legal principles, doctrines and institutions which it must preserve. There are others which can be modified and shared. How rash and unprofitable it would be for Scotland and for British justice, if at the very time when through practical necessity Europe, and even wider political constellations, were reaching for "a common law of the world," reconciling Romanistic and Anglo-American doctrines—Scots law should sink her identity in English law. Scotland's contribution may yet be to mediate, on a humbler scale than Lévy-Ulmann predicted, between the two great juristic empires.

When searching for the "common core" of legal systems, as Professor Schlesinger of Cornell has acutely discerned,<sup>26</sup> it is not necessarily the wisest choice to select for comparative analysis the most "influential" systems. The code of a relatively small and not very "influential" nation may offer particularly interesting and constructive solutions, for the very reason that its draftsmen have been "influenced" by several others and have eclectically woven the strands of several "influential" ideas into a new and original pattern. Scots law is certainly worth consideration in this connection. Again, Justice Kisch of the Hoge Raad der Nederlanden recently explained<sup>27</sup> why the Netherlands Supreme Courts had decided to award what we should call *solatium* for pain and suffering in a personal injury case. One of

<sup>26</sup> *XXth Century Comparative and Conflicts Law*, p. 67.

<sup>27</sup> *Ibid.*, pp. 262 *et seq.*

the factors which decided the judges in construing in this way the relevant section of the Civil Code was "that, in accordance . . . with what is nowadays accepted in neighbouring countries" under statutory law or judicial decision. By "neighbouring" countries (five were considered) geographical proximity was not necessarily implied; and the "harmonising construction" was adopted *because*, as appeared from comparative study, it was consistent with modern ideas of justice. The learned judge stressed that this method of construction—which has also been used in the United States—is only justifiable where the reference is to a plurality of legal systems, representing an international majority or those having particularly close contacts with the national system in which the problem for decision has emerged. It is apparent that there is all the world of difference between that technique—which was formerly used frequently in Scotland—and the pseudo-comparative approach so often used in modern times in this country of using the *other British* system *alone* for purposes of comparison, irrespective of whether the basic principles are the same. Scots law, I again contend, has particular relevance for the "harmonising technique" either in judicial decision or codification, because the systems of Anglo-American and Civilian inspiration are alike "neighbours."

I can mention only these two examples to illustrate my contention that, by maintaining the Civilian tradition, Scots law may, as Professor Friedmann has discerned, be of considerable value to British justice, as the nations of the world are impelled to reach for

common solutions for common problems. Meanwhile, significantly, the American Law Institute and many research centres in the United States, manned by scholars often of European origin, have developed English law in America into a much more cosmopolitan system than is the indigenous product. American law has gone further to meet the civil and the Scots lawyer half-way, and in international legal discussions this is important. What is in my mind, of course, when I suggest caution against precipitate assimilation of Scottish and English law, are problems such as one would find in the civil code, say, of France. Within Britain itself a measure of greater uniformity is certainly desirable in many legal matters which affect the country as a whole. A vast amount of law is already common to Scotland and England—as a glance at *Current Law* will illustrate. Scottish criminal law procedure can, however, best further British justice by providing a pattern for consideration by English lawyers, but without merger. I would stress in particular that we must not surrender key principles of private law—especially when, though relevant to Britain today, they may be relevant to Europe tomorrow. Moreover, when particular reforms in the law of Scotland—or England, or both—are deemed necessary for domestic ends, surely it is highly desirable to consider the contributions of other systems of jurisprudence in the world. To proceed merely on British experience seems both a smug and short-sighted policy.

Clearly, of course, Scots law has already been living too much on the credit of past achievement; and,

lacking adequate modern literature, some Scottish practitioners and authors have resorted too much to rash and uncritical borrowing from English reports and treatises. There has been surprising neglect recently of Civilian sources—Roman-Dutch and South African law in particular—which provide especially valuable material for such topics as obligations and moveable property. The main subverters of Scots law in modern times have been the Scots. Uncertainty has resulted from this phase of “Whoring after Strange Gods,” which I have discussed on an earlier occasion.<sup>28</sup> The time for reappraisal has come. The Scottish Universities Law Institute came into being last year, and received generous financial encouragement from the Carnegie Trust to further its publishing policy. Within ten years we may hope to see the main divisions of Scots law restated in up to twenty comprehensive treatises, faithful to the traditions of the past, but written for the modern world. I believe that the comparative researches of the authors will compensate in part for the reluctance of contemporary practitioners to turn to works in a foreign language which may be more relevant than English texts.<sup>29</sup> When this task is achieved, we should be better equipped to further the cause of British justice at home and abroad. Meanwhile I trust University Law Faculties will give due emphasis to the study of

<sup>28</sup> 1959 *Jur.Rev.* 119.

<sup>29</sup> The English language as a medium of English law is a subject for research in itself. Not even codification in Louisiana provided adequate protection against pseudo-comparative influences. The present situation in Israel gives warning of problems soon to be faced by Ceylon and India, if English ceases to be language of the courts.

European Organisations and of Comparative Jurisprudence—so dear to Miss Hamlyn's heart.

To the wooing of Lord Denning on behalf of English law, therefore, for Scots law I should answer courteously: "You honour me, my Lord, but I cannot marry you; and will be mistress in my own house. Let us remain good friends and share our thoughts, for we have much in common—but less, perhaps, than you sometimes realise. Though I know you are shy with foreigners, still I want you to get to know my relatives on the Continent and overseas."

In the summer of this year, the British Government announced its intention of seeking entry to the European Economic Community.<sup>30</sup> In 1707 Scotland came out of Europe to go into Britain—sacrificing her sovereignty (as did England) to the new Kingdom—but she still preserves much of her European legal tradition. If Britain is "to go into Europe"—for Scotland this would mean "returning to Europe"; and at this moment of time Scots law and Scots lawyers could make an invaluable contribution to a *rapprochement* between Continental and Anglo-American law. Any eventual unification and codification of certain aspects of law should be considered in the context of a wider unity than Britain alone, wherein Scots law would not represent the views of a national minority but those of an interpreter and reconciler among nations. Scots law, indeed, in the twentieth century may yet make its greatest contribution ever to the achievements of British justice.

<sup>30</sup> See correspondence, *The Times*, July 31 and August 7, 1961; article "Scots Law and the Common Market," *Glasgow Herald*, August 17, 1961.

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