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Attitudes to Codification and the Scottish Science of Legislation, 1600-1830

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I. INTERPRETATIONS OF SCOTS LAW, CIRCA 1600

A. James VI and I and Union of the Laws

On the death of Elizabeth I of England on 24 March 1603, James VI of Scotland inherited the throne of England.[1] This was the great triumph of the Stewart dynasty, which had reigned in Scotland since 1371, having

1. *See, e.g.*, Jenny Wormald, *The Union of 1603*, *in* SCOTS AND BRITONS: SCOTTISH POLITICAL THOUGHT AND THE UNION OF 1603, at 17 (Roger A. Mason ed., 1994) [hereinafter SCOTS AND BRITONS].

inherited the Scottish throne through the marriage of James's ancestor Walter the Stewart to Marjorie, the daughter of Robert I (Bruce).[2] Educated by the brilliant Scottish Humanist, George Buchanan, James was a talented poet in his native Scots; more than this, he was—rare among monarchs—an intellectual who could theorise cogently and interestingly about poetry and, perhaps more significantly here, about politics, kingship and government.[3]

James was a man with a broad and, indeed, imperial vision, which was coupled with a political realism acquired during his difficult—and no doubt sometimes terrifying—childhood and adolescence in Scotland.[4] This is not to say that he always achieved his aims: by no means. But, much more importantly, he was careful not to overreach himself. He had a streak of pragmatism that his second son, Charles, singularly lacked. One of James's favoured projects was a union of his two kingdoms of Scotland and England. This was to involve a union of the laws. James's ambitions were not achieved.[5] This topic will not be explored here. But it is useful to start with the debates about a possible union of the laws—not really much wanted by his subjects in either kingdom—because they produced interesting attempts to characterise Scots law in contrast to English law in the late-Renaissance period.

A notable feature of these characterisations was that those in favour of a union of the laws tended to argue that, at a fundamental level, the Scots and English laws were similar. The argument was essentially historical. King James himself stated in 1607 in a speech to the English Parliament:

> All the Lawe of Scotland for Tenures, Wards and Liueries, Seigniories and Lands, are drawen out of the Chauncerie of England, and for matters of equitie and in many things else, differs from you but in certaine termes:

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2. *See* STEPHEN BOARDMAN, THE EARLY STEWART KINGS: ROBERT II AND ROBERT III, 1371-1406, at 1-38 (1996).

3. *See* KING JAMES VI AND I, POLITICAL WRITINGS (Johann P. Sommerville ed., 1994); KING JAMES VI AND I, THE POEMS OF KING JAMES VI OF SCOTLAND (James Craigie ed., Scottish Text Society 1955-58). For commentary, see, e.g., G.P.V. Akrigg, *The Literary Achievement of King James I*, 44 UNIVERSITY OF TORONTO QUARTERLY 115 (1975); Rebecca W. Bushnell, *George Buchanan, James VI and Neo-Classicism*, *in* SCOTS AND BRITONS, *supra* note 1, at 91.

4. A new study of James is awaited from Jenny Wormald. Meanwhile, see Jenny Wormald, *James VI and I: Two Kings or One?*, 68 HISTORY 187 (1983), and the essays in THE REIGN OF JAMES VI (Julian Goodare & Michael Lynch eds., 2000). ALAN STEWART, THE CRADLE KING: A LIFE OF JAMES VI AND I (2003) is disappointing.

5. BRUCE GALLOWAY, THE UNION OF ENGLAND AND SCOTLAND, 1603-1608 (1986); BRIAN P. LEVACK, THE FORMATION OF THE BRITISH STATE: ENGLAND, SCOTLAND, AND THE UNION 1603-1707, at 68-101 (1987); T.B. Smith, *British Justice: A Jacobean Phantasma*, SCOTS L. TIMES (News) 157 (1982).

> *Iames* the first, bred here in England, brought the Lawes thither in a written hand.[6]

Perhaps more troubling for an English audience was the argument of Thomas Craig, one of the Scottish Commissioners for Union, who outlined the historical compatibility of the laws of both countries, concluding that it would be necessary either to go back to Norman law, or the feudal law, to harmonise them; should common ground not thus be reached, it would be possible to unite them relying on the Civil (Roman) law, which, because of its natural equity (*naturalis aequitas*), was everywhere a common law (*ius commune*).[7] Given that many English lawyers feared Scots law as Civil law, Craig's view cannot have been encouraging.

B. The Development of Scots Law

There was indeed a small measure of truth underlying James's historical view and rather more underlying that of Craig. Unified under the Kings of Scots, Scotland had been a precocious mediaeval kingdom that, on the mainland, by around A.D. 1,000, had achieved approximately its present extent.[8] Despite a background Celtic law, in the twelfth and thirteenth centuries the Kings of Scots had copied feudal tenures and certain institutions of government from Anglo-Norman England, creating a Scottish common law, not dissimilar to that of Angevin England, that started to overlay earlier, more Celtic, institutions.[9] It was these developments that James VI had misdated to the reign of James I.

The laws of the two countries had diverged thereafter, however. In contrast to England, Scotland developed neither a central civil court (other than for certain purposes the Parliament) nor a secular legal profession. Moreover, in the later Middle Ages, the legal practice of Scottish secular courts came to be influenced by that of the ecclesiastic courts and the Canon law, so that legal concepts and practices of the *ius*

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6. JAMES VI AND I, POLITICAL WRITINGS, *supra* note 3, at 173.

7. THOMAS CRAIG, DE UNIONE REGNORUM BRITANNIAE TRACTATUS 89-90, 328 (C. Sanford Terry ed., Scottish History Society 1909); *see further* B.P. Levack, *Law, Sovereignty and the Union*, *in* SCOTS AND BRITONS, *supra* note 1, at 213.

8. Alexander Grant, *The Construction of the Early Scottish State*, *in* THE MEDIEVAL STATE: ESSAYS PRESENTED TO JAMES CAMPBELL 47 (J.R. Maddicott & D.M. Palliser eds., 2000); John W. Cairns, *Historical Introduction*, *in* 1 A HISTORY OF PRIVATE LAW IN SCOTLAND 14, 15-18 (K.G.C. Reid & R. Zimmermann eds., 2000).

9. *See* W.D.H. Sellar, *Celtic Law and Scots Law: Survival and Integration*, 29 SCOTTISH STUDIES 1 (1989); Geoffrey Barrow, *The Scottish Justiciar in the Twelfth and Thirteenth Centuries*, 16 JURID. REV. (n.s.) 97 (1971), *reprinted in* GEOFFREY BARROW, THE KINGDOM OF THE SCOTS: GOVERNMENT, CHURCH AND SOCIETY FROM THE ELEVENTH TO THE FOURTEENTH CENTURY 83 (2d ed. 1973); Cairns, *supra* note 8, at 27-32.

commune were introduced.[10] In the fifteenth century, however, a central civil court progressively developed out of the King's Council, legal practice before which followed Romano-Canonical procedure and in which Canon lawyers tended to deal with much legal business. Out of this was created the Court of Session or College of Justice, formalised in 1532 to consist of a President and fourteen Lords of Session, also known as Senators of the College of Justice. This Court adopted a version of Romano-Canonical procedure and, in its early years, had a bench dominated by Canon lawyers.[11] At the same time, a recognisable, secular legal profession developed, both of general men of law and of pleaders well educated in the *ius commune*.[12] By 1600, two-thirds of the men pleading in front of the Session based their claim for admission before the court on a foreign university education in Civil and Canon law, at this period normally obtained in France.[13] Foreign study of law remained normal for most members of the Scottish bar, the Faculty of Advocates, until around 1750, the universities of choice becoming those of the United Provinces in the later seventeenth century.[14] From the scattered use of the *ius commune* found in the later Middle Ages, it now became the normal resource in deciding cases in the 1540s, although the court quickly started to develop its own case-law, usually described as "practick."[15]

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10. Cairns, *supra* note 8, at 45-47.

11. *Id.* at 57-59, 62-64, 70-71; John W. Cairns, *Revisiting the Foundation of the College of Justice*, *in* MISCELLANY FIVE 27 (Hector L. MacQueen ed., Stair Society, 2006) [hereinafter MISCELLANY FIVE].

12. *See* JOHN FINLAY, MEN OF LAW IN PRE-REFORMATION SCOTLAND (2000); Cairns, *supra* note 8, at 68-71.

13. R.K. HANNAY, THE COLLEGE OF JUSTICE: ESSAYS ON THE INSTITUTION AND DEVELOPMENT OF THE COURT OF SESSION 145 (1933), *reprinted in* THE COLLEGE OF JUSTICE, ESSAYS BY R.K. HANNAY (H.L. MacQueen ed., Stair Society 1990). On the problems with law-teaching in contemporary Scottish universities, see J.W. Cairns, *Academic Feud, Blood Feud, and William Welwood: Legal Education in St. Andrews, 1560-1611*, 2 EDINBURGH L. REV. 158 (pt. 1) 255 (pt. 2) (1988); J.W. Cairns, *The Law, the Advocates and the Universities in Late Sixteenth-Century Scotland*, 73 SCOTTISH HIST. REV. 171 (1994).

14. Robert Feenstra, *Scottish-Dutch Legal Relations in the Seventeenth and Eighteenth Centuries*, *in* ACADEMIC RELATIONS BETWEEN THE LOW COUNTRIES AND THE BRITISH ISLES, 1450-1700. PROCEEDINGS OF THE FIRST CONFERENCE OF BELGIAN, BRITISH AND DUTCH HISTORIANS OF UNIVERSITIES HELD IN GHENT, SEPTEMBER 30-OCTOBER 2, 1987, at 25, 36 (1987), *reprinted as* ROBERT FEENSTRA, LEGAL SCHOLARSHIP AND DOCTRINES OF PRIVATE LAW, 13TH-18TH CENTURIES, at xvi (1996).

15. Cairns, *supra* note 8, at 71-74; John W. Cairns, *Ius Civile in Scotland, ca. 1600*, 2 ROMAN LEGAL TRADITION 136, 141-47 (2004) [= LAW FOR ALL TIMES: ESSAYS IN MEMORY OF DAVID DAUBE 136, 141-47 (Ernest Metzger ed., 2004)]. The source from the 1540s is known as *Sinclair's Practicks*. I am relying on the preliminary text edited by Dr. Athol Murray accessible on the World Wide Web, http://www.uni-leipzig.de/~jurarom/scotland/dat/sinclair.htm, in the version in which Professor Gero Dolezalek has worked on restoring the references.

C. Ius Commune *and* Ius Proprium

This means that an English commentator's view, by the time of James's union proposals, that the laws of the two countries were "*toto genere* in all things different" had something to recommend it.[16] In this respect a characterisation of Scots law drawn up in the context of the union project may be quoted:

> There is noe common lawe in Scotland, but the Judge eyther proceedeth accordinge to warrant of the municypall lawe, which is the statutes of Parliament, and that faylinge they have recourse to the ymperiall civill lawe. Albeyt there be many conclusions as verie Axioms never contraverted uppon, as particulerly in matters of discent and succession of Landes and such other thinges, whereuppon the Judges doe proceede havinge noe particuler warrant for the same but in all former ages havinge bene acknowledged as infallible and allowed customes and consuetudes.[17]

This came from an account of Scots legal practice produced by a Scots lawyer around 1604 for an English audience, quite possibly for the Lord Chancellor of England, Thomas Ellesmere.[18] When the writer used the term "common lawe" he was using it in a way the Englishman would readily understand: there was no common law in Scotland in the sense England had a common law, that is, the common law of Coke that had supposedly existed from time immemorial. What the Scots in fact had were their statutes and their customs as to descent of land. Failing statutes (and presumably customs), the Scots turned to Roman law. It is worth noting that the "municipal law" is identified with the statutes. The practices for succession to land were merely "allowed customes and consuetudes."

Some thirty to forty years earlier, Bishop Leslie, who had served as a judge on the Court of Session, had written that Scots municipal law (the *leges municipales*) was partly in Latin and partly in the Scots language. The law book written in Latin was *Regiam Majestatem*; while,

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This is based on Edinburgh University Library MS La.III.338a. Dr. Murray has numbered the cases. Hereafter they will be cited as "C." with a number. This MS also contains an anonymous collection, which I shall also cite. Those collected by Sinclair are numbered 1-509; the anonymous collection from 509-96. *See* Athol Murray, *Sinclair's Practicks*, *in* LAW-MAKING AND LAW-MAKERS IN BRITISH HISTORY 90 (Alan Harding ed., Royal Historical Society 1980); Gero Dolezalek, *The Court of Session as a Ius Commune Court—Witnessed by "Sinclair's Practicks," 1540-1549*, *in* MISCELLANY FOUR 51 (Hector L. MacQueen ed., Stair Society 2002) [hereinafter MISCELLANY FOUR].

16. *Quoted in* B.P. Levack, *The Proposed Union of English Law and Scots Law in the Seventeenth Century*, 20 JURID. REV. (n.s.) 97, 99 (1975).

17. J.D. Mackie & W.C. Dickinson, *Relation of the Manner of Judicatores of Scotland*, 19 SCOTTISH HIST. REV. 254, 268 (1922).

18. *Id.* at 254-62.

for Leslie, the rest of the books of the laws consisted of the acts of the Parliaments (written in Scots). Like the unknown author already quoted, Leslie had identified the municipal law with *lex scripta* or statutes. He also had added:

> Albeit heir sulde be vnderstandet, that this far to the lawis of the Realme we ar astricted, gif ony cummirsum or trubilsum cause fal out, as oft chances, quhilke can nocht be agriet be our cuntrey lawis, incontinent quhateuir is thocht necessar to pacifie this controuersie, is citet out of the Romane lawis.[19]

Another quotation is helpful. This comes from an Act of Sederunt of 1596 by which the Lords of Session tried to regulate the practice of parties and their advocates in soliciting the Lords outside the court to "inform" them of their arguments on the case.[20] The attempt to "inform" the judges reflected the procedure before the Court of Session, whereby matters initially coming to its Outer House before a single Lord (sitting as the Lord Ordinary) in cases of difficulty could be reported for decision to the Lords sitting together as a collegiate bench in the Inner House.[21] After emphasising that parties and their agents should not solicit the Lords outside the Court because the report from the Outer House was sufficient information, the Act nonetheless provided, "for better satisfactioun of pairteis quhais actionis being weichtie or intricate," that each Lord should appoint a time when he or a particular servant would receive "the informatioun of the causis in wreitt." In return, the Lords promised that they would "try quhat is prescryveit or decidet thairanent, als weill be the common law as be the municipall law or practick of this realme."[22] Here again we find "municipall law" contrasted with "practick." It is probable that the term "municipall law" is to be understood as referring to the statutes of the Scottish parliament. In this quotation, however, the term "common law" is undoubtedly a

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19. 1 JOHN LESLIE, THE HISTORIE OF SCOTLAND WRYTTEN FIRST IN LATIN BY THE MOST REVEREND AND WORTHY JHONE LESLIE BISHOP OF ROSSE AND TRANSLATED IN SCOTTISH BY FATHER JAMES DALRYMPLE RELIGIOUS IN THE SCOTTIS CLOISTER OF REGENSBURG, THE YEARE OF GOD, 1596, at 119-20 (E.G. Cody ed., Scottish Text Society 1888).

20. Act of Sederunt, July 13, 1596, *in* THE ACTS OF SEDERUNT OF THE LORDS OF COUNCIL AND SESSION, FROM THE 15TH OF JANUARY 1553, TO THE 11TH OF JULY, 1790, at 26-27 (1790) [hereinafter ACTS OF SEDERUNT].

21. *See, e.g.*, John W. Cairns, *"The Dearest Birthright of the People of England:" The Civil Jury in Modern Scottish Legal History*, *in* "THE DEAREST BIRTHRIGHT OF THE PEOPLE OF ENGLAND:" THE JURY IN THE HISTORY OF THE COMMON LAW 1, 4-5 (John W. Cairns & Grant McLeod eds., 2002).

22. Act of Sederunt, July 13, 1596, *in* ACTS OF SEDERUNT, *supra* note 20, at 26. While "common law" can be used in a variety of senses, it is clear that here it is used in contrast to *ius proprium*.

reference to the Roman or Civil law, conceived of as a *ius commune* linked with the Canon law, as normally understood throughout Europe at this period. Indeed, this was the normal contemporary meaning of the term "common law" in Scotland.[23]

Study of practice before the Court of Session supports the conclusions derived from these quotations. It decided litigation on the basis of arguments derived both from the municipal law considered as the *ius proprium* of Scotland, of which the statutes were the most important part, and from the *ius commune*. Moreover, as the terms of the Act of Sederunt show, reference to the *ius commune* was wider than to it as simply supplementary law.[24]

Thus, when James inherited the English throne, his two British kingdoms had quite different legal systems, even if, at the time, some downplayed the divergences to promote the cause of greater unity.[25] Of course, there was a common, essentially European, historical origin to aspects of the two laws, in particular the land laws, but centuries of separate development had introduced major changes.[26] It is thus particularly telling that, in 1607, in a speech in favour of union of the kingdoms and the laws, James should tell his English Parliament that, when the Scots talked of their "Fundamentall Lawes," they did not mean,

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23. *See, e.g.*, Richard Maitland, Practicks, Glasgow University Library, MS Gen. 1333, at 1 (Dec. 15, 1550) [hereinafter Maitland's Practicks]: "aught to be judges eftir the common law and not the practiqs of the realme" (I have relied on the transcription of this MS made by Robert Sutherland and accessible at http://special.lib.gla.ac.uk/teach/scotslaw/
practiques.html, which is not the oldest MS of Maitland's Practicks, but this does not affect the point made here); George Mackenzie, A Discourse on the 4 First Chapters of the Digest to Shew the Excellence and usefullnesse of the Civill Law, British Library, MS Add., 18,236, fol. 16r [hereinafter Mackenzie, Discourse]: "by the Common Law is meant the Roman or Civill Law in all . . . Nations [other than England]"; Francis Grant, *Essay on Law*, *in* FRANCIS GRANT, LAW, RELIGION AND EDUCATION, CONSIDERED; IN THREE ESSAYS: WITH RESPECT TO THE YOUTH; WHO STUDY LAW: AS A PRINCIPAL PROFESSION, OR ACCESSORY ACCOMPLISHMENT 2 (1715): "by the *Municipal*; is meant, what's *peculiar* to us; in Statutes, Customs, and old Maxims of Justice and Government; *different* from the *Roman Law*. By the *Common*; I understand the *Roman Law* . . ." (each Essay in Grant's book is separately paginated, as are the preliminary matters: all references here will be to that on law); JAMES DALRYMPLE, VISCOUNT STAIR, 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 80 (I.i.11) (D. M. Walker ed., 1981) (1693): the *ius gentium* "is chiefly understood, when the common law is named among us; . . . [a]nd oft-times by the common law, we understand the Roman law, which in some sort is common to many nations."

24. For a discussion of these themes, especially with a consideration of the interesting late-sixteenth-century Scottish legal moment, see Cairns, *supra* note 15, at 147-67.

25. *See* LEVACK, *supra* note 5, at 76-91.

26. *See, e.g.*, RAOUL VAN CAENEGEM, THE BIRTH OF THE ENGLISH COMMON LAW 85-110 (2d ed. 1988); JOHN HUDSON, THE FORMATION OF THE ENGLISH COMMON LAW: LAW AND SOCIETY IN ENGLAND FROM THE NORMAN CONQUEST TO MAGNA CARTA 118-56, 220-39 (1996).

as the English did, "their Common Law, for they haue none," but rather their *ius regis*. He developed this further in a way reminiscent of the earlier quotations: "Scotland hath no Common Law as here, but the law they have is of three sorts." The first was the feudal land law, already noted, that had supposedly been brought north by James I. The second was the "Statute Lawes, which be their Acts of Parliament." The third was "the Ciuill Law" introduced from France by James V with his establishment of the Court of Session. This did not "gouerne absolutely . . . as in France;" rather, the Civil law in Scotland was "admitted in no other cases, but to supply such cases wherein the Municipall Law is defectiue."[27] James was anxious to explain that there was no common law as fundamental law in Scotland, because the Parliament had instructed the Scottish Commissioners for the Union to protect the "fundamentall lawes, ancient privileges, offices, richtis, digniteis and liberteis of this kingdom."[28] His argument that the ancient customs were the same as those of England, differing only in terminology, so that Scotland could be considered as having no common law of its own, while the Scottish statutes could be changed by the united parliament to create unity allowed him to deny the significance of this instruction.[29] By admitting that the Civil law was used failing ancient custom or statute, he was, however, conceding far more to the difference of Scots law from English law than perhaps his audience realised.

II. MUNICIPAL LAW AND STATUTE LAW, PRIOR TO 1707

A. Written Law and Ius Commune

The descriptions of Scots law around 1600 quoted in Part I strongly identified the municipal law with the statutes of the Parliament: there were customs, but they were considered neither as constituting a "common law" nor as part of the municipal law proper. The municipal law was the statutes of the Parliament. Further, for Scots lawyers, the terms *ius proprium*, *ius municipale*, and *ius civile* were interchangeable (unless the last was referring specifically to the *ius civile Romanorum*).[30]

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27. JAMES VI AND I, POLITICAL WRITINGS, *supra* note 3, at 172-74.

28. Act 1604, c. 1, *in* 4 ACTS OF THE PARLIAMENTS OF SCOTLAND 263-64 (Thomas Thomson & Cosmo Innes eds., Record Commission 1814-1875) [hereinafter APS]. On the significance here of the term "fundamental laws," see CLARE JACKSON, RESTORATION SCOTLAND, 1660-1690: ROYALIST POLITICS, RELIGION AND IDEAS 101-02 (2003).

29. JAMES VI AND I, POLITICAL WRITINGS, *supra* note 3, at 174.

30. *See, e.g.*, THOMAS CRAIG, JUS FEUDALE, TRIBUS LIBRIS COMPREHENSUM: QUIBUS NON SOLUM CONSUETUDINES FEUDALES, ET PRAEDIORUM JURA, QUAE IN SCOTIA, ANGLIA, ET PLERISQUE GALLIAE LOCIS OBTINENT, CONTINENTUR; SED UNIVERSUM JUS SCOTICUM, ET OMNES FERE MATERIAE JURIS CLARE ET DILUCIDE EXPONUNTUR, ET AD FONTES JURIS FEUDALIS ET CIVILIS SINGULA

This attitude is supported by examination of Balfour's Practicks, a collection of material selected from the statutes and court records, written in the 1570s. In traditional fashion, this analysed law into the law of nature, law of God and "law positive," which was that made by "man allanerlie."[31] The work stated:

> Gif any questioun sall happin to aryse before any jugeis of this realme, quhilk cannot be decydit, be no cleir writtin law, the decisioun and declaratioun thairof aucht and sould be referrit and continewit unto the nixt parliament, that an law may be cleirlie maid be the Lordis of the said parliament, how the said questioun, and all uther materis siclike, sould be decydit and reulllit in time to cum . . . because na jugeis within this realme hes powar to mak any lawis or statutis, except the parliament allanerlie.[32]

Balfour did not even mention custom as a source of Scots law; his focus was entirely on the law making authority of the king and Three Estates in Parliament, even though he regularly drew his account of some of the principles and details of Scots law from his collection of the decisions of the Session, which he even cited as his authority for this proposition.[33]

What makes Balfour's approach particularly interesting is that, when required, the Scots could indeed conceive of the term "municipal law" as encompassing custom or unwritten law. For example, in Sinclair's Practicks of the 1540s, the compiler once referred to "*practica et municipale ius Scotie non scriptum et consuetudinarium*" and once to "*practica et consuetudo huius regni municipalis*".[34] This said, even in Sinclair's Practicks most of the references to *ius municipale* are directly or indirectly to the medieval law-book, *Regiam Majestatem*, considered as a statute.[35] This is also the case in Maitland's Practicks of 1550-1577, as copied by John Orr, where the term municipal law is once used to refer to *Regiam Majestatem* and once used in a direct contrast to "practiqs," in the way we have noted in other sources.[36]

REDUCUNTUR 50 (I.viii.8-9) (James Baillie ed., 3d ed. 1732) (1655). For the date of composition of this work (ca. 1600), see John W. Cairns, *The Breve Testatum and Craig's Ius Feudale*, 56 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 311, 317 (1988). Further, on the ideas of *ius* and its different uses, see 1 HELMUT COING, EUROPÄISCHES PRIVATRECHT 85-90 (1985-89).

31. 1 JAMES BALFOUR, THE PRACTICKS OF SIR JAMES BALFOUR OF PITTENDREICH 1 (P.G.B. McNeill ed., Stair Society 1962-63).

32. *Id.* at 1-2.

33. *Id.* at 2; *see* W.M. Gordon, *Balfour's Registrum*, *in* MISCELLANY FOUR, *supra* note 15, at 127.

34. Sinclair's Practicks, *supra* note 15, at CC. 503, 218.

35. *Id.* at CC. 315, 352, 460, 493. See also *id.* CC. 444, 445, 485, which allude to lack of *ius municipale* on the point at issue.

36. Maitland's Practicks, *supra* note 23, at 98 (17 June 1568), 111 (29 Mar. 1570/1).

This approach to *ius municipale* may be confirmed by examination of the contemporary work by Thomas Craig, known as *Jus feudale*, written ca. 1600, the first major analytical work on Scots law. Like the sources discussed above, Craig considered the *jus regni proprium* to be the *constitutiones* and *statuta* enacted by the Three Estates of the Kingdom with the consent of the king.[37] He expressly opposed the *ius proprium* to the practick of the courts and custom: in deciding cases reference was only to be made to such practick and custom when "we lack true *jus proprium*."[38] Indeed it was the very great lack of written law in Scotland, according to Craig, that led to the following of the Roman law.[39] In other words, if the *ius proprium* consisted of the statutes, and these were few, then the *ius commune* (a *lex scripta*) was inevitably attractive and accordingly relied on.[40]

If Craig argued that the statute law, the true *ius proprium* of the Scots, was inadequate because there was so little of it, there were other ways, however, in which the statute book was judged to be unsatisfactory. In particular, there was a problem in gaining access to reliable versions of the statutes, very few of which were printed in a readily accessible version. Knowing what was the written law by which to decide litigation was not always easy.[41]

B. "Codification" Proposals, Fifteenth to Seventeenth Centuries

What were perceived to be the difficulties and problems with the Scottish *lex scripta* are revealed by consideration of various proposals, in the fifteenth and sixteenth centuries, to reduce Scots law to a collected, written form.[42] These might loosely be called codification projects, and were perhaps inspired by the "codification" of the customs in France.[43] It is sufficient to look at one example. In 1575, a Convention of Estates noted the harm "quhilk this commoun weill sustenis throw want of a

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37. CRAIG, *supra* note 30, at 50 (I.viii.9).

38. *Id.* at 51 (I.viii.13-14).

39. *Id.* at 14 (I.ii.14).

40. On Craig's understanding of the idea of *ius commune*, see Cairns, *supra* note 15, at 150-58.

41. Cairns, *supra* note 8, at 95. For a discussion of some of the issues at stake, see the insightful discussion in ARTHUR H. WILLIAMSON, SCOTTISH NATIONAL CONSCIOUSNESS IN THE AGE OF JAMES VI: THE APOCALYPSE, THE UNION AND THE SHAPING OF SCOTLAND'S PUBLIC CULTURE 64-85 (1979).

42. *See also* Levack, *supra* note 7, at 216-19.

43. *See* Cairns, *supra* note 8, at 66-67, 94-97; René Filhol, *The Codification of Customary Law in France in the Fifteenth and Sixteenth Centuries*, *in* GOVERNMENT IN REFORMATION EUROPE, 1520-1560, at 265 (H.J. Cohn ed., 1971); John P. Dawson, *The Codification of the French Customs*, 38 MICH. L. REV. 765 (1940).

perfyte writtin law quhairupoun all iugeis may knaw how to proceid and decerne," before appointing a commission to "visite the bukis of the law actis of parliament and decisionis befoir the sessioun And draw the forme of the body of our lawis alsweill of that quhilk is alreddy statute as thay thingis that were meit and convenient to be statute."[44] This ambitious project largely failed.[45] What is notable is the overwhelming stress on written law and the dissatisfaction with reliance on "practick."

If such ambitions proved impossible to fulfil, a Commission was appointed in 1592 with the rather more limited and realistic aim of gathering the "municipall lawes and actis of parliament," reflecting on "quhat lawis or actis necessarlie wald be knawin to the subiectis" and causing them to be delivered in authenticated copies to the royal printer to be printed.[46] Much of this work seems to have been carried out by John Skene, later appointed Clerk Register, whose heroic efforts produced an edition in 1597 of the statutes from the time of James I (1424) and another in 1609 of the medieval law texts, considered to be legislation, notably *Regiam Majestatem*.[47]

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44. 3 APS, *supra* note 28, at 89.

45. Cairns, *supra* note 8, at 96. It may have led to the production of BALFOUR, *supra* note 31, compiled between 1574 and 1583, drawn from the Acts of Parliament, the decisions of the Session, and the "Auld Lawes".

46. Act 1592, c. 45, *in* 3 APS, *supra* note 28, at 564. This act is another obvious use of the term municipal law to refer exclusively to statutes.

47. THE LAWES AND ACTES OF PARLIAMENT, MAID BE KING IAMES THE FIRST AND HIS SUCCESSOURS KINGS OF SCOTLAND: VISIED, COLLECTED AND EXTRACTED FURTH OF THE REGISTER (1597); with a separate title page was DE VERBORUM SIGNIFICATIONE. THE EXPOSITION OF THE TERMES AND DIFFICILL WORDES, CONTEINED IN THE FOURE BUIKES OF REGIAM MAJESTATEM, AND UTHERS, IN THE ACTES OF PARLIAMENT, INFEFTMENTS, AND USED IN PRACTIQUE OF THIS REALME, WITH DIVERSE RULES, AND COMMOUN PLACES, OR PRINCIPALLES OF THE LAWES: COLLECTED AND EXPOUND BE M. JOHN SKENE, CLERKE OF OUR SOUVERAINE LORDIS REGISTER, COUNCELL AND ROLLES (1597); REGIAM MAJESTATEM SCOTIAE, VETERES LEGES ET CONSTITUTIONES, EX ARCHIVIS PUBLICIS, ET ANTIQUIS LIBRIS MANUSCRIPTIS COLLECTAE, RECOGNITAE, ET NOTIS JURIS CIVILIS, CANONICI, NORTMANNICI AUCTORITATE CONFIRMATIS, ILLUSTRATAE, OPERA ET STUDIO JOANNIS SKENAEI, REGIAE MAIESTATI A CONCILIIS ET ARCHIVIS PUBLICIS. ANNOTANTUR IN MARGINE, CONCORDANTIAE JURIS DIVINI, LEGUM ANGLIAE, ET IURIS NOVISSIMI SCOTIAE QUOD ACTA PARLIAMENTI, VULGO VOCANT. CATALOGUM EORUM QUAE IN HIS LIBRIS CONTINETUR VICESSIMA PAGINA, INDICAT. CUM DUPLICI INDICE, ALTERO RERUM, ALTERO VERBORUM LOCUPLETISSIMO (1609); REGIAM MAJESTATEM. THE AULD LAWES AND CONSTITUTIONS OF SCOTLAND, FAITHFULLIE COLLECTED FURTH OF THE REGISTER AND OTHER AULD AUTHENTICK BUKES, FRA THE DAYES OF KING MALCOLME THE SECOND, UNTILL THE TIME OF KING JAMES THE FIRST, OF GUDE MEMORIE: AND TREWLIE CORRECTED IN SINDRIE FAULTS AND ERROURS, COMMITTED BE IGNORANT WRITERS. . . . BE SIR JAMES SKENE OF CURRIEHILL . . . QUHEREUNTO ARE ADJOINED TWA TREATISES, THE ANE, ANENT THE ORDER OF PROCES OBSERVED BEFORE THE LORDS OF COUNSELL, AND SESSION: THE OTHER OF CRIMES, AND JUDGES IN CRIMINALL CAUSES (1609). *See* Cairns, *supra* note 8, at 95-97. On Skene, see John W. Cairns, T. David Fergus & Hector L. MacQueen, *Legal Humanism and the History of Scots Law: John Skene and Thomas Craig*, *in* HUMANISM IN RENAISSANCE SCOTLAND 48, 52-56 (John MacQueen ed., 1990).

Grand projects similar to that of 1575 were again mooted in 1633, 1649, 1681, and 1695.[48] It is helpful to examine one. In 1681, it was proposed to appoint a commission to examine and assess "the whole Laws Statuts and Acts of Parliament of this his ancient Kingdom as weel printed as not printed, Together with the Customs Consuetuds and Judiciall Practicks either in the Supream or Subalterne Courts whether Civil or Criminal, which are or have been observed as Laws or Rules of Judgement." The commission was then to collect and digest these, resolving any difficulties or contradictions and omitting all obsolete matter. Finally these collections were to be digested and reduced "into such convenient order As [the commission] shall judge fitt" and, omitting all obsolete or abrogated acts, delivered to be enacted in the form of laws.[49]

While the ambition of such a project probably again made it impossible to bring to a successful conclusion, the 1680s did see the publication of two important new editions of the statutes by Sir Thomas Murray of Glendook, one in folio, the other in duodecimo.[50] The new collections made by Glendook, if flawed by modern standards, were found satisfactory by contemporaries.

The instructions for the various codification projects proposing the ultimate reduction of all customs and court "practicks" to the form of statutes indicate the overwhelming priority and authority given to legislation as constituting the municipal law: indeed, in 1686, Sir George Mackenzie of Rosehaugh (1636-91), Lord Advocate and prolific author, noted that "our Statutes . . . be the chief Pillars of our Law."[51] Part of the problem with the material, however, was that it was difficult to use and

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48. Cairns, *supra* note 8, at 98, 132-33.

49. Act 1681, c. 94, *in* 8 APS, *supra* note 28, at 356.

50. THE LAWS AND ACTS OF PARLIAMENT MADE BY KING JAMES THE FIRST, SECOND, THIRD, FOURTH, FIFTH, QUEEN MARY, KING JAMES THE SIXTH, KING CHARLES THE FIRST, KING CHARLES THE SECOND WHO NOW PRESENTLY REIGNS, KINGS AND QUEEN OF SCOTLAND. COLLECTED, AND EXTRACTED, FROM THE PUBLICK RECORDS OF THE SAID KINGDOM, BY SIR THOMAS MURRAY OF GLENDOOK KNIGHT, AND BARONET, CLERK TO HIS MAJESTIE'S COUNCIL, REGISTER, AND ROLS, BY HIS MAJESTIE'S SPECIAL WARRAND (1681); THE LAWS AND ACTS OF PARLIAMENT MADE BY KING JAMES THE FIRST, AND HIS ROYAL SUCCESSORS, KINGS AND QUEEN OF SCOTLAND IN TWO PARTS . . . COLLECTED, AND EXTRACTED, FROM THE PUBLICK RECORDS OF THE SAID KINGDOM, BY SIR THOMAS MURRAY OF GLENDOOK (1682-83).

51. GEORGE MACKENZIE, OBSERVATIONS ON THE ACTS OF PARLIAMENT, MADE BY KING JAMES THE FIRST, KING JAMES THE SECOND, KING JAMES THE THIRD, KING JAMES THE FOURTH, KING JAMES THE FIFTH, QUEEN MARY, KING JAMES THE SIXTH, KING CHARLES THE FIRST, KING CHARLES THE SECOND. WHEREIN 1. IT IS OBSERV'D, IF THEY BE IN DESUETUDE, ABROGATED, LIMITED, OR ENLARGED. 2. THE DECISIONS RELATING TO THESE ACTS ARE MENTION'D. 3. SOME NEW DOUBTS NOT YET DECIDED, ARE HINTED AT. 4. PARALLEL CITATIONS FROM THE CIVIL, CANON, FEUDAL AND MUNICIPAL LAWS, AND THE LAWS OF OTHER NATIONS, ARE ADDUC'D, FOR CLEARING THESE STATUTES sig. A4r (1686).

understand, while some acts were clearly obsolete and in desuetude. Mackenzie attempted to enhance the utility of the printed collections with his *Observations* on the statutes, a kind of annotation of them explaining where they were obsolete and interpreting them in the light of the decisions of the court and the learning of the *ius commune*.[52] He also devoted many pages to the making of statutes and their interpretation in his unpublished work on the sources and origins of law.[53]

C. Statute, Custom, and Common Law

By the time of Mackenzie, however, the idea of "municipal law" had acquired a wider scope in Scotland than that attributed to it around 1600. Mackenzie drew on the analysis of Justinian's *Institutes* in his elementary work, *Institutions of the Law of Scotland*, first published in 1684, to state that "Our *Municipal Law* of *Scotland*, is made up partly of our *written*, and partly of our *unwritten Law*."[54] This reflected the increasing influence of Justinian's *Institutes* in this period, as disparate materials were progressively synthesised into a more consciously conceived national law.[55]

For Mackenzie, the written law of Scotland consisted of the acts of Parliament, the acts of sederunt (rulings on procedure and administration of justice made by the Lords of Session), and the books of the *Regiam Majestatem* with the other "Auld Lawes" as edited by Skene. Unwritten law was "*the constant tract, of decisions, past by the* Lords of Session, which is considered as Law; the Lords respecting very much their own Decisions" and also "our *Ancient customes* . . . which have been universally received among us." Mackenzie also pointed out that "such is the Force of custome, or consuetude, that if a Statute, after long standing has never been in observance or having been, has run in

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52. *Id.*

53. Mackenzie, Discourse, *supra* note 23, fols. 18r-46r. A modern biography of Mackenzie is wanting. There is, however, much of value about him in JACKSON, *supra* note 28, *passim*, while ANDREW LANG, SIR GEORGE MACKENZIE, KING'S ADVOCATE, OF ROSEHAUGH: HIS LIFE AND TIMES, 1636(?)-1691 (1909) is still useful.

54. GEORGE MACKENZIE, THE INSTITUTIONS OF THE LAW OF SCOTLAND 5 (2d ed. 1688); J. INST. I.i. There are textual problems with this work, but these do not affect these comments in a significant way: *see* John W. Cairns, *The Moveable Text of Mackenzie: Bibliographical Problems for the Scottish Concept of Institutional Writing*, *in* CRITICAL STUDIES IN ANCIENT LAW, COMPARATIVE LAW AND LEGAL HISTORY: ESSAYS IN HONOUR OF ALAN WATSON 235 (John W. Cairns & Olivia F. Robinson eds., 2001).

55. *See* Klaus Luig, *The Institutes of National Law in the Seventeenth and Eighteenth Centuries*, 17 JURID. REV. (n.s.) 193 (1972); J.W. Cairns, *Institutional Writings in Scotland Reconsidered*, 4 J. OF LEGAL HIST. 76 (1983) [= NEW PERSPECTIVES IN SCOTTISH LEGAL HISTORY 76 (Albert Kiralfy & Hector L. MacQueen eds., 1984)].

desuetude; *Consuetude* prevails over the *statute*."[56] Francis Grant (c.1660-1726) gave a similar account, describing Scots municipal law as "what's *peculiar* to us; in Statutes, Custom, and old Maxims of Justice and Government."[57]

Despite this more recognised role for custom and court decisions in the municipal law, both Mackenzie and Grant still emphasised the overwhelming authority of Roman Civil law, and it is necessary to appreciate this to understand the contemporary attitude to statutes and custom. Mackenzie claimed that Roman law "has great influence in *Scotland*, except where Our own express Laws, or Customes, have receded from it." Grant stated that young lawyers ought to know "our municipal and common laws;" Scots municipal law was what was "*peculiar* . . . *different* from the *Roman Law*;" while, by "the *Common*," he understood "the *Roman Law*." Mackenzie commented that "by the common Law in our Acts of Parliament is meant the *Civil Law* of the *Romans*."[58]

This continuing traditional identification of "common law" with the Roman law (understood in a broad sense as the law received and developed in the middle ages) provides the context in which Mackenzie's comment on the interpretation of statutes should be understood. He stated that they should be so interpreted as to avoid absurdity and "as may best agree with the mind of the *Legislator*, and *Analogie*, or general design of the common Law."[59] There can be no doubt but that Mackenzie here meant the *ius commune*. Indeed, he later pointed out that he followed "*Justinians* method" so that there might be "as little difference found betwixt the Civil Law and ours, as is possible."[60] Similarly, a generation before Mackenzie, Lord Kerse had interpolated into the Practicks compiled by his father, Sir Thomas Hope, the comment that "Statuts contrare to the commone law ar stricti juris, and aucht not be extended."[61] Mackenzie himself wrote that "Correctory Law[s]" should

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56. MACKENZIE, *supra* note 54, at 5-7.

57. GRANT, *supra* note 23, at 2. For a persuasive argument that this treatise was written by Francis Grant, Lord Cullen, see Clare Jackson, *Revolution Principles, Ius Naturae, and Ius Gentium in Early-Enlightenment Scotland: The Contribution of Sir Francis Grant, Lord Cullen (C. 1660-1726), in* EARLY MODERN NATURAL LAW THEORIES: CONTEXT AND STRATEGIES IN THE EARLY ENLIGHTENMENT 107, 128 n.46, 130 n.63 (T.J. Hochstrasser & Peter Schröder eds., 2003).

58. GRANT, *supra* note 23, at 2; MACKENZIE, *supra* note 54, at 3-4. GRANT, *supra* note 23, at 45-58, also emphasises this meaning of common law in Scottish statutes and its statutory authority in Scotland.

59. MACKENZIE, *supra* note 54, at 8.

60. *Id.* at 9.

61. 1 THOMAS HOPE, HOPE'S MAJOR PRACTICKS, 1608-1633, at 2 (J.A. Clyde ed., Stair Society 1937-1938). This is an evident reference to the Commentators' brocard, *statuta stricte*

be "strictly interpreted," which applied not only to "these Laws which restrict the Statutory Law but even in these which restrict the Common Law."[62] In other words, the common law, *ius commune*, or Roman law was so central to Scots law, that statutes were to be interpreted strictly if they contradicted it. Roman law was regarded as dominant. This was so, even though for Mackenzie, despite the explicit inclusion of "unwritten law" in the municipal law, statutes, rather than custom, were necessarily the core of the municipal law. He considered that law derived its authority from a superior power: in the case of natural law, this was God; in the case of the municipal law, this was the king, acting with the Three Estates, the legislative power being the "*Kings Prerogative*."[63] Though Grant emphasised that legislation was by both king and estates, he also stressed the importance of legislation, arguing, for example, that the common (Roman) law was binding in Scotland because of statutory recognition.[64]

D. Decisions and Common Law

Mackenzie recognised the importance of the decisions of the Session, but considered them only practick, not law, as the Lords of Session were not legislators.[65] Indeed, he pointed out that the Lords did not need to follow their earlier decisions, but they generally did, so that a "*constant tract, of decisions*" could be taken as establishing law.[66] This said, court decisions were, for Mackenzie, an unsatisfactory source, often reached corruptly or hastily by ignorant judges. Nonetheless, he laid down some conditions for attaching authority to decisions:[67]

> 1 I conceive that Decisions by the Prince though Judgeing himself, and even the Decisions of King and Parliament should not extend beyound Private Cases.

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sunt interpretanda. *See, e.g.*, FRANZ WIEACKER, A HISTORY OF PRIVATE LAW IN EUROPE 101-03 (Tony Weir trans., 1995).

62. Mackenzie, Discourse, *supra* note 23, fol. 37v; *see also id.* fol. 41r: "our Law's [sic] should be strictly interpreted." This is in reliance on Act 1428, c. 11, *in* 2 APS, *supra* note 28, at 16.

63. MACKENZIE, *supra* note 54, at 5; Mackenzie, Discourse, *supra* note 23, fols. 8r, 18v.

64. GRANT, *supra* note 23, at 43, 67.

65. Mackenzie, Discourse, *supra* note 23, fols. 54r, 55r.

66. MACKENZIE, *supra* note 54, at 6.

67. Mackenzie, Discourse, *supra* note 23, fols. 60v-61v. It is easy to recognise the origin of Mackenzie's views in the writings of the *ius commune* on the topic. For a useful overview, see G.R. DOLEZALEK, "STARE DECISIS:" PERSUASIVE FORCE OF PRECEDENT AND OLD AUTHORITY (12TH-20TH CENTURY) *passim* (University of Cape Town Inaugural Lecture 1989); COING, *supra* note 30, at 125-26.

2 A constant Series of Decisions, which the Civill Law calls, res perpetuo judicatae, ought to be in great veneration.[68]

3 Where the Lords declare they will decide soe in all tyme comeing great respect ought to be had to them, for then it is to be presumed the Case was fully debated and Considered.

4 Respect is to be had to solemn Decisions in praesentia, and therefore I conceive the Remarker of the Decision should observe whither the Cause was decided upon a Debate in presentia or upon a Report from the Utter House, and in this Case he should name the Reporter, as the French Decisions doe, for there is great difference amongst Reporters both as to Learning and Integrity.[69]

5 If the Reasons upon both sides seeme to hang equally in the Scale of Justice, then the Authority even of a single Decision may Cast the Ballance.

6 It must be considered if the Cause was well debated, and the prevailer neither related to great Men, nor Judges, for it is enough that these may sometimes gaine a Cause without debauching our Law to Posterity: . . . .[70] And as Christanaeus [*sic*] observes they are to be only respected when they are pronunced secundum Ius Commune et Analogiam . . . .[71]

In fact, as the last reference to Paulus Christinaeus suggests, Mackenzie was rather of the opinion that

> [o]ur Law [should be] directed by the Writings of Learned Lawyers who give their Judgment in abstract Cases wherein none are concerned but their own Souls, Reputation and Posterity, which generally tye men to be Just,

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68. He here cites D. 1.3.38.

69. Mackenzie is here referring to a Lord of Session sitting as an Ordinary in the Outer House reporting a point of difficulty to the Lords sitting as a collegiate bench in the Inner House. The "Reporter" is the Lord Ordinary.

70. Mackenzie here cited and quoted JEAN DE CORAS [CORASIUS], IN PRIMUM PANDECTARUM LIBRUM, AC SECUNDI TITULUM PRIMUM (DIGESTUM VETUS VOCANT) COMMENTARII, 300 (on D. 1.5.25) (1584):

> Quo circa nec senatus quidem nostri placita, quae nos aresta dicimus, in aliis causis, & negotiis ullam habent iuris necessitatem, quam inter eos, inter quos decreta sunt: unde iis qui tantopere senatusconsultorum exemplis moventur, illud Ciceronis obiicere soleo, non exempla maiorum quaerenda esse, sed consilium eorum, a quo exempla nata sunt inquirendum.

He commented that most of the lawyers, including Sandaeus and Mornacius were of the same view, citing JOHAN VAN DEN SANDE, DECISIONES FRISICAE, SIVE RERUM SUPREMA FRISIORUM CURIA JUDICATARUM LIBRI QUINQUE 61 (II.iii.6) (1680), and ANTOINE MORNAC, OBSERVATIONES IN XXIV. PRIORES LIBROS PANDECTARUM 24 (on D. 1.3.38) (1654).

71. The reference is to 1 PAUL VAN CHRISTYNEN, PRACTICARUM QUAESTIONUM RERUMQUE IN SUPREMIS BELGARUM CURIIS ACTARUM ET OBSERVATARUM DECISIONES 1-3 (Decisiones 1 & 2) (1626-33). The quotation, if indeed meant to be taken as such, is not exact, but certainly gives the gist of Christinaeus' views.

> and who have great Leisure to meditate upon what they transmit to Posterity as Law.[72]

In other words, when problems and uncertainty arose, courts should refer to the *ius commune* and its authors, with the views of whom decisions should always be compatible. Custom was authoritative only insofar as the king and people tacitly consented to it: custom was not created as such by a court decision, but a decision could make a custom known, which could then be sufficiently established if tacitly acquiesced in by the king and people.[73]

This meant that, for Mackenzie, the role of the Civil law was evidently very great, especially given the approach to statutes that he advocated. His traditional views on the centrality of statutes to the municipal law of Scotland as *ius proprium*, also emphasised their inherent superiority to custom and practick. Uncertainty was to be resolved by reference to the Civil law. This was because "God Almighty did inspire the Romans to digest the principles of Reason into a Body of their positive Law, to the End Nations might have common principles wherein they might agree."[74] Grant also saw Roman law as divinely inspired.[75] He argued that it was applied in Scotland "not of meer Discretion, or as a *variable Directory* to Reason", but rather because "the Civil-common Law obtains, *now*, of *Necessity*, or as binding". The Scots had adopted the "Civil-common Law" because their "peculiar Statutes, and consuetudinary Maxims, were *very few*". For Grant, insistence on reliance on Roman law was vital because "some, out of Ignorance, Indolence, Desire, or Desine; when pinch'd in a Case" made "*elusory*" this rule of reliance on Roman law, "by setting up *themselves*, in Place of it; for *Supreme*; that is, pretending their own *private Reason*; alias, *Maggot*".[76] In other words, Roman law as common law was authoritative and applicable in Scotland. It might be identifiable with *ius gentium* and *ius naturale*, which certainly could be seen as giving it a moral content, but it was binding in itself, and individual reason (which

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72. Mackenzie, Discourse, *supra* note 23, fol. 57v. It is worth noting that he did not place as much weight on the *Consilia* of lawyers, "whereof there are very many," because of the interest of those who employed them to make them, and the same applied to some extent to the "opinions . . . of Universitys [*sic*], whereof many are extant, [which] are of great Authority Abroad, but generally they are paid for, which diminishes much their Authority": *id.* fols. 57v-58r. GRANT, *supra* note 23, at 139, was of the same view: "what's delivered in *Tractates* and *Commentaries*, preponderates *Consultations* or *Responses*; that are more obnoxious to *Partiality*, and have not *at one Time* such *total Views* of Analogy."

73. MACKENZIE, *supra* note 54, at 7; Mackenzie, Discourse, *supra* note 23, fol. 63v.

74. Mackenzie, Discourse, *supra* note 23, fol. 18r.

75. GRANT, *supra* note 23, at 4-5, 11-12.

76. *Id.* at 45.

in reality was often reduced to "maggot" or "whim") could not replace it, by claiming to be superior in its results.

E. Viscount Stair, Custom, and Natural Law

A quite different attitude can be identified in the work of Sir James Dalrymple, Viscount Stair (1619-95)—a contrasting approach that in some ways anticipated and influenced developments in the later eighteenth century. For many years President of the Court of Session, Stair was the slightly older contemporary of Mackenzie and a whole generation in advance of Grant.[77] Stair's major work was his *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*, substantially written by 1662, but first published in 1681, with a second edition in 1693.[78] In the dedication to King Charles that prefaced the first edition, Stair wrote that "[o]ur law is most part consuetudinary, whereby what is found inconvenient is obliterated and forgot;" moreover, he exulted that "[w]e are not involved in the labyrinth of many and large statutes."[79] In direct contradiction to Mackenzie (and indeed all those who proposed codification of the Scots law), Stair considered custom to be superior to statutory law, because as a law it was "wrung out from . . . debates upon particular cases, until it come to the consistence of a fixed and known custom." This allowed "the conveniences and inconveniences thereof through a tract of time" to be "experimentally seen." Thus, what was "found in some cases convenient, if in other cases afterwards . . . found inconvenient" would prove "abortive in the womb of time" before achieving "the maturity of a law." In statutes, however, the lawgiver had immediately to "balance the conveniences and inconveniences;" in so doing, he could and often did make mistakes, so that there were left "*casus incogitati*." He admitted that initially in customary law "the people run some hazard . . . of their judges' arbitrement;" but, when the law was fully developed, they had the

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77. A modern biography of Stair is wanting: *but see* A.J.G. MACKAY, MEMOIR OF SIR JAMES DALRYMPLE, FIRST VISCOUNT STAIR, PRESIDENT OF THE COURT OF SESSION IN SCOTLAND AND AUTHOR OF THE "INSTITUTIONS OF THE LAW OF SCOTLAND": A STUDY IN THE HISTORY OF SCOTLAND AND SCOTCH LAW DURING THE SEVENTEENTH CENTURY (1873). G.M. Hutton, *Stair's Public Career*, *in* STAIR TERCENTENARY STUDIES 1 (D.M. Walker ed., Stair Society 1981), is unsatisfactory [hereinafter STAIR TERCENTENARY STUDIES].

78. I shall here use the edition of 1981, *supra* note 23, based on the second of 1693. Little of value has been published on the crucial issue of the development of the text of STAIR, INSTITUTIONS, and the relationship between the two editions and the manuscripts, of which there are two stems dating from 1662 and 1666 respectively: *see* ALAN WATSON, THE MAKING OF THE CIVIL LAW 31 (1981). On the textual problems, see Cairns, *supra* note 54, at 245-47.

79. STAIR, *supra* note 23, at 60-61.

advantage that what had been changed by developing custom was discarded and completely forgotten. On the other hand, "in statutory written law, the vestiges of all the alterations remain" and kept increasing in volume, which meant that the statutes ceased "to be evidences and securities to the people," but instead became "labyrinths, wherein they are fair to lose their rights, if not themselves."[80]

Stair placed Scots law in the context of the *ius naturale* and the *ius gentium*. His account of natural law was very strongly influenced by Hugo Grotius, although his views differed from those of the Dutch author.[81] For Stair, the basic common principles of natural law were "known to men without reasoning and experience . . . written in the hearts of men." The fact that these principles were "known to men every where through the world" demonstrated that they constituted natural law. God also gave men reason so that "thence they might by consequence deduce his [i.e., natural] law in more particular cases."[82] Like Grotius, Stair did not think that natural law had simply been willed by God: he perhaps accepted a realist rather than a voluntarist position on natural law, but he gave greater scope for God than the Dutch author, and his approach in this respect, perhaps deliberately, was ambiguous to avoid theological problems.[83] Thus, not even God could change natural law, "even though he be accountable to, and controllable by none, and so hath absolute freedom of his choice;" this was because God "doth . . . unchangeably determine himself by his goodness, righteousness, and truth" and could not "deny himself, or act unsuitably to his divine perfections . . . because his goodness, justice and truth are as certain by his free choice, as are his omnipotency and sovereignty."[84] As well as "these dictates of reason (wherein law consists) which are in the understanding," there was "an inclination in the will to observe and follow those dictates, which is justice."[85] Stair explained that "[t]his law

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80. *Id.* at 84-85 (I.i.15).

81. The clearest account of Stair's legal theory is to be found in P.G. Stein, *The Theory of Law*, *in* STAIR TERCENTENARY STUDIES, *supra* note 77, at 181. For a comparison of the different approaches of Stair and Mackenzie to natural law and fundamental laws, see Clare Jackson, *Natural Law and the Construction of Political Sovereignty in Scotland, 1660-1690*, *in* NATURAL LAW AND CIVIL SOVEREIGNTY: MORAL RIGHT AND STATE AUTHORITY IN EARLY MODERN POLITICAL THOUGHT 155 (Ian Hunter & David Saunders eds., 2002).

82. STAIR, *supra* note 23, at 75 (I.i.3-4).

83. *See* A.H. CAMPBELL, THE STRUCTURE OF STAIR'S INSTITUTIONS 26-29 (David Murray Lecture 1954). Campbell explores the issue of Pufendorf's influence on Stair; however, the date of composition of the INSTITUTES (the early 1660s, at the latest), negates much of his discussion. The matter of the relationship of Stair to Pufendorf is, however, much more complicated than has been thought, *see* Thomas Richter, *Did Stair Know Pufendorf?*, 7 EDINBURGH L. REV. 367 (2003).

84. STAIR, *supra* note 23, at 73-74 (I.i.1).

85. *Id.* at 74 (I.i.2).

of nature is also called Equity, from that equality it keeps amongst all persons," while "equity is also taken for the law of rational nature."[86]

F. Human Law, Custom, and Scots Law

According to Stair, "[h]uman law" was "that which, for utility's sake" was "introduced by men . . . either by tacit consent, by consuetude or custom, or by express will or command of those in authority, having the legislative power."[87] According to their origin, laws were classed as written or unwritten. Stair admitted that "law" was sometimes taken in "opposition to custom, as it comprehendeth equity or the natural law, and the edicts and statutes of nations and their law-givers." Further, he noted that "law" was sometimes "more strictly" understood in the "vulgar distinction of law, statute, and custom" in the sense of "equity or the common law, as the customs and statutes [signify] the peculiar recent laws of several nations."[88] In other words, "law" had a popular meaning of the *ius commune*, while national or local laws were considered as statutes and custom, the *ius proprium*.

Human law was divided by Stair into laws common to many nations and laws of one nation. The former, the law of nations, "stands in the customs owned and acknowledged by all, or at least the most civil nations." These were generally "nothing else but equity and the law of nature and reason." The "common law of reason" was what was generally understood in Scotland by the term "common law," in contrast to England where the term applied to "the common current of their civil law, as opposite to statute and their late customs." This understanding of the term was also occasionally used in Scotland; but "oft-times by the common law, we understand the Roman law, which in some sort is common to many nations."[89]

Stair next explained that the "law of each society of people under the same sovereign authority" was called the civil law; though the term "civil law" was now generally appropriated to the civil law of the Romans "as the most excellent." There was an "affinity" between the law of Scotland and the law of the Romans so that, though it was not recognised in Scotland "as a law binding for its authority," yet it was

86. *Id.* at 76 (I.i.6).
87. *Id.* at 79 (I.i.10).
88. *Id.*
89. *Id.* at 79-80 (I.i.10-11).

"followed for its equity."[90] In this he put forward a view very similar to that expressed earlier by Thomas Craig.[91]

After explaining the necessity of human law (which derived its authority from natural law, being but the "public sponsions of princes and people" (promises being enforceable under natural law), he turned to Scots law.[92] Reflecting his view of the superiority of custom, he explained that Scots "customs, as they have arisen mainly from equity, so they are also from the civil, canon, and feudal laws," which thus, especially the civil law, were of "great weight" in Scotland, but which were only received "according to their equity and expediency, *secundum bonum et æquum*."[93] He stated that the historical origin of Scots law (as of all laws) could "at first" have been "no other than *æquum et bonum*, equity and expediency." This was because no nation could at its first coming together have enacted laws, nor could it have customs prior to coming together as a nation. Thus, "nations of old submitted to their princes, choosing . . . to refer their interests and differences to the determination of their sovereigns," rather than allow people to exercise self-help. Thus, from the beginning, government required submission to a sovereign. After the constitution of government, nations next came to be "ruled by consuetude," which declared equity and constituted expediency. Next came positive laws, statutes. This meant that "every nation, under the name of law, understand their ancient and uncontroverted customs time out of mind, as their first fundamental law." Stair applied this schematic historical analysis to both Rome and England (mentioning that in the latter example, the term "common law" was applied to the "ancient and unquestionable customs").[94]

Turning to Scotland, he stated that "we are ruled in the first place by our ancient and immemorial customs, which may be called our common law."[95] What is striking is Stair's adoption of this English usage (though once known in medieval Scotland as referring to the law common

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90. *Id.* at 80 (I.i.12).

91. *See* Cairns, *supra* note 15, at 150-58; John W. Cairns, *The Civil Law Tradition in Scottish Legal Thought*, *in* THE CIVILIAN TRADITION AND SCOTS LAW: ABERDEEN QUINCENTENARY ESSAYS 191, 204-06 (David L. Carey Miller & Reinhard Zimmermann eds., 1997) [hereinafter CIVILIAN TRADITION AND SCOTS LAW].

92. Stair, *supra* note 23, at 82-85 (I.i.15). On Stair and the "social contract," see Neil MacCormick, *Law, Obligation and Consent: Reflections on Stair and Locke*, 65 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 387 (1979).

93. STAIR, *supra* note 23, at 85 (I.i.16).

94. *Id.* at 86-87 (I.i.16).

95. *Id.* at 87 (I.i.16).

throughout Scotland).[96] It is in contradiction to what he had said earlier about the term being normally understood in Scotland in the sense of *ius gentium* or Roman law.[97] Of course, in the first text he did acknowledge that "sometimes" in Scotland the term was used in the English sense, and here he also commented that the term "common law" sometimes meant "equity . . . or the civil Roman law."[98] The form of the verb "may be called" probably should be taken as indicating Stair's consciousness that this was not the normal understanding of the phrase, used here on analogy with English practice.

He next commented that "[i]n the next place are our statutes, or our acts of Parliament." These were inferior to the ancient law in that they were "liable to desuetude, which never encroaches on the other."[99] This led Stair into a discussion of the authority of the Lords of Session to issue Acts of Sederunt, which Mackenzie considered a part of the written law. Stair considered the power of the Lords of Session and the authority of their decreets, and concluded that "frequent agreeing decisions are more effectual than acts of sederunt . . ., which do easily go into desuetude." A "custom by frequent decisions" had greater force than "a simple decision." Stair thus ended up with what appears to be a hierarchy of sources: ancient custom, statutes, and recent customs revealed (created?) by decisions of the courts. Finally, should "our ancient law, statutes, and our recent customes and practiques [be] defective, recourse is had to equity." This was because it was the "first and universal law." There was also recourse "to expediency, whereby laws are drawn in consequence *ad similes casus*."[100]

The contrast with Mackenzie, Grant and other Scottish writers, and the aspirations of the Parliament is evident. For Stair ancient custom and modern custom (the practick of the courts) were the main constituents of Scots law, and it was good that this was so. Statutes were inferior to

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96. On the use of the term "common law" in Scotland in this sense, see W.D.H. Sellar, *The Resilience of the Scottish Common Law*, *in* CIVILIAN TRADITION AND SCOTS LAW, *supra* note 91, at 149 [hereinafter Sellar, *The Resilience of the Scottish Common Law*]. Sellar argues that in this usage Stair is part of a continuous tradition, which might suggest that this understanding of the term "common law" was part of a continuous tradition in Scotland. I would disagree; Stair is, at most, reviving a usage that had become obsolete. *See* further on Sellar's views, W.D.H. Sellar, *The Common Law of Scotland and the Common Law of England*, *in* THE BRITISH ISLES 1100-1500: COMPARISONS, CONTRASTS AND CONNECTIONS 82 (R.R. Davies ed., 1988). John Ford, *The Law of the Sea and the Two Unions*, *in* ANGLO-SCOTTISH RELATIONS FROM 1603 TO 1900, at 127, 131 (T.C. Smout ed., 2005), makes some perceptive remarks.

97. STAIR, *supra* note 23, at 80 (I.i.11).

98. *Id.* at 87 (I.i.16).

99. *Id.*

100. *Id.* at 87-88 (I.i.16).

ancient custom in being subject to desuetude; moreover, extensive legislation tended to create confusion in the law. Scotland was accordingly lucky in having very few statutes. Here it is important to look at an insight of David Sellar. He has pointed out that Stair's examples of ancient custom were all taken from Anglo-Norman law and are all found in *Regiam Majestatem*.[101] This is crucial to his different picture. While Mackenzie and others considered *Regiam* as a statute, as part of Scotland's *lex scripta*, Stair, following the earlier example of Craig, rejected its authority, because of its foundation in the English treatise attributed to Glanvill.[102] He therefore had to ascribe to ancient custom the areas of law dealt with in *Regiam*. Of course, Craig had done so too; but his sixteenth-century focus on the statutes as central to Scots municipal law, with his different understanding of the relationship between the *ius proprium* and the *ius commune*, led him to state that because they had so little written law Scots tended to rely much on the *lex scripta* of the Roman Civil law. For Stair, rejection of the authority of *Regiam* resulted in a focus on the ancient customs of Scotland because of his views on the superiority of custom over statute.

G. Scots Law and the Usus Modernus Pandectarum

Despite the power of Stair's vision of a Scottish customary law advancing through the progressive inscription of equity into law by the Court of Session, there can be little doubt but that Mackenzie still expressed the general and indeed typical view of Scots about the nature of their law and the best mode of law-making. Statutes were the core of the law. Any other view makes nonsense of the proposals to "codify" the law in the 1680s and 1690s. Authors were very cautious about ascribing a direct and clear law-making role to the judges.[103] Failing statute or custom, recourse was to be had to the *ius commune*.

It is probably fair to describe Scotland, around 1700, as a country of the *usus modernus Pandectarum*, in which the work of courts and legal scholars had been progressively blending the Roman law and the

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101. Sellar, *Resilience of the Scottish Common Law*, *supra* note 96, at 155.

102. STAIR, *supra* note 23, at 88-89 (I.i.16); CRAIG, *supra* note 30, at 51 (I.viii.11). *See generally* Cairns, Fergus & MacQueen, *supra* note 47, at 61-64; Hector L. MacQueen, *Glanvill Resarcinate: Sir John Skene and Regiam Majestatem*, *in* THE RENAISSANCE IN SCOTLAND: STUDIES IN LITERATURE, RELIGION, HISTORY AND CULTURE OFFERED TO JOHN DURKAN 385 (A.A. MacDonald, Michael Lynch & I.B. Cowan eds., 1994).

103. *See, e.g.*, SIR JAMES STEUART OF GOODTREES, DIRLETON'S DOUBTS AND QUESTIONS IN THE LAW OF SCOTLAND, RESOLVED AND ANSWERED 70 (1715). SIR JOHN NISBET OF DIRLETON, SOME DOUBTS AND QUESTIONS, IN THE LAW; ESPECIALLY OF SCOTLAND (1698), was a posthumous publication, Nisbet having died in 1687.

municipal law, the *ius commune* and the *ius proprium*, into a unique system, which could be understood within a general framework of the *ius naturale* and *ius gentium*.[104] Despite their crucial intellectual differences, this is the general context within which the work of Stair and Mackenzie must be understood. The primary source of the law was statutes. There were also ancient customs of feudal origin, but the vital source of development, influencing judicial decision-making, was the Roman law and its modern commentators, including the views of foreign courts. It is here important to remember that when Stair saw the courts advancing the law through equity and expediency, he considered that, as equity, the provisions of Roman law were often followed, so that we need not see the result he achieved—if not his reasoning—as necessarily dramatically opposed to that of Mackenzie.

Yet the differences between Stair and Grant or Mackenzie were obvious, and were focused not only around differing emphases on the role of the courts and custom, but also on the value put on the *ius commune*. Given that Grant wrote for law students, it is tempting to see his essay as intended to be an antidote to any exposure to Stair's views. Notable is his stress on the superiority of reliance on Roman law over reliance on reason, which is a constant theme through his work. He criticised the frustration of "the *Obligation* of the *Roman Law* . . . under the false Notion of *Reason*, or material justice" and argued that "*Reason* . . . is the *Eye* to see, not the *Hand* to *make*, *Law*:" it was Roman law that provided the certainty to protect liberty, property, honour and life.[105]

III. THE IMMEDIATE IMPACT OF THE UNION OF 1707

A. Incorporating Union and Scots Law

James VI's aspiration for the union of his two British kingdoms was achieved in 1707, under his great granddaughter Queen Anne. His desire for a union of the laws was left unfulfilled, as the factors affecting the move to union were very different from those that had animated him.[106]

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104. WIEACKER, *supra* note 61, at 159-95; Klaus Luig, *Usus modernus*, *in* 5 HANDWÖRTERBUCH ZUR DEUTSCHEN RECHTSGESCHICHTE cols. 628-36 (Adalbert Erler, Ekkehard Kaufmann et al. eds., 1971-98).

105. GRANT, *supra* note 23, at 3, 9-10, 146.

106. On this huge topic, see, e.g., C.A. WHATLEY WITH D. J. PATRICK, THE SCOTS AND THE UNION (2006); MICHAEL FRY, THE UNION: ENGLAND, SCOTLAND AND THE TREATY OF 1707 (2006); WILLIAM FERGUSON, SCOTLAND'S RELATIONS WITH ENGLAND: A SURVEY TO 1707, at 180-277 (repr. 1994) (1977); WILLIAM FERGUSON, SCOTLAND: 1689 TO THE PRESENT. THE EDINBURGH HISTORY OF SCOTLAND VOLUME IV 36-69 (1968) [hereinafter FERGUSON, SCOTLAND: 1689 TO THE PRESENT]. On the intellectual background, see, e.g., William Ferguson, *Imperial Crowns: A Neglected Facet of the Background to the Treaty of Union of 1707*, 53 SCOTTISH HIST. REV. 22

The provisions on which the union was achieved were set out in a number of articles agreed by Commissioners appointed by each Parliament. Most of these concerned fiscal measures, such as free trade, a unified system of weights and measures, and a single coinage.[107]

The manner of the Parliamentary Union was essentially to incorporate Scotland into existing English structures. This required that provisions be made to protect and clarify the position of the Scottish courts and Scots law; a scheme to achieve this was set out in a number of articles of the Union. The eighteenth article provided for the application in Scotland of the same laws on trade, customs and excise as in England, before stating that "all other Laws in use within the Kingdom of Scotland doe after the Union and notwithstanding thereof remain in the same force as before . . . but alterable, by the Parliament of Great Britain." The article went on to distinguish between those laws "concerning Publick Right, Pollicy and Civil Government," which could be made the same throughout the United Kingdom, and those that "Concern Privat Right," to which "no alteration [may] be made . . . except for evident utility of the Subjects within Scotland."[108] The exact effect of this may be disputed, but the intention was clear: Scots private law was not to be changed simply to bring it into line with English law.

The position of the Scottish courts was covered in the nineteenth and twentieth articles. The first of these, among other provisions, preserved the Court of Session and Court of Justiciary (the criminal court) "in all time coming within Scotland," though subject to such "Regulations for the better Administration of Justice" as might be made by the Parliament of Great Britain.[109] Though now placed under the authority of the Lord High Admiral or Commissioners of Admiralty of Great Britain, the Admiralty Court was maintained, again alterable by the new Parliament, but an admiralty court was always to be retained to deal with "Maritim Cases, relating to Private Rights," and heritable rights of admiralty were preserved to their owners as rights of property. All inferior courts were preserved, again alterable by the Parliament. Supporting the assimilation of the laws on trade, customs, and excise to those of England, the article also provided that a new Court of Exchequer

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(1974); John Robertson, *An Elusive Sovereignty: The Course of the Union Debate in Scotland, 1698-1707*, *in* A UNION FOR EMPIRE: POLITICAL THOUGHT AND THE BRITISH UNION OF 1707, at 198 (John Robertson ed., 1995) [hereinafter UNION FOR EMPIRE]; KARIN BOWIE, SCOTTISH PUBLIC OPINION AND THE ANGLO-SCOTTISH UNION, 1699-1707 (2007).

107. *See* Articles of Union, in Appendix, 11 APS, *supra* note 28, at 201-05. The proceedings of the Commissioners are set out in *id.* at 145-200.

108. *Id.* at 203.

109. *Id.*

was to be erected in Scotland to decide "Questions Concerning the Revenues of Customs and Excises." This court was to possess "the same Power and Authority in such Cases, as the Court of Exchequer has in England." It was also to retain the Scottish Exchequer's jurisdiction over the "power of passing Signatures, Gifts, Tutories, and in other things;" it was not, however, to have the type of extensive jurisdiction possessed by the English Court of Exchequer at common law. The Scottish Privy Council, which possessed an important jurisdiction over public peace and order was also preserved until Parliament thought fit to make changes. The general thrust of these provisions was made clear by the provisions that "no Causes in Scotland be Cognoscable, by the Courts of Chancery, Queens Bench, Common Pleas or any other Court in Westminster Hall" and that these courts were not after the Union to have "Power to Cognosce, Review, or Alter the Acts, or Sentences of the Judicatures within Scotland, or Stop the Execution of the same." The twentieth article preserved the heritable jurisdictions as rights of property.[110] As with the laws, the Scottish courts were to be preserved and their jurisdictions generally left unchanged; they were to remain as superior courts, not subject to English courts, as if the latter were in some way superior or imperial in authority. The type of supervision that the Court of King's or Queen's Bench in Westminster exercised over the Irish courts was not to exist.[111]

The Scottish and English legal systems thus remained independent, and the Union specifically preserved the Scots law and courts; but the legislature was now the Parliament of Great Britain, situated in Westminster, and inevitably dominated by English politicians and their particular concerns, while, in the new constitutional structures, the House of Lords came in place of the Scottish Parliament in hearing appeals from the superior courts, which had previously been called protestations

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110. *Id.* at 203-04. The new Court of Exchequer was created by the Exchequer Court (Scotland) Act 1707, 6 Anne, c. 53; on it, see A.L. Murray, *The Post-Union Court of Exchequer*, *in* MISCELLANY FIVE, *supra* note 11, at 103; John W. Cairns, *Natural Law, National Laws, Parliaments and Multiple Monarchies: 1707 and Beyond*, *in* NORTHERN ANTIQUITIES AND NATIONAL IDENTITIES: PERCEPTIONS OF DENMARK AND THE NORTH IN THE EIGHTEENTH CENTURY (Henrick Horstbøll & Knud Haakonssen eds., forthcoming 2007). The Scottish Privy Council was abolished (effective in 1708) by 6 Anne, c. 40 (1707): *see* FERGUSON, SCOTLAND: 1689 TO THE PRESENT, *supra* note 106, at 54-55; P.W.J. RILEY, THE ENGLISH MINISTERS AND SCOTLAND 90-93 (1964).

111. On the complex issue of the jurisdiction in error of the English King's Bench over the Irish King's Bench and the assertion of direct English (and then British) House of Lords' jurisdiction over the Irish House of Lords, see F.H. Newark, *Notes on Irish Legal History*, *in* F.H. NEWARK, ELEGANTIA JURIS: SELECTED WRITINGS 203, 215 (F.J. McIvor ed., 1973); Andrew Lyall, *The Irish House of Lords as a Judicial Body, 1783-1800*, 28-30 IRISH JURIST (n.s.) 314, 327-28 (1993-95).

for remeid of law. These changes did not mean that there was an instant and strong legislative influence of English law on Scots law—far from it. This was because Scotland was essentially allowed to be governed under a patronage system exercised by a succession of often competing Scottish noblemen, who were allowed to conduct and control matters, provided they could produce for the government loyal, elected members in the Houses of Commons and Lords.[112]

B. Legislative Neglect

The consequence, following the Union, was relative legislative neglect of Scots law in the eighteenth century, especially in contrast to the notable era of reform between 1660 and 1707. This is not to say that there was no legislation applicable to Scotland. There was much; but it largely concerned fiscal and revenue issues.[113] The political crises of the two Jacobite Rebellions did introduce some reforms: for example, the abolition of military tenures and heritable jurisdictions in 1747.[114] Yet the general proposition holds. Such other major reforms that there were—in election law, entail, and bankruptcy—tended to be "Scottish Acts" in that they were drafted by the Scottish law officers and were approved by the judges of the Court of Session, the various societies of lawyers, and the

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112. On the patronage system in eighteenth-century Scotland, see J.S. SHAW, THE POLITICAL HISTORY OF EIGHTEENTH-CENTURY SCOTLAND 38-83 (1999); J.S. SHAW, THE MANAGEMENT OF SCOTTISH SOCIETY, 1707-1764: POWER, NOBLES, LAWYERS, EDINBURGH AGENTS AND ENGLISH INFLUENCES 86-117 (1983); J.M. Simpson, *Who Steered the Gravy Train, 1707-1766?*, *in* SCOTLAND IN THE AGE OF IMPROVEMENT: ESSAYS IN SCOTTISH HISTORY IN THE EIGHTEENTH CENTURY 47 (N.T. Phillipson & Rosalind Mitchison eds., 1970); ALEXANDER MURDOCH, "THE PEOPLE ABOVE": POLITICS AND ADMINISTRATION IN MID-EIGHTEENTH-CENTURY SCOTLAND 1-27 (1980); Alexander Murdoch, *Lord Bute, James Stuart Mackenzie and the Government of Scotland, in* LORD BUTE: ESSAYS IN RE-INTERPRETATION 117 (K.W. Schweizer ed., 1988); MICHAEL FRY, THE DUNDAS DESPOTISM (1992). For a general survey, see Cairns, *supra* note 8, at 143-45. Scotland had a relatively large nobility, who were represented in the House of Lords by 16 elected from their number, while there were 45 Scottish members in the Commons: see article 22 in Appendix, 11 APS, *supra* note 28, at 204.

113. Joanna Innes, *Legislating for Three Kingdoms: How the Westminster Parliament Legislated for England, Scotland and Ireland, 1707-1830*, *in* PARLIAMENTS, NATIONS AND IDENTITIES IN BRITAIN AND IRELAND, 1660-1850, at 15 (Julian Hoppit ed., 2003) [hereinafter PARLIAMENTS, NATIONS AND IDENTITIES].

114. Tenures Abolition Act 1746, 20 Geo. II, c. 50; Heritable Jurisdictions (Scotland) Act 1747, 20 Geo. II, c. 43. These came as part of a more general programme: see BRUCE LENMAN, THE JACOBITE RISINGS IN BRITAIN 1689-1746, at 278-79 (1980); Cairns, *supra* note 8, at 147-48; Cairns, *supra* note 110. B.F. Jewell, The Legislation Relating to Scotland After the Forty-Five 147-208 (unpublished Ph.D. thesis, North Carolina, 1975), has a detailed discussion of the development and enactment of this legislation, though the focus is somewhat narrowly on the politics.

freeholders of the counties.[115] Contemporary Scots recognised how few had been the reforms in Scots law introduced by statute after the Union, other than those following the Rebellion of 1745.[116]

C. The Role of the House of Lords

As the final appellate court in civil (but not criminal) matters, the House of Lords was another source of potential English influence.[117] Despite, however, its necessary effect in individual cases and the undoubted popularity of appeals, it did not yet have an immediate, major impact on Scottish legal thinking. This was largely because there was no publication of the decisions of the House in Scottish appeals, allowing the Court of Session to ignore the Lords' decisions as precedents if it so chose. It was to take a century for reports of Scottish appeals to be published, and in the preface to the first set of reports of such decisions, the reporter noted that in "sundry instances . . . where the Judgments of the Court of Session have been reversed in Parliament, the original decisions still remain as precedents . . . in the Collections of decided Cases, in the Dictionary of Decisions, and in the works of Law Writers of authority."[118] This is a matter on which further study is needed; but one can also point out that some at least of the Scottish representative peers took seriously their duties in dealing with Scottish appeals, so that one need not suppose that all Scottish appeals were generally regarded from an English legal perspective. Thus, one case concerning a servitude was referred to the Dukes of Athol and Argyll; the latter wrote to the Lord Justice-Clerk, Charles Areskine, a member of the Court of Session bench, discussing the law and asking for advice.[119] Argyll, it should be remembered, had studied law in the Netherlands in the early 1700s, and could be mocked for the extent of his learning in the Roman law;[120] he

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115. NICHOLAS PHILLIPSON, THE SCOTTISH WHIGS AND THE REFORM OF THE COURT OF SESSION 1785-1830, at 3-4 (Stair Society 1990) (the term "Scottish Acts" is Phillipson's); *see* Bob Harris, *The Scots, the Westminster Parliament, and the British State in the Eighteenth Century*, *in* PARLIAMENTS, NATIONS AND IDENTITIES, *supra* note 113, at 124.

116. 1 GEORGE WALLACE, SYSTEM OF THE PRINCIPLES OF SCOTS LAW, at xix (1760).

117. *See* A.J. MacLean, *The 1707 Union: Scots Law and the House of Lords*, 4 J. OF LEGAL HIST. 50 (1983) [= NEW PERSPECTIVES IN SCOTTISH LEGAL HISTORY, *supra* note 55, at 50]; A.J. MacLean, *The House of Lords and Appeals from the High Court of Justiciary, 1707-1887*, 30 JURID. REV. (n.s.) 192 (1985).

118. DAVID ROBERTSON, CASES ON APPEAL FROM SCOTLAND DECIDED IN THE HOUSE OF PEERS, at xvi-xvii (1807).

119. Duke of Argyll to Charles Areskine, Mar. 20 (no year), National Library of Scotland [hereinafter NLS], MS 5087, fols. 196-197.

120. John W. Cairns, *William Crosse, Regius Professor of Civil Law in the University of Glasgow, 1746-1749: A Failure of Enlightened Patronage*, 12 HIST. OF UNIVERSITIES 159, 161 (1993).

ensured that his nephew, the Earl of Bute, was educated in law in the Netherlands at Groningen and Leiden because he thought this valuable training for any Scottish peer who might serve in the House of Lords, a view that was not unique to him.[121]

D. The Faculty of Advocates

Also crucial in ensuring continuity after the Union was the education of members of the Faculty of Advocates. From 1707 to around 1750, the majority of those admitted to the Faculty continued to study law in the Netherlands, although now usually (but not invariably) after having first studied it in Scotland.[122] Thus, well into the eighteenth century, Scots lawyers maintained their links with European legal scholarship.[123] Further, in practice, advocates, until 1750, were solely admitted by examinations in Latin on Roman law consciously modelled on the examinations for a doctorate in law at a university.[124] Such a legal training helped maintain the uniqueness of Scots law within the British context.

IV. THE ROLE OF THE *IUS NATURALE* AND THE *IUS GENTIUM*

Thomas Craig had carefully placed Scots law within the context of the *ius naturale* and the *ius gentium*.[125] Stair in particular had developed that line of analysis of Scots law, and it even influenced the thinking of Mackenzie.[126] Around the time of the Union, there was an intense interest

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121. Bute matriculated in Groningen in 1730 and in Leiden in 1732: ALBUM STUDIOSORUM ACADEMIAE GRONINGANAE col. 178 (1915); ALBUM STUDIOSORUM ACADEMIAE LUGDUNO-BATAVAE, MDLXXV-MDCCCLXXV col. 940 (1875). See (Scroll), Andrew Fletcher, Lord Milton to James Stuart Mackenzie, Apr. 1764, NLS, MS 16731, fol. 139, on the possibilities in the Lords for a Scottish peer with a legal training.

122. Feenstra, *supra* note 14, at 36. On the development of study of law in Scotland, see John W. Cairns, *"Importing our Lawyers from Holland": Netherlands' Influences on Scots Law and Lawyers in the Eighteenth Century*, *in* SCOTLAND AND THE LOW COUNTRIES, 1124-1994, at 136 (G.G. Simpson ed., 1996).

123. On the start to move away from the continental scholarship, see John W. Cairns, *Legal Study in Utrecht in the Late 1740s: The Legal Education of Sir David Dalrymple, Lord Hailes*, *in* SUMMA ELOQUENTIA: ESSAYS IN HONOUR OF MARGARET HEWETT 30, 69-74 (Rena van den Bergh ed., 2002) [= Editio Specialis FUNDAMINA: A JOURNAL OF LEGAL HISTORY (2002)].

124. John W. Cairns, *Advocates' Hats, Roman Law and Admission to the Scots Bar, 1580-1812*, 20:2 J. OF LEGAL HIST. 24 (Aug. 1999); John W. Cairns, *The Formation of the Scottish Legal Mind in the Eighteenth Century: Themes of Humanism and Enlightenment in the Admission of Advocates*, *in* THE LEGAL MIND: ESSAYS FOR TONY HONORÉ 253 (Neil MacCormick & Peter Birks eds., 1986).

125. Cairns, *supra* note 91, at 200-03; Cairns, *supra* note 15, at 150-58.

126. STAIR, *supra* note 23, at 85-89 (I.i.16); Mackenzie, Discourse, *supra* note 23, fols. 2-10.

in natural law in Scotland; while this was in line with much of Europe, there was a special and urgent Scottish dimension.[127]

A. The Revolution of 1688-89

When James VI had identified the fundamental laws of Scotland with the "Ius Regis," he was referring to the indefeasible rights of succession to the throne.[128] Parliament itself in 1681 had stated that to alter the hereditary succession would amount to "the utter Subversion of the Fundamental Laws" of the kingdom.[129] Thus, the events of 1688 –the arrival of William and Mary in England and the flight of James VII and II—that led to the offer of the Scottish Crown jointly to William and Mary required some significant justification. The Convention of the Estates that met in Edinburgh in 1689 resolved that James had "forefaulted" his right to be king;[130] it went on in the Claim of Right to assert that James, by his illegal actions, which had subverted the constitution and the Protestant religion, had "forfaulted the right to the Croune" so that "the throne is become vacant."[131] It is difficult to conceive of this as anything other than, at the very least, reflecting some type of contractual view of the relationship of monarchy to subjects.[132] Indeed, Stair regretted the Convention's choice of the radical term "forefaulted," as it suggested that "the Conventione had a superioritie of jurisdictione." He would have preferred an approach that stated that because James "had violat his pairt of the mutuall engagments, they wer frie of ther part."[133] Stair's opinion was a product of his understanding of the contractual nature of the polity derived from his study of modern natural law, in particular of the work of Grotius. He was not alone in justifying the Revolution by reference to the work of the Dutch theorist.

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127. *See generally* KNUD HAAKONSSEN, NATURAL LAW AND MORAL PHILOSOPHY: FROM GROTIUS TO THE SCOTTISH ENLIGHTENMENT 15-62 (1996); WIEACKER, *supra* note 61, at 222-48.

128. JAMES VI AND I, POLITICAL WRITINGS, *supra* note 3, at 172.

129. *Quoted in* JACKSON, *supra* note 28, at 49.

130. 9 APS, *supra* note 28, at 34.

131. *Id.* at 39.

132. B.P. Lenman, *The Poverty of Political Theory in the Scottish Revolution of 1688-1690*, *in* THE REVOLUTION OF 1688-1689: CHANGING PERSPECTIVES 244, 255 (Lois G. Schwoerer ed., 1992), suggests that "forefaulted" should not be regarded as radical as it might seem, since the term originates in feudal law. On the other hand to most contemporary Scots the term seemed distinctly radical: *see* Tim Harris, *The People, the Law, and the Constitution in Scotland and England: A Comparative Approach to the Glorious Revolution*, 38 J. OF BRITISH STUDS. 28, 47 (1999).

133. Harris, *supra* note 132, at 47.

Thus, Sir Francis Grant of Cullen justified the "Glorious Revolution" by explicit reference to Grotius' views on a just war.[134]

Intellectual responses to the Revolution differed; there can be little doubt, however, that it led to the increased significance of the language of the *ius naturale* and *ius gentium* in the discussion of Scottish politics in this period.[135] It is thus possible to understand why, in 1699, William Scott, a regent in philosophy in the University of Edinburgh, justified Scottish possession of the colony on Spanish territory at Darien by reference to Grotian natural law.[136] If an understanding of political authority in Scotland could no longer be rooted in the indefeasible hereditary right of the monarch, then natural law and the law of nations offered a way of discussing the various approaches to the location of sovereignty and giving a legitimate foundation to the state.

B. Natural Law and Education

Scots interest in the *ius naturale* and *ius gentium* had been developed and sustained in the later seventeenth century by the education of the advocates. It was common for those studying Civil law in the Netherlands also to take a private class on natural law.[137] Further, in the same period, Scottish libraries started to collect the main texts on the secular natural law of the seventeenth century, particularly those of Grotius and Samuel Pufendorf, and the accumulating commentaries on them.[138]

The second half of the seventeenth century had seen the prevailing Aristotelianism of the natural philosophy curriculum of the Scottish

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134. Jackson, *supra* note 57, at 108-12, 114-15.

135. *See* JACKSON, *supra* note 28, at 191-215. The most obvious competing approach was that of the neo-Machiavellian civic tradition associated with Andrew Fletcher of Saltoun. *See, e.g.*, ANDREW FLETCHER, POLITICAL WORKS (John Robertson ed., 1997); John Robertson, *The Scottish Enlightenment at the Limits of the Civic Tradition*, *in* WEALTH AND VIRTUE: THE SHAPING OF POLITICAL ECONOMY IN THE SCOTTISH ENLIGHTENMENT 137 (Istvan Hont & Michael Ignatieff eds., 1983) [hereinafter WEALTH AND VIRTUE]; JOHN ROBERTSON, THE SCOTTISH ENLIGHTENMENT AND THE MILITIA ISSUE (1985).

136. C.P. Finlayson, *Edinburgh University and the Darien Scheme*, 34 SCOTTISH HIST. REV. 97 (1955); David Armitage, *The Scottish Vision of Empire: Intellectual Origins of the Darien Venture*, *in* UNION FOR EMPIRE, *supra* note 106, at 97.

137. Cairns, *supra* note 122, at 137-39; Kees van Strien & Margreet Ahsmann, *Scottish Law Students at Leiden at the End of the Seventeenth Century: The Correspondence of John Clerk, 1694-1697*, 19 LIAS: SOURCES AND DOCUMENTS RELATING TO THE EARLY MODERN HISTORY OF IDEAS 271, 291-92, 294, 297 (1992).

138. *See* Christine Shepherd, *The Inter-Relationship between the Library and Teaching in the Seventeenth and Eighteenth Centuries*, *in* EDINBURGH UNIVERSITY LIBRARY, 1580-1980: A COLLECTION OF HISTORICAL ESSAYS 67, 72-73 (Jean R. Guild & Alexander Law eds., 1982); John. W. Cairns, *Scottish Law, Scottish Lawyers and the Status of the Union*, *in* UNION FOR EMPIRE, *supra* note 106, at 243, 258.

universities, especially those of Edinburgh, St Andrews, and both of Aberdeen, supplemented—eventually to be supplanted—by Newtonian physics; at the same time there was increased emphasis placed on the teaching of mathematics.[139] The same rejection of scholastic Aristotelianism led, in the teaching or ethics and moral philosophy, to an interest in the natural law theories of the seventeenth century, as developed by Grotius, Thomas Hobbes, Richard Cumberland, Pufendorf, and John Locke. The emblematic figure here is generally taken to be Gershom Carmichael (1672-1729), Regent at the University of Glasgow, and its first Professor of Moral Philosophy.[140]

C. Carmichael, Pufendorf, and Grotius

Carmichael adopted Pufendorf's *De Officio Hominis et Civis Juxta Legem Naturalem Libri Duo*, first published in 1673, as his textbook for the moral-philosophy component of his teaching.[141] He went on to publish editions with his own supplements and annotations.[142] Pufendorf's short work offered Carmichael a work on ethics founded in

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139. C.M. Shepherd, *Newtonianism in Scottish Universities in the Seventeenth Century*, *in* THE ORIGINS AND NATURE OF THE SCOTTISH ENLIGHTENMENT 65 (R.H. Campbell & Andrew Skinner eds., 1982).

140. *See* James Moore & Michael Silverthorne, *Gershom Carmichael and the Natural Jurisprudence Tradition in Eighteenth-Century Scotland*, *in* WEALTH AND VIRTUE, *supra* note 135, at 73; James Moore & Michael Silverthorne, *Natural Sociability and Natural Rights in the Moral Philosophy of Gerschom Carmichael*, *in* PHILOSOPHERS OF THE SCOTTISH ENLIGHTENMENT 1 (Vincent Hope ed., 1984); James Moore & Michael Silverthorne, *Protestant Theologies, Limited Sovereignties: Natural Law and Conditions of Union in the German Empire, The Netherlands and Great Britain*, *in* UNION FOR EMPIRE, *supra* note 106, at 171, 189-97.

141. SAMUEL PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW (James Tully & Michael Silverthorne eds., 1991), is the text relied on here. For a powerful modern discussion of Pufendorf, see T.J. HOCHSTRASSER, NATURAL LAW THEORIES IN THE EARLY ENLIGHTENMENT 40-110 (2000).

142. GERSHOM CARMICHAEL, S[AMUELIS] PUFFENDORFII DE OFFICIO HOMINIS ET CIVIS, JUXTA LEGEM NATURALEM, LIBRI DUO. EDITIO NOVA, AUCTA OBSERVATIONIBUS & SUPPLEMENTIS, . . . ADJECTIS A GERSCHOMO CARMICHAEL (1718); GERSHOM CARMICHAEL, S[AMUELIS] PUFFENDORFII DE OFFICIO HOMINIS ET CIVIS, JUXTA LEGEM NATURALEM, LIBRI DUO. SUPPLEMENTIS ET OBSERVATIONIBUS IN ACADEMIAE JUVENTUTIS AUXIT ET ILLUSTRAVIT GERSCHOMUS CARMICHAEL, PHILOSOPHIAE IN ACADEMIA GLASGUENSI PROFESSOR. EDITIO SECUNDA PRIORE AUCTIOR ET EMENDATIOR (1724). Carmichael's annotations were included in the Leiden edition published as Samuel PUFENDORF, DE OFFICIO HOMINIS ET CIVIS SECUNDUM LEGEM NATURALEM LIBRI DUO (1769). For an English translation of Carmichael's notes, see GERSHOM CARMICHAEL, NATURAL RIGHTS ON THE THRESHOLD OF THE SCOTTISH ENLIGHTENMENT: THE WRITINGS OF GERSHOM CARMICHAEL (James Moore & Michael Silverthorne eds., 2002) [hereinafter CARMICHAEL, NATURAL RIGHTS]. Limited parts of Carmichael's comments can also be found translated in GERSHOM CARMICHAEL, GERSHOM CARMICHAEL ON SAMUEL PUFENDORF'S DE OFFICIO HOMINIS ET CIVIS JUXTA LEGEM NATURALEM LIBRI DUO (John N. Lenhart ed. & Charles H. Reeves trans., Privately Published 1985). All references here will be to the English-language edition by Moore & Silverthorne.

natural law divorced from any Aristotelian or Thomist idea of nature; yet, it also posed problems for the Scottish professor. In particular, Pufendorf made natural law independent of theology and propounded an essentially social and even to some extent historical theory of natural law.[143] This was indeed the subject of the famous criticism of Pufendorf by G.W. Leibniz, who saw the former's views as essentially Hobbesian and voluntarist.[144] Carmichael's correction of Pufendorf was to link natural law with natural theology, so that its duties and precepts derived from God, not simply from a limited human *socialitas*.[145] This has various significant consequences that we need not explore here. It is worth noting, however, that, following Locke, Carmichael developed a much more positive view of the state of nature than the German author, and adopted Locke's labour theory of property.[146]

Moore and Silverthorne have claimed that "it was above all Carmichael who was responsible for establishing the natural jurisprudence tradition in the Scottish universities."[147] The significance of Carmichael should not be underestimated; but he was not alone. Indeed, it is difficult to accept that it was solely or largely due to his practice that natural jurisprudence became a staple of moral philosophy and ethics in

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143. CARMICHAEL, NATURAL RIGHTS, *supra* note 142, at 17.

144. *See, e.g.*, HOCHSTRASSER, *supra* note 141, at 79-81; HAAKONSSEN, *supra* note 127, at 46-49. On Leibniz, see PATRICK RILEY, LEIBNIZ' UNIVERSAL JURISPRUDENCE: JUSTICE AS THE CHARITY OF THE WISE (1996); Patrick Riley, *Leibniz on Justice as "The Charity of the Wise"*, 8 JAHRBUCH FÜR RECHT UND ETHIK 143 (2000). For an overview of Leibniz's theory of natural law, see Gregory Brown, *Leibniz's Moral Philosophy*, *in* THE CAMBRIDGE COMPANION TO LEIBNIZ 411, 413-23 (Nicholas Jolley ed., 1995) [hereinafter COMPANION TO LEIBNIZ].

145. CARMICHAEL, NATURAL RIGHTS, *supra* note 142, at 17, 21-29, 46-53. See the discussion in Knud Haakonssen, *Natural Law and Moral Realism: The Scottish Synthesis*, *in* STUDIES IN THE PHILOSOPHY OF THE SCOTTISH ENLIGHTENMENT 61, 68-72 (M.A. Stewart ed., 1990) [hereinafter PHILOSOPHY OF THE SCOTTISH ENLIGHTENMENT]; Moore & Silverthorne, *Gershom Carmichael and the Natural Jurisprudence Tradition in Eighteenth-Century Scotland*, *supra* note 140, at 77-78.

146. Moore & Silverthorne, *Gershom Carmichael and the Natural Jurisprudence Tradition in Eighteenth-Century Scotland*, *supra* note 140, at 80-83; Moore & Silverthorne, *Natural Sociability and Natural Rights in the Moral Philosophy of Gerschom Carmichael*, *supra* note 140, at 8-10; Peter Stein, *From Pufendorf to Adam Smith: The Natural Law Tradition in Scotland*, *in* PETER STEIN, THE CHARACTER AND INFLUENCE OF THE ROMAN CIVIL LAW: HISTORICAL ESSAYS 381, 382-86 (1988) [hereinafter STEIN, CHARACTER AND INFLUENCE]. Stein (*id.* at 386), succinctly summaries what he saw as Carmichael's legacy: "the link between ethics and natural theology, the identification of benevolence as the prime virtue, the restriction of justice to duties whose performance can be compelled, the emphasis on rights rather than duties, the sharp distinction between perfect rights, enforceable, and imperfect rights, not enforceable, . . . the basing of property rights on labour rather than consent. . . ."

147. Moore & Silverthorne, *Gershom Carmichael and the Natural Jurisprudence Tradition in Eighteenth-Century Scotland*, *supra* note 140, at 74.

Scotland.[148] Thus the intense interest of the lawyers in the *ius naturale* and *ius gentium* has already been noted, as has the importance of their political implications in Scotland. Scott, the Edinburgh Regent who had justified the Darien scheme by reference to Grotius, had evidently been giving lectures on Grotius for some years, before he published, in 1707, for the use of Edinburgh students, a compend of Grotius' treatise *De Iure Belli ac Pacis*.[149] None of the Edinburgh Professors of Moral Philosophy in the first half of the eighteenth century has attained the reputation of Carmichael; yet their teaching was also influenced by natural law.[150] Further in this line, in 1707, the chair of Public Law and the Law of Nature and Nations was established in the University of Edinburgh, the first chair of law to be created in Scotland in the modern period;[151] its first holder offered classes in 1711 on the topic.[152]

D. Natural Law and Scots Law

Just as the natural-law tradition was varied and complex in the first half of the eighteenth century, so it is fair to assume that Scottish reactions and contributions to it were likewise. Here it is important to note that Grotius, Cumberland, and Pufendorf were largely understood as mediated through the popular editions of Jean Barbeyrac.[153] Other than for major figures, it is accordingly difficult to disentangle the various

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148. The point is important. Carmichael is usually seen as a transitional figure in a historiography of the Scottish Enlightenment that can be traced back to the writings of Dugald Stewart at the beginning of the nineteenth century and which has been largely unquestioned. See the important essay: Paul Wood, *Introduction: Dugald Stewart and the Invention of "the Scottish Enlightenment," in* THE SCOTTISH ENLIGHTENMENT: ESSAYS IN REINTERPRETATION 1 (Paul Wood ed., 2000) [hereinafter SCOTTISH ENLIGHTENMENT]. For the general context, see Roger L. Emerson, *Science and Moral Philosophy in the Scottish Enlightenment*, *in* PHILOSOPHY OF THE SCOTTISH ENLIGHTENMENT, *supra* note 145, at 11.

149. HUGONIS GROTII DE JURE BELLI AC PACIS LIBRORUM III. COMPENDIUM, ANNOTATIONIBUS & COMMENTARIIS SELECTIS ILLUSTRATUM. IN USUM STUDIOSAE JUVENTUTIS ACADEMIAE EDINENSIS (1707); *see* Finlayson, *supra* note 136, at 99-100.

150. *See* Richard B. Sher, *Professors of Virtue: The Social History of the Edinburgh Moral Philosophy Chair in the Eighteenth Century*, *in* PHILOSOPHY OF THE SCOTTISH ENLIGHTENMENT, *supra* note 145, at 87.

151. 1 ALEXANDER GRANT, THE STORY OF THE UNIVERSITY OF EDINBURGH DURING ITS FIRST THREE HUNDRED YEARS 231-33 (1884); John W. Cairns, *The Origins of the Edinburgh Law School: The Union of 1707 and the Regius Chair*, 11 EDINBURGH L. REV. 300 (2007).

152. *See* John W. Cairns, *The First Edinburgh Chair in Law: Grotius and the Scottish Enlightenment*, *in* EX IUSTA CAUSA TRADITUM: ESSAYS IN HONOUR OF ERIC H. POOL 32, 37-39 (Rena van den Bergh ed., 2005) [= Editio Specialis FUNDAMINA: A JOURNAL OF LEGAL HISTORY (2005)].

153. These were popular in Scotland as elsewhere. One can find them advertised in the Scottish press: Cairns, *supra* note 138, at 258-59; *see also* HAAKONSSEN, *supra* note 127, at 58-59. On Barbeyrac, see Tim Hochstrasser, *Conscience and Reason: The Natural Law Theory of Jean Barbeyrac*, 26 HISTORICAL J. 289 (1993).

threads and interlocking influences that made up the tradition in the Scottish legal works so as to reach a clear classification of different approaches taken by individuals in Scotland. This is because typical themes in the literature of natural law occur in all works creating impressions of resemblance, even if the premises on which conclusions are founded may be very different, while the language of natural law affected all discussions of morals.[154]

It is easy to point to the complexity of the Scots lawyers' reaction to modern natural law. Thus, there was a continuing tradition of expounding Grotius from the chair of Public Law and the Law of Nature and Nations in the University of Edinburgh. George Abercromby, appointed in 1735, had used Grotius, *De Iure Belli ac Pacis*, as his textbook.[155] His successor, Robert Bruce of Kennet, advocate, who held the chair from 1759-1764, did likewise.[156] In 1760, he published a compend of Grotius' work for the use of his class.[157] In contrast, John Erskine, Professor of Scots Law, expressed, in his *Principles of the Law of Scotland*, written for and based on his classes, the typical tripartite division of duties under natural law into three found in Pufendorf's textbook *De officio*.[158] Without developing a full analysis of Erskine's method, it is evident that he certainly approached natural law from within the school of Pufendorf, and, in his major work, *An Institute of the Law of Scotland*, published posthumously, one can thus see he avowedly drew on J.G. Heineccius, the pupil of Christian Thomasius, an important and prolific writer in the tradition of Pufendorf.[159] Erskine nonetheless cited

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154. A point well made in Pauline C. Westermann, *Hume and the Natural Lawyers: A Change of Landscape*, *in* HUME AND HUME'S CONNEXIONS 83, 84-85 (M. A. Stewart & John P. Wright eds., 1994).

155. *A Short Account of the University of Edinburgh, the Present Professors in It, and the Several Parts of Learning Taught by Them*, 3 SCOTS MAG. 371, 371 (1741); *see* Cairns, *supra* note 152, at 41-43.

156. *See* CALEDONIAN MERCURY (8 Oct. 1759): "Lectures upon *Grotius de jure belli ac pacis*."

157. HUGONIS GROTII DE JURE BELLI AC PACIS LIBRORUM III. COMPENDIUM. IN USUM STUDIOSAE JUVENTUTIS ACADEMIAE EDINENSIS (1760). Preliminary study suggests that this is a revised and expanded version of Scott's COMPENDIUM, *supra* note 149, of 1707; but more work needs to be done. There is no indication in the volume that it was published for Bruce's class, but the date is compelling: *see* Cairns, *supra* note 152, at 43-46.

158. 1 JOHN ERSKINE, THE PRINCIPLES OF THE LAW OF SCOTLAND: IN THE ORDER OF SIR GEORGE MACKENZIE'S INSTITUTIONS OF THAT LAW 1-2 (I.i.2) (1754).

159. 1 JOHN ERSKINE, AN INSTITUTE OF THE LAW OF SCOTLAND. IN FOUR BOOKS. IN THE ORDER OF SIR GEORGE MACKENZIE'S INSTITUTIONS OF THAT LAW 2 (I.i.5) (1773). (It is also interesting to note the citation to Hobbes.) There has been little sustained modern discussion of Heineccius. On his legal theory, see Ernst Reibstein, *J.G. Heineccius als Kritiker des grotianischen Systems*, 24 ZEITSCHRIFT FÜR AUSLANDISCHES ÖFFENTLCHES RECHT UND VÖLKERRECHT 236 (1964).

Grotius for the definition of the law of nature and Cumberland (with whom he disagreed) on sanctions, while mentioning Pufendorf's terminology, which he did not adopt, for the secondary law of nature.[160]

The influence of Heineccius in Scotland has not been much studied, but the significance of his work cannot be doubted. Thus, in the 1730s, John Stevenson, Professor of Logic in the University of Edinburgh, used Heineccius' textbook on philosophy, first published in 1728, as well as Locke's works, in his class. An edition of Heineccius' textbook was published in Edinburgh in 1756.[161] As Haakonssen speculates, it is probable that he also taught using Heineccius' history of philosophy (also included in the Edinburgh edition).[162] Heineccius set out his natural-law theory in *Elementa Iuris Naturae et Gentium, Commoda Auditoribus Methodo Adornata*, first published in Halle in 1737. In this he developed the "axiomatic method" that he also applied to his popular textbooks of Roman law.[163] The Scot George Turnbull, sometime Regent at Marischall College and University of Aberdeen, translated Heineccius' *Elementa Iuris Naturae et Gentium* in 1741, adding his own comments and supplements.[164] Heineccius' axiomatic method influenced George Wallace, advocate, in working out the methodology for his (incomplete) *System of the Principles of the Law of Scotland* of 1760.[165] He also drew on Heineccius to help explain the obligation to obey the law of nature.[166]

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160. ERSKINE, *supra* note 159, at 3 (I.i.6-7), 4 (I.i.12).

161. *See* THE AUTOBIOGRAPHY OF DR. ALEXANDER CARLYLE OF INVERESK 1722-1805, at 47-48 (John Hill Burton ed., 1910); J.G. HEINECCIUS, ELEMENTA PHILOSOPHIAE RATIONALIS ET MORALIS (1728); J.G. HEINECCIUS, ELEMENTA PHILOSOPHIAE RATIONALIS, EX PRINCIPIIS ADMODUM EVIDENTIBUS JUSTO ORDINE ADORNATA. PRAEMISSA EST HISTORIA PHILOSOPHICA (1756), on which see Warren McDougall, *A Catalogue of Hamilton, Balfour and Neill Publications*, *in* SPREADING THE WORD: THE DISTRIBUTION NETWORKS OF PRINT, 1550-1850, at 187, 213 (Robin Myers & Michael Harris eds., 1998). Further on the editions of Heineccius' works, see Robert Feenstra, *Heineccius in den alten Niederlanden: Ein bibliographischer Beitrag*, 72 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 297 (2004).

162. The history was appended to the 1733 edition of the Elementa philosophiae: J.G. HEINECCIUS, ELEMENTA PHILOSOPHIAE RATIONALIS ET MORALIS, EX PRINCIPIIS ADMODUM EVIDENTIBUS JUSTO ORDINE ADORNATA. ACCESSERE HISTORIA PHILOSOPHICA ET INDEX LOCUPLETISSIMUS, EDITIO NOVA ET EMENDATIOR(1733); HAAKONSSEN, *supra* note 127, at 89 n.68.

163. On his axiomatic method, see JAN SCHRÖDER, RECHT ALS WISSENSCHAFT: GESCHICHTE DER JURISTEN METHODE VOM HUMANISMUS BIS ZUR HISTORISCHEN SCHULE (1500-1850) 183 (2001). The textbooks were J.G. HEINECCIUS, ELEMENTA IURIS CIVILIS SECUNDUM ORDINEM INSTITUTIONUM, COMMODA AUDITORIBUS METHODO ADORNATA (1725); J.G. HEINECCIUS, ELEMENTA IURIS CIVILIS SECUNDUM ORDINEM PANDECTARUM, COMMODA AUDITORIBUS METHODO ADORNATA (1728). *See* Feenstra, *supra* note 161, at 306-09.

164. J.G. HEINECCIUS, A METHODICAL SYSTEM OF UNIVERSAL LAW: OR, THE LAWS OF NATURE AND NATIONS DEDUCED FROM CERTAIN PRINCIPLES AND APPLIED TO PROPER CASES (George Turnbull ed. & trans., 1741; 2d ed. 1763) (all references here will be to the 1763 text).

165. 1 WALLACE, *supra* note 116, at xx.

166. *Id.* at 13 n.* (I.iii.20).

It is worth noting that the writers on law whom Wallace specifically praised for their learning and ability were Grotius, Samuel and Heinrich von Cocceji, Heineccius, and Baron Montesquieu.[167] Like many other authors, Wallace was also very influenced by Francis Bacon, while considering it necessary to argue against David Hume's epistemology in order to give a proper foundation to his account of the laws of nature.[168] Finally, one can note that Heineccius' axiomatic textbooks on Roman law, from the middle years of the eighteenth century, were the standard works used to teach the subject in Scotland.[169] Indeed, there were to be two Scottish editions of Heineccius' textbook based on Justinian's *Institutes*.[170] Generations of Scots lawyers were thus familiar with Heineccius' axiomatic approach.

George Turnbull commented in his translation of Heineccius' *Elementa Iuris Naturae et Gentium*:

> [O]ne well versed in the knowledge of natural law, can never be at a loss to find out what ought to be the general positive law in certain cases, and how positive law ought to be interpreted in cases, which, tho' not expressly excepted in a law, which must be general, yet are in the nature of things excepted.[171]

This reflects the actual practical use made of the *ius naturale* and *ius gentium* by Scots lawyers in their pleadings. This is readily demonstrated by examination of the Session Papers and other records.

From the inception of the Court of Session it had been common for complex arguments to be reduced to writing.[172] In particular, this had

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167. *Id.* at 46 (I.viii.67). On the Cocceji, father and son, see HAAKONSSEN, *supra* note 127, at 135-45. Montesquieu is discussed further below.

168. 1 WALLACE, *supra* note 116, at xx, 1 (I.i.1-2), 7-9 (I.ii.11).

169. For teaching at Glasgow, see John W. Cairns, *"Famous as a School for Law, as Edinburgh . . . for Medicine:" Legal Education in Glasgow, 1761-1801*, *in* THE GLASGOW ENLIGHTENMENT 133, 140-42 (Andrew Hook & Richard B. Sher eds., 1995) [hereinafter Cairns, *Legal Education in Glasgow*]; John W. Cairns, *From "Speculative" to "Practical" Legal Education: The Decline of the Glasgow Law School, 1801-1830*, 62 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 331, 343-45 (1994). For teaching at Edinburgh, see HUGO ARNOT, HISTORY OF EDINBURGH 398-99 (1779); 2 GRANT, *supra* note 151, at 365; John W. Cairns, *The Face That Did Not Fit: Race, Appearance, and Exclusion from the Bar in Eighteenth-Century Scotland*, 9 FUNDAMINA: A JOURNAL OF LEGAL HISTORY 11, 17, 20 (2003) [hereinafter Cairns, *The Face That Did Not Fit*].

170. J.G. HEINECCIUS, ELEMENTA JURIS CIVILIS SECUNDUM ORDINEM INSTITUTIONUM, COMMODA AUDITORIBUS METHODO ADORNATA (1780); J.G. HEINECCIUS, ELEMENTA JURIS CIVILIS SECUNDUM ORDINEM INSTITUTIONUM, COMMODA AUDITORIBUS METHODO ADORNATA: NUNC AB EMBLEMATIBUS LIBERATA, INTEGRITATI SUAE RESTITUTA, NOTIS PASSIM ADSPERSIS EMENDATA, CORRECTA, SUPPLETA, A CHRIST. GOTTLOB. BIENERO, J.U.D. ANTECESSORE LIPSIENSI (Ninian Little ed., 1822).

171. 1 HEINECCIUS, *supra* note 164, at 323.

172. *See, e.g.*, Cairns, *supra* note 15, at 142.

been recognised for "Informations" presenting arguments to the Inner House in matters reported to the Lords from the Outer House.[173] By 1677, written Informations had "become ordinary," in the words of the Court.[174] The increasing practice of reducing matters to writing (and from 1710 to print), led to the development of a civil process that was essentially written, although oral debates at the bar continued to play a significant part.[175] Large collections of Session Papers eventually accumulated.[176] Study of these, though in its infancy, indicates the extent to which advocates routinely relied on divine law, natural law, and Roman law as well as Scots municipal law, in presenting their arguments to the Lords.[177] It is also worth noting that the examples of drafting of written argument in a treatise on Scottish criminal procedure considered how they should be drafted with reference to the law of nature and the divine law as well as the *ius gentium* and Scots law.[178]

This provides a context for Turnbull's remark on the advantages of study of the natural law as an aid to study of modern law:

> And it would not certainly be an improper way of studying our laws, first to get well acquainted with the laws of nature (large commentaries upon which are generally at the same time commentaries upon the Roman laws, the examples being commonly taken from thence), and then to go over the same laws of nature again in order, and to enquire into our laws under each head, and try them by the laws of nature, as the Roman laws are commonly canvassed by the maxims of natural equity, in treatises upon universal law.[179]

Given such opinions, it is unsurprising that in 1760 the Advocates advised all those intending to seek admission to their Faculty to study the law of nature and nations, "the fountain of Justice and equity," announcing they were "satisfied with the merit and abilities of the

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173. Act of Sederunt, July 13, 1596, *in* ACTS OF SEDERUNT, *supra* note 20, at 26-27; Act of Sederunt, Nov. 6, 1677, *in* ACTS OF SEDERUNT, *supra* note 20, at 135-36.

174. Act of Sederunt, Nov. 6, 1677, *in* ACTS OF SEDERUNT, *supra* note 20, at 135.

175. For a brief discussion of the procedure of the Session, see Cairns, *supra* note 21, at 4-5.

176. For a discussion, see Angus Stewart, *The Session Papers in the Advocates Library*, *in* MISCELLANY FOUR, *supra* note 15, at 199; D.R. Parratt, The Development and Use of Written Pleadings in Scots Civil Procedure 18-152 (unpublished Ph.D. thesis, Edinburgh 2004).

177. For examples, see John W. Cairns, *Stoicism, Slavery, and Law: Grotian Jurisprudence and Its Reception*, 22-23 GROTIANA 197, 222-31 (2001/2002); John A. Inglis, *Eighteenth Century Pleading*, 19 JURID. REV. (o.s.) 42, 53 (1907-08).

178. J. LOUTHIAN, FORM OF PROCESS BEFORE THE COURT OF JUSTICIARY IN SCOTLAND 139-84 (1732).

179. 2 HEINECCIUS, *supra* note 164, at 230-31.

Professor of that College."[180] The Professor to whom the resolution referred was Robert Bruce, who was a successful teacher who attracted a large class.[181] In 1762, the Advocates again recommended that candidates for admission should study the "law of Nature and nations" as a part of "Learning . . . immediately connected with the Roman Law and Law of Scotland." The Faculty's examinators were to test the applicants on it "in so far as it is connected with the Civil Law or with the Law of this Country."[182]

V. MORALS AND LAW

A. Moral Judgement and Natural Law

By 1760, when the advocates introduced their regulation, a number of Scots had already made a significant contribution to the traditions that had arisen from seventeenth-century natural law. Haakonssen has argued that the "mainstream of Scottish moral philosophy in the eighteenth century" constituted "a basically cognitivist and realist tradition."[183] By this he meant that members of this tradition considered, first, that "moral judgements have truth value; that there are facts about which some moral judgements are true; and that these facts are the presence of certain qualities in persons, which cannot be reduced to subjective states of the person who judges." Secondly, these philosophers shared the view that "man is naturally supplied with a special moral sense which simultaneously approves or disapproves of, and occasions, the apprehension of moral qualities."[184] Haakonssen claimed that this tradition encompassed Frances Hutcheson, George Turnbull, Lord Kames, Adam Ferguson, Thomas Reid and the Common Sense philosophers, and Dugald Stewart, and that its members "subscribed to a view of morals which did not set the sorts of limits to the scope of politics which we find at the heart of Hume's and Smith's thinking."[185] It is also evident that this approach influenced the accounts of natural law given by legal authors such as Erskine and Wallace.[186]

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180. THE MINUTE BOOK OF THE FACULTY OF ADVOCATES: VOLUME 3, 1751-1783, at 94 (Jan. 8, 1760) (Angus Stewart ed., Stair Society 1999) [hereinafter MINUTE BOOK].

181. Bruce had forty students in his final year: 1 MATRICULATION ROLL OF THE UNIVERSITY OF EDINBURGH: ARTS-LAW-DIVINITY 262 (Alexander Morgan transcriber, Edinburgh University Library (typescript, 1933-34)).

182. MINUTE BOOK, *supra* note 180, at 119 (24 Nov. 1762).

183. HAAKONSSEN, *supra* note 127, at 64.

184. *Id.* at 65-66.

185. *Id.* at 64.

186. *See* ERSKINE, *supra* note 159, at 1-9 (I.i.1-29); 1 WALLACE, *supra* note 116, at 1-60.

While it is unnecessary here to discuss the differing views of these philosophers in any detail, it is appropriate to consider aspects of their thinking. From the perspective of this study what is most important is how these theorists approached the issue of moral judgement.[187] Influenced by the thinking of John Locke and the third Earl of Shaftesbury, and by the seventeenth-century "revolution" in the natural sciences, they sought an empirical foundation for morals, and developed varying ideas of a moral sense.[188] Thus, Hutcheson, Professor of Moral Philosophy in Glasgow, 1728-1746, grounded ethics in observation and study of the thinking and behaviour of human beings. He argued that humanity by virtue of a moral sense was able to judge whether or not an action was right or wrong. Moral judgement was thus not founded in the reason (he argued strongly against ethical rationalists such as Samuel Clarke and William Wollaston), but in the senses, as morally beautiful actions gave pleasure.[189] Hutcheson used his theory of the moral sense to provide a foundation to a system of natural law based on that of Pufendorf that, he hoped, avoided the criticisms made of the latter's work by Leibniz.[190] Turnbull developed a comparable approach in his writings and translation of Heineccius.[191] The judge and prolific author, Henry

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187. The following draws on John W. Cairns, *Legal Theory*, *in* THE CAMBRIDGE COMPANION TO THE SCOTTISH ENLIGHTENMENT 222 (Alexander Broadie ed., 2003) [hereinafter SCOTTISH ENLIGHTENMENT COMPANION].

188. *See, e.g.*, D.D. RAPHAEL, THE MORAL SENSE (1947); Luigi Turco, *Moral Sense and the Foundation of Morals*, *in* SCOTTISH ENLIGHTENMENT COMPANION, *supra* note 187, at 136.

189. On the interpretations of Hutcheson's moral sense theory, see W.K. Frankena, *Hutcheson's Moral Sense Theory*, 16 J. HIST. IDEAS 356 (1955); David Fate Norton, *Hutcheson's Moral Sense Theory Reconsidered*, 13 DIALOGUE: CANADIAN PHILOSOPHICAL REVIEW 3 (1974); Kenneth P. Winkler, *Hutcheson's Alleged Realism*, 23 J. HIST. PHIL. 179 (1985); David Fate Norton, *Hutcheson's Moral Realism*, 23 J. HIST. PHIL. 397 (1985). There is strong disagreement over the view (espoused by Norton and Haakonssen) that Hutcheson's moral sense theory is cognitive. John D. Bishop, *Moral Motivation and the Development of Francis Hutcheson's Philosophy*, 57 J. HIST. IDEAS 277, 284-85 (1996), is of the view that Hutcheson's account of moral sense is ultimately inconsistent. The authoritative account of Hutcheson's life remains W.R. SCOTT, FRANCIS HUTCHESON: HIS LIFE, TEACHING AND POSITION IN THE HISTORY OF PHILOSOPHY (1900).

190. HAAKONSSEN, *supra* note 127, at 65-85. Others have seen inconsistency here in Hutcheson: *see, e.g.*, James Moore, *The Two Systems of Francis Hutcheson: On the Origins of the Scottish Enlightenment*, *in* PHILOSOPHY OF THE SCOTTISH ENLIGHTENMENT, *supra* note 145, at 37; James Moore, *Hutcheson's Theodicy: The Argument and the Contexts of a System of Moral Philosophy*, *in* SCOTTISH ENLIGHTENMENT, *supra* note 148, at 239. *See generally* V.M. HOPE, VIRTUE BY CONSENSUS: THE MORAL PHILOSOPHY OF HUTCHESON, HUME, AND ADAM SMITH 23-49 (1989).

191. HAAKONSSEN, *supra* note 127, at 85-99; K.A.B. Mackinnon, *George Turnbull's Common Sense Jurisprudence*, *in* ABERDEEN AND THE ENLIGHTENMENT: PROCEEDINGS OF A CONFERENCE HELD AT THE UNIVERSITY OF ABERDEEN 104 (Jennifer J. Carter & Joan H. Pittock eds., 1987); David Fate Norton, *George Turnbull and the Furniture of the Mind*, 36 J. HIST. IDEAS 701 (1975).

Home, Lord Kames, followed Hutcheson's rejection of ethical rationalism and accepted the idea of a moral sense as the explanation of how moral judgement was possible. Recognising the potentially utilitarian consequences of aspects of Hutcheson's views, he developed them by arguing that there were two aspects to the moral sense: a sense of duty and a sense of propriety or fitness. He argued that while many moral actions were right and fitting to be carried out, they could not be compelled; on the other hand, just actions could be compelled as justice was derived from the sense of duty. On this basis he developed a theory of the laws of nature.[192] The most radical proponent of a version of moral-sense theory was David Hume, who, in his *Treatise of Human Nature* (1739-1740), mounted a devastating attack not only on, *inter alia*, ethical rationalism (as had Hutcheson), but also on traditional natural law. If he owed much to Hutcheson, Hume nonetheless contended that the virtue of justice did not originate in the moral sense; instead, it was an "artificial" virtue, by which he meant that it originated solely in social convention.[193] He thus argued that rules for the allocation of the scarce resources necessary for life developed out of customary practices on the basis of expediency and necessity.[194] In the later *Enquiry Concerning the Principles of Morals* (1751), Hume stressed emphatically that the sole origin of justice was utility.[195] His critics were many. Here we may single out Thomas Reid, first Regent in the King's College and University of Aberdeen and then Professor of Moral Philosophy in Glasgow.[196] Reid viewed Hume as a dangerously brilliant sceptic. Developing his own empiricist views, Reid argued that Hume's emphasis on moral sense as founded in "feeling" was mistaken; rather, humankind possessed a mind with various innate powers. In particular, humanity had the cognitive

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192. Kames first set out his moral theory in HENRY HOME, LORD KAMES, ESSAYS ON THE PRINCIPLES OF MORALITY AND NATURAL RELIGION (1751). He further developed it in HENRY HOME, LORD KAMES, PRINCIPLES OF EQUITY (2d ed. 1767), and HENRY HOME, LORD KAMES, SKETCHES OF THE HISTORY OF MAN (1774). *See generally* IAN SIMPSON ROSS, LORD KAMES AND THE SCOTLAND OF HIS DAY 222-46 (1972).

193. DAVID HUME, A TREATISE OF HUMAN NATURE 307-66 (III.ii.1-12) (David Fate Norton & Mary J. Norton eds., 2000). The two-volume edition in the Clarendon Edition of the Works of David Hume is still awaited.

194. From a huge literature, *see, e.g.*, KNUD HAAKONSSEN, THE SCIENCE OF A LEGISLATOR: THE NATURAL JURISPRUDENCE OF DAVID HUME AND ADAM SMITH 4-44 (1981); Westermann, *supra* note 154; HOPE, *supra* note 190, at 50-82.

195. DAVID HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS: A CRITICAL EDITION 13-27 (Section III) (Tom L. Beauchamp ed., 1998 [= Clarendon Edition of the Works of David Hume, vol. 4].

196. On Reid's life, see Knud Haakonssen, *Introduction*, *in* THOMAS REID, PRACTICAL ETHICS 1, 6-37 (Knud Haakonssen ed., 1990); *see also* THE CORRESPONDENCE OF THOMAS REID (Paul Wood ed., 2002).

capacity to form moral judgements, as one aspect of the first principles of human knowledge and intellectual powers of the mind that constituted what Reid designated Common Sense.[197] On this basis, Reid went on to develop a natural jurisprudence based around the idea of a natural law commanded by God and grasped through human reason.[198]

B. Conjectural History and Legal Development

The language and concepts of natural law may have been commonplace in the first half of the eighteenth century, but certain aspects of such theories had undergone a major revolution by the date of the Advocates' Resolution in 1760. Pufendorf's theory of the contracts that brought to an end the state of nature and created civil society (a contract between the heads of families in the state of nature to create a civil society and then a contract between the sovereign and the governed) had already attracted criticism from his editors G.G. Titius and Barbeyrac, both of whom saw civil society as a progressive, incremental development into which humankind entered for varying reasons.[199] Barbeyrac, here influenced by Gershom Carmichael, later retracted this criticism of Pufendorf, acknowledging that the idea of a social contract could act as a justification, which still permitted historical investigation of the origins of civil societies.[200] One particularly dramatic intervention in this debate came from David Hume, who provided a powerful critique of the theory of a state of nature ended by a social contract.[201]

This debate provides the background to the discussion in, for example, Wallace's *System* of 1760, in which the author argued that mankind had always lived in a social state. Yet, he thought, human beings could not have lived long together without the need of government, as ideas of property would have existed from the first. He did not consider, however, that there would have been an original contract "at the first institution of government between the governors and governed;" rather, "the reins would be rashly put into the hands of the magistrate." This meant that the "power . . . of the first magistrates must have been arbitrary; and the political constitution of the most antient

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197. HAAKONSSEN, *supra* note 127, at 182-201; Keith Lehrer, *Beyond Impressions and Ideas: Hume vs Reid*, *in* THE SCIENCE OF MAN IN THE SCOTTISH ENLIGHTENMENT: HUME, REID AND THEIR CONTEMPORARIES 108 (Peter Jones ed., 1989).

198. Haakonssen, *supra* note 196, at 58-63; HAAKONSSEN, *supra* note 127, at 201-05.

199. See the discussion by Knud Haakonssen, *Commentary*, in REID, *supra* note 196, at 301, 410-12.

200. *Id.*; CARMICHAEL, NATURAL RIGHTS, *supra* note 142, at 124-27, 146-56.

201. HUME, *supra* note 193, at 317-18 (III.ii.2.15-17), 345-48 (III.ii.2.1-5); HUME, *supra* note 195, at 17 (III.15).

states . . . fixed either by chance or by force." To control the arbitrary actions of such magistrates, "general abstract rules, by which every case might be decided" would soon be established. Such rules "which are the laws, could be no other than expressions of their original notions of right and wrong." As life became more complicated, more laws would be created and "legislation would grow without end, because it would at last be discovered to be necessary, that the law should extend to every contingency in human life."[202] Laws of nature could be immediately apprehended by the exercise of reason either by instant intuition or by deduction.[203] They ought to provide the basis on which civil law was to be founded.[204] Thus, while Wallace accepted the existence of a natural law, the state of nature was for him an almost essentially historical epoch in a conjectural history.

Wallace presented a picture of law as always developing as new needs arose with the progress of humankind. In other words, he set out legal development as a part of a general, conjectural history of humanity. This, of course, reflected contemporary development in historiography in Scotland.[205] Thus, in his general approach to law, Wallace drew on the work of Montesquieu, whose *L'Esprit des Lois* of 1748 had aroused considerable interest in Scotland.[206] Montesquieu had eschewed organising his treatise around the universal principles of natural law; instead, he emphasised how varying forms of government and varying physical, social, and historical circumstances led to differing laws with diverse "spirits."[207] This approach evidently influenced Wallace's thinking about law, even if he disagreed with some of the details in Montesquieu's *magnum opus*.[208]

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202. 1 WALLACE, *supra* note 116, at xv-xvi.

203. *Id.* at 11-13 (I.iii.19-22).

204. *Id.* at 2 (I.i.5).

205. The literature is extensive and varied. *See, e.g.*, WILLIAM ZACHS, WITHOUT REGARD TO GOOD MANNERS: A BIOGRAPHY OF GILBERT STUART, 1743-1786 (1992); DAVID ALLAN, VIRTUE, LEARNING AND THE SCOTTISH ENLIGHTENMENT: IDEAS OF SCHOLARSHIP IN EARLY MODERN HISTORY (1993); COLIN KIDD, SUBVERTING SCOTLAND'S PAST: SCOTTISH WHIG HISTORIANS AND THE CREATION OF AN ANGLO-BRITISH IDENTITY, 1689-C. 1830 (1993); WILLIAM ROBERTSON AND THE EXPANSION OF EMPIRE (Stewart J. Brown ed., 1997); KAREN O'BRIEN, NARRATIVES OF ENLIGHTENMENT: COSMOPOLITAN HISTORY FROM VOLTAIRE TO GIBBON 56-166 (1997); J.G.A. POCOCK, BARBARISM AND RELIGION. VOLUME TWO. NARRATIVES OF CIVIL GOVERNMENT 163-365 (1999). There is a useful outline of some of the issues at stake in ALEXANDER BROADIE, THE SCOTTISH ENLIGHTENMENT: THE HISTORICAL AGE OF THE HISTORICAL NATION (2001).

206. For his biography, see ROBERT SHACKELTON, MONTESQUIEU: A CRITICAL BIOGRAPHY (1961).

207. CHARLES DE SECONDAT DE MONTESQUIEU, THE SPIRIT OF THE LAWS (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone eds. and trans., 1989).

208. *See* 1 WALLACE, *supra* note 116, at xii, 1.

Wallace did not explicitly refer to Montesquieu's insight that there were links between the laws of a nation and whether it lived by trade and navigation, or by cultivation of the soil, or by keeping flocks and herds, or by hunting.[209] He did quote with approval, however, the French author's opinion that "[l]aw in general is human reason insofar as it governs all the peoples of the earth; and the political and civil laws of each nation should be only the particular cases to which human reason is applied," a sentence followed by an account of the inevitable particularity of laws related to government, climate, and economy.[210] By the date of Wallace's publication of his *System*, a number of authors in both France and Scotland had already developed out of Montesquieu's work a theory that society developed through various stages of differing modes of subsistence.[211] In this respect a crucial Scottish work was Lord Kames' *Historical Law-Tracts* of 1758, which combined his version of moral-sense theory with a "four-stage" theory of development derived and adapted from Montesquieu.[212] Kames' views represent one line of thinking that had developed in Scotland from the varying approaches to the moral sense as the foundation of moral judgement; it is worth stressing, however, that not all authors found the "four-stage" theory a useful explanatory device, even if they found Montesquieu's work persuasive and insightful.[213]

C. Development of a Science of Legislation

There was also an important ideological and modernising message about Scots law in Kames' historical discussion, in which reform was seen as necessary to recreate Scots law as a law for a commercial nation.[214] While prior to the Union, reformers had wished to reduce Scots law to a series of statutes, Kames in contrast emphasised the role of *courts*, rather than of *legislatures*, in developing the law. He argued that courts possessed an equitable jurisdiction, according to which judges, drawing on the moral sense, were able to develop the law as necessary

209. MONTESQUIEU, *supra* note 207, at 289 (XVIII.8).

210. *Id.* at 8 (I.3); 1 WALLACE, *supra* note 116, at 2 (I.i.4).

211. *See, e.g.*, R.L. MEEK, SOCIAL SCIENCE AND THE IGNOBLE SAVAGE 68-130 (1976); Peter Stein, *The Four Stage Theory of the Development of Societies*, *in* STEIN, CHARACTER AND INFLUENCE, *supra* note 146, at 395.

212. 1 HENRY HOME, LORD KAMES, HISTORICAL LAW-TRACTS 92-94 (1758). Stein, *supra* note 211, at 403-05, considers that Kames was the first to develop the "four-stage" theory; I am inclined to disagree, but the argument is too complex to set out here.

213. *See, e.g.*, ADAM FERGUSON, AN ESSAY IN THE HISTORY OF CIVIL SOCIETY 10 (Duncan Forbes ed., 1966) (1767).

214. *See, e.g.*, DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN 144-75 (1989).

according to the principles of justice and utility. The courts had to recognise that historical development could turn moral duties of beneficence into duties of justice and develop the law accordingly.[215]

Adam Smith had a rather different view of the foundation of moral judgement, but he ultimately presented an argument about the role of the courts in legal development comparable in many ways to that of Kames. In *The Theory of Moral Sentiments* (1758), Smith argued that human beings possessed the ability to judge the propriety and merit of the behaviour of others through the mechanisms of sympathy and the concept of the impartial spectator. This made moral judgement possible. On this foundation, he argued that justice neither relied on some special moral sense nor was derived from "reason." Rather, justice arose from the confrontation of mankind with episodes that aroused in the observer a perception that another had been wronged and that the wronged person's sense of resentment was appropriate and ought to have an outlet in a due measure of punishment of the individual who had committed the wrong.[216] Smith accordingly argued that the rules of justice arose in this way from the moral sentiments.[217] Smith accepted a version of the "four-stage" theory, and accordingly saw law as historically dynamic, recognising that what was just was going to depend on the particular circumstances of differing societies. Moreover, he observed that laws, once formed, could be tenacious as sets of rules, resulting in legal provisions lasting beyond their usefulness and the circumstances that had given rise to them.[218]

On this basis, Smith developed a science of legislation, but not in the sense that it was necessary to reduce all law to legislative form.[219] While he recognised that there could be a need for legislation to deal

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215. *See generally* HENRY HOME, LORD KAMES, PRINCIPLES OF EQUITY (1760); *see* LIEBERMAN, *supra* note 214, at 159-75.

216. ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 86-91 (II.ii.3.4-12), 340-42 (VII.iv.36-37) (D.D. Raphael & A.L. Macfie eds., 1976; repr. 1982) [= The Glasgow Edition of the Works and Correspondence of Adam Smith, I]. *See generally* HAAKONSSEN, *supra* note 194, at 45-82. For a recent critique of Smith's theorising about the virtues (including justice), see Robert Shaver, *Virtues, Utility, and Rules*, *in* THE CAMBRIDGE COMPANION TO ADAM SMITH 189 (Knud Haakonssen ed., 2006) [hereinafter COMPANION TO SMITH].

217. *See* John W. Cairns, *Adam Smith and the Role of the Courts in Securing Justice and Liberty*, *in* ADAM SMITH AND THE PHILOSOPHY OF LAW AND ECONOMICS 31, 36-40 (Robin Paul Malloy & Jerry Evensky eds., 1994); HAAKONSSEN, *supra* note 194, at 83-98.

218. HAAKONSSEN, *supra* note 194, at 135-53, 178-89; Cairns, *supra* note 217, at 55; *see also* David Lieberman, *Adam Smith on Justice, Rights, and Law*, *in* COMPANION TO SMITH, *supra* note 216, at 214.

219. *See* John W. Cairns, *Ethics and the Science of Legislation: Legislators, Philosophers and Courts in Eighteenth-Century Scotland*, 8 JAHRBUCH FÜR RECHT UND ETHIK 159, 171-75 (2000).

with some eventualities, in general, he favoured incremental development of the law through the activities of the courts. The best law emerged when juries and judges formed moral judgements of new circumstances presented to them and decided what ought to be done in individual cases. He told his class on rhetoric and belles lettres in Glasgow in 1763 that, in England, the "sentences of former Cases are greatly regarded and form what is called the common law." In an unconscious echo of Stair, he stated that this "is found to be much more equitable than that which is founded on Statute only," because "what is founded on practise and experience must be better adapted to particular cases than that which is derived from theory only."[220] Thus, the best way for rules of justice, of "natural jurisprudence," as Smith put it, to be transformed into laws was not by legislation, but instead by the operation of precedent, with courts deciding such questions as and when they arose.[221]

VI. LEGAL EDUCATION AND LAW REFORM

A. Lord Kames and Legal Education

One consequence of such an approach to law reform was a renewed focus on the need for adequately educated lawyers: "philosopher" lawyers who could understand natural jurisprudence and work towards its inscription as law through the system of precedent. This explains the Advocates' concern in the 1760s that those who aspired to join the Faculty should be educated in natural law. Emphasising the need for suitable legal education, Kames argued that "[l]aw in particular becomes then only a rational study, when it is traced historically, from its first rudiments among savages, through successive changes, to its highest improvements in a civilized society."[222] Approached this way, Kames thought that legal education would train the student to understand how

220. ADAM SMITH, LECTURES ON RHETORIC AND BELLES LETTRES 175 (ii.200) (J.C. Bryce ed., 1983; repr. 1985) [= The Glasgow Edition of the Works and Correspondence of Adam Smith, IV]. The location of Smith's copy of JAMES DALRYMPLE, VISCOUNT STAIR, 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 (3d ed. 1759), is currently unknown: ADAM SMITH'S LIBRARY: A CATALOGUE 79 (no. 469) (Hiroshi Mizuta ed., 2000).

221. SMITH, *supra* note 216, at 218 (VI.ii.intro.2). For the argument, see Cairns, *supra* note 219, at 167-75; Cairns, *supra* note 217, at 40-45.

222. 1 KAMES, *supra* note 212, at [v].

law developed historically and understand the links between law and social change.[223] Kames concluded:

> Were law taught as a rational science, its principles unfolded, and its connection with manners and politics, it would prove an enticing study to every person who has an appetite for knowledge. We might hope to see our lawyers soaring above their predecessors; and giving splendor to their country, by purifying and improving its laws.[224]

B. John Millar of Glasgow

The most important law-teacher in Scotland in the second half of the eighteenth century, who educated many future leaders of the legal profession, was John Millar, from 1761-1801 Regius Professor of Civil Law in Glasgow.[225] A *protégé* of Kames and a former pupil of Smith, Millar centred his teaching around the theories of natural jurisprudence that he had acquired from Smith, and, indeed, it would be a fair judgement to consider him the intellectual heir of his master's science of legislation.[226]

By the time of Millar's immediate predecessor in the chair, Hercules Lindesay, the duties of the office had come to be understood as that of offering two classes: one on the *Institutes* of Justinian, the other on his *Digest*. These were considered "the proper business of the Professorship."[227] Millar taught these two courses using as his textbooks

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223. HENRY HOME, LORD KAMES, ELUCIDATIONS RESPECTING THE COMMON AND STATUTE LAW OF SCOTLAND [vii]-xiii (1777).

224. *Id.* at xiii.

225. Cairns, *Legal Education in Glasgow*, *supra* note 169, gives a general assessment of Millar. There is a partial list of his pupils in WILLIAM C. LEHMANN, JOHN MILLAR OF GLASGOW, 1735-1801: HIS LIFE AND THOUGHT AND HIS CONTRIBUTIONS TO SOCIOLOGICAL ANALYSIS 36-37 (1960). For further aspects of his teaching, see John W. Cairns, *John Millar's Lectures on Scots Criminal Law*, 8 OXFORD J. LEGAL STUDS. 364 (1988) [hereinafter Cairns, *John Millar's Lectures*]; John W. Cairns, *Rhetoric, Language, and Roman Law: Legal Education and Improvement in Eighteenth-Century Scotland*, 9 LAW & HIST. REV. 31, 39-49 (1991) [hereinafter Cairns, *Rhetoric, Language, and Roman Law*]; John W. Cairns, *John Millar, Ivan Andreyevich Tret'yakov, and Semyon Efimovich Desnitsky: A Legal Education in Scotland, 1761-1767*, *in* SCOTLAND AND RUSSIA IN THE ENLIGHTENMENT. PROCEEDINGS OF THE INTERNATIONAL CONFERENCE 1-3 SEPTEMBER 2000, EDINBURGH 20 (Tatiana Artemieva, Peter Jones & Michael Mikeshin eds., St Petersburg Centre for History of Ideas 2001) [= 15 THE PHILOSOPHICAL AGE: ALMANAC (2001)].

226. *See generally* HAAKONSSEN, *supra* note 127, at 154-81.

227. John W. Cairns, *The Origins of the Glasgow Law School: The Professors of Civil Law, 1714-1761*, *in* THE LIFE OF THE LAW: PROCEEDINGS OF THE TENTH BRITISH LEGAL HISTORY CONFERENCE OXFORD 1991, at 151, 174-83, 185 (Peter Birks ed., 1993). The quotation is from John Craig, *Account of the Life and Writings of John Millar, Esq.*, *in* JOHN MILLAR, THE ORIGIN OF THE DISTINCTION OF RANKS: OR, AN INQUIRY INTO THE CIRCUMSTANCES WHICH GIVE RISE TO INFLUENCE AND AUTHORITY, IN THE DIFFERENT MEMBERS OF SOCIETY, at i, xix (4th ed. 1806).

the relevant works of Heineccius.[228] Millar, however, expanded the scope of the curriculum in law at Glasgow, adding a class in Scots law, a class on government (initially described as on the public law of Scotland), and even a class on English law.[229]

It was traditional in the Scottish universities to teach the course on the *Institutes* twice each year, once in the winter session and again in the summer session.[230] Millar quickly altered the nature of the second course on the *Institutes*, because, according to his first biographer, he considered "the employment of a whole winter in tracing . . . the exact line of Roman Law . . . a mere waste of time and study." He decided accordingly to devote the second course to "Lectures on Jurisprudence."[231] In doing so, he adopted the analysis of law derived from Smith's Lectures on Jurisprudence;[232] indeed, his lectures rather resembled those of his teacher, granted his more focused attention on Roman law.

He told his class that his aim in the second course on the *Institutes* (in contrast to that in the first) was to reason "on the principles whereon their decisions are founded." Such principles were "to be the chief consideration and . . . we shall be led to compare the Roman law with that of other Nations."[233] He explained:

> It shall . . . be our cheif [*sic*] employment to enquire into the principles of the Roman Law, and to compare them with those of other countries. The aim of Students of Roman Law at this period, ought to be not merely to know what was the Roman System. That would be of little consequence of itself . . . . It has however a regard paid it as the system of Lawiers and Judges of great experience, and of a country which subsisted for such a long tract of time, and where we may consequently expect to find the rules of Jurisprudence of the most perfect kind. As however in the most perfect of all human Systems, there are numberless imperfections and Blemishes, it will certainly be proper in those who study the Roman law at this period, to enquire into the justice or propriety of these regulations. This can only be done by comparing it with the Laws of other countries, and with our

228. Cairns, *Legal Education in Glasgow*, *supra* note 169, at 140-42.

229. The chronology is set out in Cairns, *A Legal Education in Scotland, 1761-1767*, *supra* note 225, at 23-25; Cairns, *Legal Education in Glasgow*, *supra* note 169, at 136-39.

230. Cairns, *supra* note 227, at 185; ARNOT, *supra* note 169, at 398-99.

231. Craig, *supra* note 227, at xx.

232. *See* Cairns, *Legal Education in Glasgow*, *supra* note 169, at 140; ADAM SMITH, LECTURES ON JURISPRUDENCE 397-554 (R.L. Meek, D.D. Raphael & P.G. Stein eds., 1978; repr. 1982) [= The Glasgow Edition of the Works and Correspondence of Adam Smith, V].

233. NLS, Adv. MS 28.6.8, 1 (second sequence of pagination).

> own natural feelings of right and wrong. This is certainly a very usefull exercise, as it enlarges our experience.[234]

Millar accordingly started his class, after preliminary advice on reading, with a discussion of moral theory leading to an account of rights and the progress of law.[235] He analysed law into classes of rights, which were asserted by actions. Rights concerned persons or things. The rights of persons arose from the relationships of husband and wife, parent and child, master and servant, guardian and ward. Rights of things were divided into real and personal: the former concerned property, servitude, pledge and exclusive privilege; personal rights arose from contract, delinquency or crime.[236] It was described as a class "in which [Millar] treated of such general principles of Law as pervade the codes of all nations, and have their origin in those sentiments of justice which are imprinted on the human heart."[237] This is obviously Smith's analytical jurisprudence.[238] Millar thus developed in his second class on the *Institutes* a critical and analytical jurisprudence derived from Smith's theories; he also applied it in his account of Scots law.[239]

Smith's influence is further seen directly in the classes on government. Millar's historical and comparative approach to different systems of government in different countries allowed a judgement "concerning the expediency of different institutions and enlarge[d] our views concerning the principles of Government;" this meant that "we ought to examine each particular system historically, tracing each regulation from the origins through all the subsequent changes."[240] The progress of government was explained utilising Smith's stadial analysis.[241]

Millar's classes thus gave his students a rich and detailed account of legislative science. In the class on Government, the students learned how the legislative power, national defence, and the securing of public tranquillity by the appointment of magistrates and the establishment of courts of justice created the framework within which private rights arose, were recognised, and could be enforced. In the second class on the *Institutes*, Millar set out an analytical and historical jurisprudence, focused on Roman law, while the classes on Civil law and Scots law showed how rights were instantiated. There can be no surprise that, in

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234. NLS, Adv. MS 20.4.7, fols. 1r-2r.
235. *Id.* fols. 2r-23r.
236. NLS, MS 3930, 299-301 demonstrates this analytical breakdown.
237. Craig, *supra* note 227, at xx.
238. HAAONSSEN, *supra* note 194, at 99-134.
239. *See* Cairns, *John Millar's Lectures*, *supra* note 225, at 374-80.
240. Glasgow University Library [hereinafter GUL], MS Hamilton 116, 1-2.
241. GUL, MS Gen. 289, 31-33.

1777, Kames exempted Millar alone from his criticism of contemporary legal education, which he considered "trained [law students] to rely upon authority" and did not encourage them in "the exercise of reasoning."[242] Millar's biographer noted that the course on Government instructed the "young Lawyer . . . in the spirit and real intention of the Laws," revealing "to the future statesman . . . views of human society, of the nature and ends of Government, and of the influence of Public Institutions on the prosperity, morals, and happiness of states";[243] that on jurisprudence directed "the enlightened Legislator . . . in the noble, but arduous, attempt, to purify and improve the laws of his country." The historical aspect of Millar's legal theory prevented "inconsiderate innovation, and indiscriminate reform," since it demonstrated that "no institutions, however just in themselves, can be either expedient or permanent, if inconsistent with established ranks, manners, and opinions."[244]

C. Allan Maconochie and John Wright of Edinburgh

Millar was not alone in this approach. We have noted that Bruce, as Professor of Public Law and the Law of Nature and Nations in Edinburgh, taught from a compend of Grotius; his choice of book suggests that he would have given a relatively traditional account of natural law.[245] His immediate successor, James Balfour, allegedly failed to secure a class and was recorded by Arnot in 1779 as not teaching.[246] The University had advertised Balfour's classes for sessions 1777-78 and 1778-79;[247] but there is no evidence that he either taught in those years or, indeed, was anticipated to be likely to teach. In fact, it is quite possible that the aim of the advertisements was to put pressure on him to resign; he was certainly replaced in 1779, when Allan Maconochie succeeded to the chair.[248]

Descriptions of Maconochie's class survive:

> He traces the rise of political institutions from the natural characters and situation of the human species; follows their progress through the rude periods of society; and treats of their history and merits, as exhibited in the principal nations of ancient and modern times, which he examines

242. KAMES, *supra* note 223, at [vii]-ix.
243. Craig, *supra* note 227, at lvii.
244. *Id.* at xl-xli.
245. Cairns, *supra* note 152, at 43-46.
246. ARNOT, *supra* note 169, at 398. On Balfour, see, e.g., Cairns, *supra* note 152, at 46-47; Sher, *supra* note 150, at 109-15.
247. EDINBURGH EVENING COURANT (Oct. 4, 1777 & Sept. 5, 1778); EDINBURGH ADVERTISER (Sept. 12, 1777 & Sept. 4, 1778).
248. *See* Cairns, *supra* note 152, at 47.

> separately, classing them according to those general causes to which he attributes the principal varieties in the forms, genius, and revolutions of governments. In this manner he endeavours to construct the science of the spirit of laws on a connected view of what might be called the natural history of man as a political agent; and he accordingly concludes his course with treating of the general principles of municipal law, political œconomy, and the law of nations.[249]

Together with some surviving fragments of his lectures, such accounts of Maconchie's class indicate that he was instructing his class in the science of legislation in a manner similar to that of Millar, with a focus on historical natural jurisprudence in the manner of Adam Smith, whose work had influenced him.[250]

Another teacher in Edinburgh who also, at least some of the time, flirted with such an approach in classes on Roman law was John Wright, who taught privately.[251] Thus, in 1785, he stated that his classes would be "rendered as practical as possible, by comparing the rules of the Civil Law both with the maxims of *Universal Jurisprudence*, and with the principles of our *own Law*."[252] Like Millar, Wright did not expound the Digest of Justinian in its original order, but described himself as teaching it "in *the order* of the Institutions, and all the titles in the 50 books are, for that purpose, selected into a small printed *Syllabus*."[253] Perhaps mindful of Kames' criticism of those who taught law as "naked facts" and did not give to the students "any exercise to the judgement," Wright claimed that, in his teaching, "Explanations are not confined to mere facts, either of Law, or of Opinions; but extend to philosophical reasons, and to historical deduction."[254]

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249. HUGO ARNOT, THE HISTORY OF EDINBURGH 398 (2d ed. 1788). See also the description in [Henry Brougham], *Memoir of Allan Lord Meadowbank*, 2 LAW REVIEW AND QUARTERLY JOURNAL OF BRITISH AND FOREIGN JURISPRUDENCE 72, 75-77 (1845) [repr. as [HENRY BROUGHAM], MEMOIR OF THE LATE ALLAN MACONOCHIE OF MEADOWBANK, ONE OF THE SENATORS OF THE COLLEGE OF JUSTICE 10-12 (privately printed 1845)].

250. Cairns, *supra* note 152, at 48-51. Maconochie's son is the first known owner of the second (dated 1766) of the two surviving sets of student manuscripts of Smith's Lectures on Jurisprudence. *See* ADAM SMITH, LECTURES ON JUSTICE, POLICE, REVENUE AND ARMS DELIVERED IN THE UNIVERSITY OF GLASGOW BY ADAM SMITH, REPORTED BY A STUDENT IN 1763, at xv-xvii (Edwin Cannan ed., 1896).

251. For an assessment of Wright, see Cairns, *The Face That Did Not Fit*, *supra* note 169, at 12-28.

252. EDINBURGH ADVERTISER (Nov. 11, 1785).

253. EDINBURGH EVENING COURANT (Nov. 8, 1794).

254. KAMES, *supra* note 223, at viii-ix; EDINBURGH EVENING COURANT (Nov. 8, 1794).

D. Education and Legislative Science

From the third quarter of the eighteenth century, a vision of the science of legislation derived from the thinking of Adam Smith and Lord Kames was becoming entrenched in legal education. Law was seen as historically progressive, linked to differing types of societies, and as capable of reform through the work of lawyers in litigation. Legal education was geared to making lawyers sensitive to the needs and methods of legal development.

VII. CODIFICATION AND LEGISLATION

It is possible to understand these developments in Scotland as the elaboration of varying versions of a historical natural jurisprudence. On continental Europe too, an empirical and "historical" natural law had developed out of the writing of Pufendorf, particularly through the work of Thomasius, who made a sharp distinction between law and morality. Law was willed; but it ought to be made to conform to contemporary human needs. Natural law—morality—was merely advice to the legislator.[255]

A. Christian Wolff and Codification

Christian Wolff, however, returned to a systematic, rationalist approach, rejecting Thomasius' sharp distinction between law and morality and historical approach to natural law. Wolff accepted an essentially scholastic position that there was an intrinsic and objective morality stemming from human reason that was accessible to the individual human conscience. (Others were to link his views with those of Leibniz.) Human beings, according to the light of their reason, could choose whether or not to pursue the goal of perfection. Good actions were those that assisted an individual towards perfection; bad actions were those that led towards imperfection. It was possible through the exercise of human reason to know practical ethics, that is, what was natural law. Natural law was thus not dependent on the will of a legislator. The human capacity for reasoned deduction allowed natural

255. *See, e.g.*, WIEACKER, *supra* note 61, at 251-53; HOCHSTRASSER, *supra* note 141, at 112-49. It is possible to identify utilitarianism in Thomasius' work: Joachim Hruschka, *The Greatest Happiness Principle and other Early German Anticipations of Utilitarian Theory*, 3 UTILITAS 165 (1991).

law to be known. Logical deduction from a higher principle ensured the validity of individual laws.[256]

Wolff has been identified as particularly important in creating, through his geometric method, law as a closed system, in which judicial decisions become the "logical application of abstract principles and general concepts." Whereas the method of the *ius commune* had been "to analyse an authoritative text and to draw a conclusion from it," following Wolff's approach, "the ultimate basis for decision was a synthetic legal concept which could be traced back to ultimate higher principles in a manner consonant with the system."[257]

If natural law was deducible by reason, positive law was the product of will. For Wolff, subjects had conceded to the prince the power to legislate through exercise of will. The prince had the duty to seek the perfection and happiness of his subjects through legislating natural law into positive law. This meant that Wolff (and similar philosophers) provided ideological support for the legislative schemes and projects for codification of the Enlightened, absolutist monarchs of Europe.[258] As Klippel has pointed out, the "blueprint" that natural law provided for enlightened absolutism was the pursuit of "happiness;" this greatly extended the concerns of the state, which had to ensure the happiness of the citizens, thereby requiring to legislate very comprehensively for all aspects of social life.[259]

Together with a Wolffian approach to law, such an attitude promoted codification of private law, as well as extensive legislation on all fields of life, private and public. It is worth stressing that in the German lands such reforms were not always successfully managed or carried out, and that it is always necessary to remember the variation between the polities that made up the Empire.[260] Nonetheless, this suggests an approach somewhat at variance with that which had developed in contemporary Scotland. It becomes important therefore, in the light of the above discussion, to return briefly to the issue of how Scots viewed legislation, since they were certainly aware of these

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256. WIEACKER, *supra* note 61, at 253-55; HOCHSTRASSER, *supra* note 141, at 150-86. For an assessment of the relationship between the thought of Wolff and that of Leibniz, see Catherine Wilson, *The Reception of Leibniz in the Eighteenth Century*, *in* COMPANION TO LEIBNIZ, *supra* note 144, at 442, 444-53.

257. WIEACKER, *supra* note 61, at 255; *see also* SCHRÖDER, *supra* note 163, at 170-75, 180-82.

258. WIEACKER, *supra* note 61, at 254; HOCHSTRASSER, *supra* note 141, at 167.

259. *See* Diethelm Klippel, *Legal Reforms: Changing the Law in Germany in the Ancien Régime and in the Vormärz*, 100 PROCEEDINGS OF THE BRITISH ACADEMY 43 (1999).

260. *Id.* at 44-55; WIEACKER, *supra* note 61, at 257-75. Klippel provides a useful corrective to the idea of the "natural law codes" found in, *inter alia*, Wieacker's work.

developments in continental thought, so that, for example, an English translation of the Prussian *Projekt des Corporis Juris Fridericiani* was published in Edinburgh in 1762, while Turnbull had translated Heineccius, whose works, in any case, were well known.[261]

B. Precedent and Individual Rights

While Adam Smith and others were as concerned with legislative science in a broad sense as were the advisors to reforming rulers in the Empire, they did not see it as a necessary function of government to achieve such desired aims through comprehensive legislation. This was true, they thought, not only for matters of justice, but also for issues of "police," those aspects of public regulation based on expediency.[262] Sometimes it was indeed necessary to legislate, but it had to be done carefully: "Laws frequently continue in force long after the circumstances, which first gave occasion to them, and which alone could render them reasonable are no more."[263] Moreover, even when it was necessary to legislate, such as, for example, to turn a duty of beneficence into one of law, it had to be carried out carefully, because, if neglected, the "commonwealth [would be exposed] to many gross disorders and shocking enormities," but, "to push it too far is destructive of all liberty, security, and justice."[264] In contrast to the emphases in the ambitions for codification in the later eighteenth century in the German lands, the happiness of the community was not to be pursued at the expense of individual rights and liberties. Indeed, as Winch has put it, "[t]rue wisdom often consisted in respecting the superior knowledge that actors in the social drama have of their own affairs."[265] As Smith himself famously wrote in 1790, attacking the conceit of the "man of system:"

> Some general, and even systematical, idea of the perfection of policy and law, may no doubt be necessary for directing the views of the statesman. But to insist upon establishing, and upon establishing all at once, and in spite of all opposition, every thing which that idea may seem to require, must often be the highest degree of arrogance. It is to erect his own

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261. THE FREDERICIAN CODE; OR, A BODY OF LAW FOR THE DOMINIONS OF THE KING OF PRUSSIA. FOUNDED ON REASON, AND THE CONSTITUTIONS OF THE COUNTRY (1761) (this was based on a French edition); HEINECCIUS, *supra* note 164.

262. *See, e.g.*, Donald Winch, *Science and the Legislator: Adam Smith and After*, 93 ECON. J. 501 (1983).

263. 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 383 (III.ii.4) (R.H. Campbell, A.S. Skinner & W.B. Todd eds., 1976; repr. 1979; repr. 1981) [= The Glasgow Edition of the Works and Correspondence of Adam Smith, II].

264. SMITH, *supra* note 216, at 81 (II.ii.1.8).

265. Winch, *supra* note 262, at 503.

> judgment into the supreme standard of right and wrong. It is to fancy himself the only wise and worthy man in the commonwealth, and that his fellow-citizens should accommodate themselves to him and not he to them. It is upon this account, that of all political speculators, sovereign princes are by far the most dangerous.[266]

C. The Attack on Legislation

For Scots law, as we have seen, this emphasised development primarily by precedent. Law was best built up progressively, case by case, as judges and juries reacted sympathetically to real situations and decided where justice lay. This avoided abstract speculation about what law was needed; rather, focusing on litigation demonstrated clearly what law was in fact needed and when. The choice between competing legal principles was made through decisions in litigation according to natural jurisprudence. As Robert Bell put it in 1794, if the law was formed through deciding cases it would possess "that flexibility, which enables it to follow the manners and customs of a nation through all the changes to which they are subject." Legislation, on the other hand, meant that the law was "in a great measure stationary" and would eventually turn the "the statute-book" into "a contradictory, unwieldy, and oppressive mass."[267]

Towards the end of the eighteenth century, therefore, Scots law was moving away from its earlier ideal of legislation as the best mode of law-making towards a system of precedent, and in a direction somewhat different from mainstream thought in much of continental Europe. To some extent this was due to the Union and the development of liberal tendencies in political thought: intellectually Scots looked more now to London than to Continental Europe; in contrast to the old Scottish Parliament, Westminster was a relatively reluctant legislator for Scots private law. In line with the way Scottish Enlightenment thought favoured piecemeal incremental reform, David Hume, nephew of the philosopher and a successful Professor of Scots Law in the University of Edinburgh from 1786 to 1822, counselled his students against "systematical views" of which "[m]en of genius" were "naturally fond." He pointed to "the inconveniences and distresses which mankind would suffer if their affairs and intercourse were uniformly governed, according to the same invariable rule in all cases." A student had to avoid the

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266. SMITH, *supra* note 216, at 233-34 (VI.ii.2.17, 18).

267. CASES DECIDED IN THE COURT OF SESSION, FROM NOVEMBER 1790 TO JULY 1792. COLLECTED BY ROBERT BELL, CLERK TO THE SIGNET, at vii-x (1794) [hereinafter CASES . . . 1790-1792].

"hazard of . . . preferring too much those arguments which bear the appearance of deducing a conclusion logically from general principles."[268]

A legislative, systematic approach to law reform in the manner of codification was to be avoided. In the 1790s, a commentator emphasised that it was the "decisions of the Court of Session" which had brought "our law to its present improved state;" it was the same source that could be expected to bring about "those farther improvements of which it is susceptible." As the Scots moved away from the older *ius commune*, the development of historical natural jurisprudence had led them to the view that the "law of this country consists principally of the decisions of the Court of Session." Moreover, this was to be considered "perhaps a fortunate circumstance . . . and one which may bring our jurisprudence to a state of excellency, by a natural and certain progress."[269] This was because courts did "not pronounce judgment until the whole facts necessary for judging the cause are fully known." Moreover, courts could examine the question under consideration thoroughly and carefully and weigh up the consequences of a decision. When the same question was raised again "under circumstances nearly similar," the former decision was reconsidered and this continued "until a general rule be formed, drawn from the united wisdom of our judges, and founded on the firm basis of experience."[270] Law was thus able to progress naturally and easily, in a manner "congenial to the nature of society," accommodating itself to social change, so that "the alterations which become necessary, are produced by almost imperceptible degrees . . . without the appearance of innovation."[271]

As the Scots moved away from the old *ius commune*, they thus moved not towards codification as an ideal, but instead towards a view that the best law emerged out of competing individuals seeking judicial resolution of their disputes. For this to work, however, the courts needed to be structured in such a way that maximised the possibilities of natural jurisprudence being turned into positive law in the sense of precedent. Moreover, as the acceptable sources of Scots law became limited to statutes and decisions, it was necessary to ensure that the reports of the latter be adequate to indicate any precedents.

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268. 1 DAVID HUME, BARON DAVID HUME'S LECTURES 1786-1822, at 4-5 (G.C.H. Paton ed., Stair Society 1939-1958).

269. CASES . . . 1790-1792, *supra* note 267, at vi-vii.

270. *Id.* at vii-viii.

271. *Id.* at viii.

VIII. REFORMS: PROCEDURE, COURT, AND REPORTS

As such views became current in Scotland, opinion grew in favour of major reform of the Court of Session in particular. Increasing the pressure for this was the perception that a growing backlog of cases was the product of both the structure of the Court and its form of process, as the volume of litigation doubled between 1760 and 1800.[272] Reform of the Session was also thought to be the solution to the very high rate of appeal from the Court of Session to the House of Lords; in fact, by 1800, no less than four-fifths of all appeals to the Lords originated in the Court of Session, arguably causing the arrears of three years in judicial business that had built up before the House.[273]

A. Romano-Canonical Procedure

The Session had preserved the basic structure acquired in 1532 as the College of Justice, and still consisted of a President and fourteen Ordinary Lords. All fifteen sat together in the Inner House (nine being a quorum), deciding issues by a vote. The Court had continuously developed its version of Romano-Canonical procedure through Act of Sederunt, general practice, and reference to the writings on procedure of the *ius commune*.[274] Each Lord Ordinary would sit in turn in the Outer House as Lord Ordinary of the Week, Lord Ordinary upon the Bills, as one of the two weekly Lords Ordinary on Oaths and on Witnesses, and Lord Ordinary on Concluded Causes. Though the offices were separate, the same individual might exercise them at the same time: for example, it was common for the Lord Ordinary of the Week also to serve as Lord Ordinary upon the Bills (in which capacity he dealt with requests to advocate cases to the Session from lower courts or to suspend the decrees of lower courts).

The Lord Ordinary of the Week dealt with initial applications and dealt with "ordinary processes" enrolled before him on the basis of the pursuer's libel and the defender's defences. The litigants' advocates would debate the cause before him *viva voce*, though it was also common for him to direct that their arguments be reduced to written Memorials if there were legal points of difficulty. Likewise, he might require that the pursuer produce written condescendences to clarify

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272. PHILLIPSON, *supra* note 115, at 46-47.

273. *Id.* at 85. For an example, see Andrea C. Loux, *The Great Rabbit Massacre—A "Comedy of the Commons?" Custom, Community and Rights of Public Access to the Links of St Andrews*, 22 LIVERPOOL L. REV. 123, 137 (2000).

274. There is a convenient short account of procedure in SUGGESTIONS FOR SOME REFORMATIONS IN THE FORM OF PROCESS IN THE COURT OF SESSION 3-6 (1787).

averments of fact and how they were to be proved. Should there be no need to take proof by oath or witness, it was possible for the Lord Ordinary to dispose of ordinary processes himself. It was always possible for litigants to ask the Lord Ordinary to review his own interlocutors or to take a reclaiming petition against his interlocutors to the Inner House. The Lord Ordinary could also report matters of difficulty to the Inner House for decision, in which case the litigants would prepare printed Informations setting out their arguments. The majority of causes were ultimately decided in the Outer House in this way. "Extraordinary processes" had to be determined by the Inner House.[275] In truth, few ordinary processes of any significance failed to reach the Inner House, possibly more than once, by means of reports or reclaiming petitions. Each Lord Ordinary would also sit once a week at the side bar in the Outer House before the main sitting of the Court in order to deal with the further progress of causes originally brought before him as Lord Ordinary of the Week.

Should there be a need to take proof either by oath or witness, this was passed to the relevant Lord Ordinary. This could only be done once the Lord Ordinary of the Week had passed an Act of Litiscontestation authorising the taking of proof. In theory, this act could only be passed if the Lord Ordinary had ruled authoritatively on the legal issues in the case, having dealt with the claims of the pursuer and defences (exceptions) of the defender (perhaps after reclaiming petitions to the Inner House, or a report of matters of difficulty to the Inner House), so that the action could pass to proof of fact. The Lord Ordinary of the Week might decide, however, that the issues of fact and law were so inextricably linked that he passed an Act before Answer, that is, allowed the taking of proof before ruling on the pleas in law before him. In practice, the Lord Ordinary on Witnesses commonly granted a commission for someone else to question witnesses elsewhere on the basis of interrogatories. Parliament Hall, which served as the Outer House, was not ideal for questioning witnesses, who often, if in Edinburgh, were examined in convenient, nearby taverns.[276] By the 1780s, the practice of examination of witnesses by the two Ordinaries on

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275. PHILLIPSON, *supra* note 115, at 43-44; Cairns, *supra* note 21, at 4.

276. PHILLIPSON, *supra* note 115, at 43-46; Stewart, *supra* note 176, at 202; Cairns, *supra* note 21, at 4-5. On the significance of *litis contestatio*, see R.H. Helmholz, *The Litis Contestatio: Its Survival in the Medieval Ius Commune and Beyond*, *in* LEX ET ROMANITAS: ESSAYS FOR ALAN WATSON 73 (Michael Hoeflich ed., 2000). Until 1686 evidence was taken by the judge in private and sealed only to be made available on advising of the cause by the whole court; after 1686, parties and their lawyers could be present when witnesses were examined and could have access to their depositions. Evidence Act, 1686, c. 30, in 8 APS, *supra* note 28, at 599.

Oaths and Witnesses could be described as in disuse, because of the use of commissioners appointed by the Court.[277]

Once proof had been taken, if there had been an act of litiscontestation, the whole process was enrolled as a concluded cause. The office of Lord Ordinary on Concluded Causes had been created in 1693, with the duty of examining the proof, hearing the parties on the issues of probation, litiscontestation and testimony, and making a written report on the whole cause for the Inner House for advising.[278] The Lord Ordinary prepared a document (printed by the later eighteenth century), setting out the pleadings of the parties and the evidence of the witnesses. This was usually called a Statement of the Cause. It was on this basis that the Inner House would decide the cause.[279]

A complex cause would accumulate a large bundle of papers, and observers considered that litigation in the Court of Session had, by the mid-eighteenth century, despite the significance of oral debate, become a largely written process: "Ours is a court of *papers*. We are never seriously engaged but when we write," wrote James Boswell in 1776.[280] In 1789, one judge estimated that, in six months, 24,390 quarto pages had to be read for Inner House business.[281]

B. Procedure and Precedent

Observers considered that the form of process used before the Court of Session was the main reason for the delay and the growing backlog of cases pending; with this we need not be concerned here.[282] What we need to consider is the problems the form of process may have caused for the development of precedent. In particular, two observations are important. First, procedure was flexible and litigants were readily allowed to amend their pleadings, which meant that the nature of a case could be uncertain and the points of law at issue fluid as it progressed through the Court, so that what exactly was at issue could be unclear, leading to uncertainty as to the precedent established. Secondly, judges in the Inner House

277. SUGGESTIONS FOR SOME REFORMATIONS, *supra* note 274, at 5.

278. Act Anent Advising Concluded Causes, 1693, c. 30, in 9 APS, *supra* note 28, at 282-83. For a discussion, see STAIR, *supra* note 23, at 1091 (appendix).

279. PHILLIPSON, *supra* note 115, at 43-44, 56; Cairns, *supra* note 21, at 5. Matters were handled somewhat differently if there had been an act before answer: STAIR, *supra* note 23, at 1091 (appendix).

280. JAMES BOSWELL, BOSWELL'S EDINBURGH JOURNALS 1767-1786, at 238 (Hugh M. Milne ed., 2001).

281. JOHN SWINTON, CONSIDERATIONS CONCERNING A PROPOSAL FOR DIVIDING THE COURT OF SESSION INTO CLASSES OR CHAMBERS; AND FOR LIMITING LITIGATION IN SMALL CAUSES; AND FOR THE REVIVAL OF JURY-TRIAL IN CERTAIN CIVIL ACTIONS 23-24 (1789).

282. *See* PHILLIPSON, *supra* note 115, at 46-61.

decided by a vote whether to find for the pursuer or defender. This meant that it was frequently doubtful as to why a case was decided one way or another: different judges—and it should be remembered that the quorum was nine—might have quite different reasons for deciding in favour of one or the other party. It therefore could be a problem to extract a clear precedent from a decision, other than by studying the final interlocutor in the light of the written pleadings; but these were not always clear themselves and very complex. As one advocate commented to the Court:

> *In Cumulo* one of your Lordships is moved by one Reason, and another by another, which Reasons, if they were examined or determined separately, would be repelled by the Plurality, which also is the Case why in most Sovereign Courts, especially in England, the Judges do resolve particular Points, which renders the Reason of the Decisions clear, and makes the Precedent of greater Use in other Cases.[283]

Another observer remarked:

> The difference of opinion, which could not fail to arise from the different views of the case that suggested themselves to the minds of so many Judges, gave rise often to discussions, the result of which was not always to forward the cause. Few pleas could well be brought before the Court, without plausibility enough to secure the vote of one or more of the Judges. . . . Among so many discordant decisions, too, the grounds of the judgment could not always be traced; and it was often difficult to decide, what actually had been held to be the law of the case.[284]

When the focus in arguing the law had been on statutes and well-known customs, as well as tracts of decisions, viewed against interpretation of the extensive sources of the *ius commune*, these had not been significant problems. As, however, the law became ever more focused on development through decided cases, the difficulties posed by inadequate reports with uncertain and conflicting reasoning behind decisions became ever more acute.

Those who suggested reforms in the last quarter of the eighteenth century were mindful of this problem, though more concerned with other issues. Thus, in 1785, it was proposed to reduce the number of judges before the Session to ten. While fiscal issues were to the fore in this, one hope was also that improved discussion of the law among the judges would result.[285] One of the proponents of the reform commented that "it

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283. *Quoted in* Inglis, *supra* note 177, at 52.

284. 1 [JAMES IVORY], FORM OF PROCESS BEFORE THE COURT OF SESSION, THE NEW JURY COURT, AND THE COMMISSION OF TEINDS 17-18 (1815-18).

285. PHILLIPSON, *supra* note 115, at 63.

has never been supposed that to determine a matter of law, there was any advantage in a multiplicity of Judges."[286] The failed reforms stimulated a debate over the problems of procedure, out of which emerged a relatively common view that it was necessary to separate more clearly issues of fact and law and perhaps introduce the civil jury.[287]

C. Reforms, 1807-1825

In 1807, there was an abortive attempt to reform the Session, by splitting it into three chambers with concurrent jurisdictions, creating a permanent court of appeal, and making it possible for litigants in most instances to opt for jury trial. The aims behind these proposals were to some extent technical; but a Whiggish, ideological belief in the superiority of English trial by jury coloured the whole scheme.[288] The next year, however, the Session was split into two Divisions, the First presided over by the Lord President, the Second by the Lord Justice-Clerk (the effective head of the (criminal) Justiciary Court, now given for the first time an official role in the Court of Session). The aim was that two courts of equal co-ordinate jurisdiction should dispose of work more quickly than one.[289] The Act also authorised the appointment of a Commission to "enquire . . . particularly into the Forms of Process in the Court of Session." It is obvious what the intentions were. The Commission was specifically instructed to consider the introduction of jury trial, the possibility of more pleading *viva voce*, the issue of taking evidence on commission, and the creation of permanent Lords Ordinary.[290] A sense of the superiority of English procedure lay behind these. By 1813, Lords Ordinary were permanent in the Outer House, so that there now appeared to be a court of first instance and a court of second instance, rather than the older collegiate structure.[291]

In 1815, an act was finally passed in Parliament creating—for a trial period of seven years—a jury court, headed by a Lord Chief Commissioner with two Commissioners. The Jury Court dealt with issues that the Court of Session, by interlocutor, sent to it for

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286. ILAY CAMPBELL, AN EXPLANATION OF THE BILL PROPOSED IN THE HOUSE OF COMMONS, RESPECTING JUDGES IN SCOTLAND (1785), *quoted in* PHILLIPSON, *supra* note 115, at 75.

287. PHILLIPSON, *supra* note 115, at 77-84.

288. Much of the following account is derived from my discussion in Cairns, *supra* note 21, at 3, 6-7. *See also* PHILLIPSON, *supra* note 115, at 85-110; Cairns, *supra* note 8, at 151.

289. Court of Session Act 1808, 48 Geo. III, c. 151.

290. *Id.* § 22; PHILLIPSON, *supra* note 115, at 112-26.

291. Cairns, *supra* note 8, at 151-52.

determination by a jury.[292] By 1819, the Jury Court had been judged to be successful. It was made permanent by an act of Parliament that now required Lords Ordinary to send for trial by jury certain classes of cases raised in the Outer House.[293]

In 1823 yet another Commission was established to consider procedure before the Session.[294] This Commission was of the view that the permanent Outer House had been a success and that accordingly the number of permanent Lords Ordinary should be increased; any continuing problems could be dealt with by ensuring more efficient conduct of business. The resulting Act provided that, in ordinary actions, there would be a summons and defences that set out clearly what was at issue between the parties in matters of fact and law. Further, there would be no decision on the merits of the case until a record with its condescendences and pleas in law had been made up, adjusted, and closed. The Lord Ordinary could then decide the cause on its merits or report it to the Inner House. Procedures were to be expeditious, disciplined, and simple. Neither the Ordinaries nor the Inner House could be asked to reconsider their decisions. The list of causes that had to be sent to the Jury Court from the Court of Session was also very greatly expanded to cover the main areas of commercial law. There were now to be seven Lords Ordinary permanently in the Outer House, with the other judges split between the two divisions of the Inner House. In consequential acts of sederunt, the Lords recognised the significance of the changes and showed a determination not only to enforce strictly the new forms of process but also to ensure that pleading became primarily oral, rather than written.[295] In 1830, in an act carrying out further major reform and rationalisation of the Scottish court structures, the Jury Court was abolished and its jurisdiction merged with that of the Court of Session.[296]

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292. Jury Trials (Scotland) Act 1815, 55 Geo. III, c. 42. The next two paragraphs are adapted from Cairns, *supra* note 8, at 151-52.

293. Jury Trials (Scotland) Act 1819, 59 Geo. III, c. 35; Cairns, *supra* note 8, at 152-53.

294. 4 Geo. IV, c. 85 (1823); William M. Gordon, *George Joseph Bell—Law Commissioner*, *in* OBLIGATIONS IN CONTEXT: ESSAYS ON HONOUR OF PROFESSOR D.M. WALKER 79 (A.J. Gamble ed., 1990).

295. Court of Session Act 1825, 6 Geo. IV, c. 120; *see* Charles Hope, *Speech . . . on Moving the Court To Pass Acts of Sederunt for the Better Regulating of the Forms of Process in the Courts of Law in Scotland*, *in* THE ACTS OF SEDERUNT OF THE LORDS OF COUNCIL AND SESSION, FROM THE 19TH JUNE 1821 TO 8TH JULY 1831, at 97-103 (1832).

296. Court of Session Act 1830, 11 Geo. IV and 1 Will. IV, c. 69, §§ 1-16; *see* discussion in PHILLIPSON, *supra* note 115, at 158-64; Cairns, *supra* note 8, at 153-54.

D. Clarity of Precedent

The effect of these reforms, particularly the development of the system of the open and closed record, was to help clarify when there was a dispute over the applicable law in a case and to clarify what was at dispute in the law. As one commentator recognised in 1823, "in a great measure . . . the mode in which the pleadings are conducted" was the direct cause of "the difficulty of ascertaining precisely the grounds on which the decision is placed by the Court."[297] The new system of the closed record attempted to rectify this. Further, the ambition that pleading should become primarily oral forced advocates early to be more discriminating in the lines of argument on the law they would run before the judges, while allowing direct judicial probing of arguments as they were presented to the court.[298]

While the new reforms had developed out of existing procedure, the changes resulted in a court in appearance and working radically different from what it had been. By the end of the third decade of the nineteenth century, the Court of Session had thus been restructured and its procedures reformed in such a way that, in deciding causes, it created clearer precedents. The need for this was recognised in the drafting of the act of 1825, which provided "that in order to preserve uniformity in the decisions of the court, and to settle doubtful questions of law which may arise," if the judges in the Inner House were equally divided (each division consisted of four judges), the judges might direct that the cause be judged by both divisions sitting together, or by the whole court. Likewise, the judges of either division, "in such cases as it shall appear to them advisable to have any question occurring before them settled by the judgment of the whole court" could order that "such matter be heard before the whole judges."[299] The division of the court was not to be allowed to create conflicting precedents.

As the living sources of Scots law became progressively limited to statutes and cases in the second half of the eighteenth century, so proper reporting of cases became ever more important. Reports tended to consist of an account of the facts and the law at issue culled from the written pleadings, together with the formal sentence of the court. Given how voluminous the pleadings could be and the variety of reasons on

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297. [ROBERT HANNAY], LETTER TO THE DEAN OF THE FACULTY OF ADVOCATES, RELATIVE TO A PLAN WHICH HAS BEEN PROPOSED FOR REPORTING THE DECISIONS OF THE COURT OF SESSION 15 (1823).

298. It was not, however, until the Court of Session Act 1850, 13 and 14 Vict., c. 36, s. 14, that written argument in the old style was completely forbidden.

299. Court of Session Act 1825, 6 Geo. IV, c. 120, s. 23.

which judges may have decided, it was difficult to extract clear rulings on law from the decisions. This was compounded by the fact that the opinions of the judges were not systematically preserved. Indeed, when in a case of significance there would be between nine and fifteen opinions, ignoring them held some advantages for the reporter.[300] With the division of the Session in 1808, the subsequent creation of a permanent Outer House, and the 1825 reforms that turned the Outer House into a first instance court and the Inner House primarily into one of second instance, the problem of the multiplicity of judicial opinions progressively disappeared. Further, the system of open and closed record also rendered individual legal points in question more obvious.

E. Law Reports and Common Law

By the end of the third quarter of the eighteenth century, commentators started to consider that "the reasoning upon the Bench," could be considered "the surest road to come at the true principles upon which each particular question was decided."[301] Robert Bell, who published reports for the years 1790-1792, was the first to make a systematic record of the opinions of the judges. He claimed that "it is what passes on the Bench; it is the opinion of the judges, which ought to be preserved in our reports," because "the principle of a decision" could not readily be gathered from the printed Session Papers.[302] In 1808, the Faculty of Advocates itself expressed the view "[t]hat a report of the opinions of the Judges ought to accompany the decisions," as otherwise, "the reports of decisions must always remain imperfect and

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300. *See* Cairns, *supra* note 8, at 172-75. They would sometimes be recorded in a case of significance, such as the "Douglas Cause" or the famous case on copyright. *See* A SUMMARY OF THE SPEECHES, ARGUMENTS, AND DETERMINATIONS OF THE RIGHT HONOURABLE THE LORDS OF COUNCIL AND SESSION IN SCOTLAND, UPON THAT IMPORTANT CAUSE, WHEREIN HIS GRACE THE DUKE OF HAMILTON AND OTHERS WERE PLAINTIFFS, AND ARCHIBALD DOUGLAS OF DOUGLAS ESQ.; DEFENDANT. WITH AN INTRODUCTORY PREFACE, GIVING AN IMPARTIAL AND DISTINCT ACCOUNT OF THIS SUIT (1767); JAMES BOSWELL, THE DECISION OF THE COURT OF SESSION, UPON THE QUESTION OF LITERARY PROPERTY; IN THE CAUSE JOHN HINTON . . . PURSUER; AGAINST ALEXANDER DONALDSON AND JOHN WOOD, . . . AND JAMES MEUROSE . . . DEFENDERS (1774). On the latter, see, e.g., Richard S. Tompson, *Scottish Judges and the Birth of British Copyright*, 37 JURID. REV. (n.s.) 18, 27-31 (1992).

301. DECISIONS OF THE COURT OF SESSION, FROM THE YEAR 1738 TO THE YEAR 1752. COLLECTED AND DIGESTED INTO THE FORM OF A DICTIONARY. BY SIR JAMES FERGUSSON OF KILKERRAN, BARONET, ONE OF THE SENATORS OF THE COLLEGE OF JUSTICE. PUBLISHED BY HIS SON, at iv (1775).

302. CASES . . . 1790-1792, *supra* note 267, at v. See also the very interesting remarks on decisions in the advertisement to ROBERT BELL, CASES DECIDED IN THE COURT OF SESSION, SUMMER SESSION 1794,—WINTER SESSION 1794-5,—AND SUMMER SESSION 1795 (1796).

unsatisfactory."[303] Thereafter judicial opinions were routinely reported, if not in a consistent fashion. The reporter sometimes preserved a direct account, but sometimes gave a précis. Indeed, it was not unknown for complex speeches to be omitted because of their very difficulty.[304]

The development of reporting accompanied and influenced the growth of a new approach to law that had developed out of the Scots Enlightenment. Lord Kames, for example, had not untypically considered that the importance of decisions lay in their congruence with reason.[305] Scots lawyers, however, had gone beyond that view. In 1821, Robert Hannay stated that "[r]eports furnish not only the evidence of established rules, but materials for the invention of new." By this he meant that "when cases occur which neither Laws nor former Decisions comprehend," Scots lawyers drew on "that artificial reason obtained by long study, observation, and experience, exercised upon analogies of existing laws, which are gathered from the comparison of statutes, rules, and cases, that is to say, by the comparison of facts, arguments, and decisions, with the grounds or reasons for them; such analogies becoming, through course of time and the sanction of decisions, a part of the Law itself." Hannay stressed the superiority of precedent as a source of law. Legislation, the alternative option, was dismissed as the product of "the common sense of unlettered men," to which the "artificial reason" of the common law was compared to the latter's benefit. Hannay must be referring to the famous defence of "the artificial reason" of English common law put forward by Coke against the exercise of "natural reason" (here described by Hannay as "common sense").[306]

Hannay thus claimed that there was a reason immanent in the Scottish common law from which answers to new problems might be derived. While to some extent this begs to be compared to Wolff's thinking, this meant that trained lawyers could extend the existing rules and develop them into new areas through analogical (rather than deductive) reasoning. It followed that, when, in fact, an unforeseen case came for decision, "the best Lawyers," because of their "like trains of

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303. [ROBERT HANNAY], ADDRESS TO THE RIGHT HONOURABLE LORD PRESIDENT HOPE, AND TO THE MEMBERS OF THE COLLEGE OF JUSTICE, ON THE METHOD OF COLLECTING AND REPORTING DECISIONS 6-7 (1821).

304. *Id.* at 7-8.

305. 1 [HENRY HOME, LORD KAMES], THE DECISIONS OF THE COURT OF SESSION; FROM ITS FIRST INSTITUTION TO THE PRESENT TIME. ABRIDGED, AND DIGESTED UNDER PROPER HEADS, IN FORM OF A DICTIONARY. COLLECTED FROM A GREAT NUMBER OF MANUSCRIPTS, NEVER BEFORE PUBLISHED, AS WELL AS FROM THE PRINTED DECISIONS, at ii (1741).

306. HANNAY, *supra* note 303, at 28. On Coke, see GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION 30-38, 61-63 (1986).

thought, like affections, like habits and wants," would in general broadly agree on how it should be resolved.[307] In sum, the decisions embodied in case reports become not exemplars of an authoritative rationality lying outside themselves, as Kames had once thought, but, rather, building blocks of law's own rationality in a practical and historically developing tradition operated by educated lawyers.

IX. CONCLUSION: ANXIETIES OVER CODIFICATION

A. Transformations

The mind-set of Scottish lawyers changed significantly over the course of the eighteenth century. In 1700, Scots law is best understood as representative of the *usus modernus Pandectarum*; there had developed in the seventeenth century, out of the older view of the *ius proprium* and the *ius commune* a Roman-Scots law, in which the *ius civile* was progressively integrated with Scottish material, all justified and rationalised by the *ius naturale* and the *ius gentium*. By 1800, however, the view that "the Civil Law was our Common Law" seemed quite outdated.[308] Indeed, while well into the eighteenth-century the term "common law" had meant the Romano-Canonical *ius commune*, now it was used, rather in the fashion of England, in opposition to statute law: the *lex non scripta* as distinct from the *lex scripta*.[309] While statutes had once been seen as the main and most important source of Scots municipal law and its reform, now the focus of the lawyers, even if they recognised the primacy of statute in a hierarchy of sources, was on the dynamic development of law through decided cases. Statutes were considered to make the law stationary; they dealt with specific grievances, but led to rigidity. They limited future development. Judge-

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307. HANNAY, *supra* note 303, at 27.

308. ROBERT BELL, MEMORIAL PRESENTED TO THE CLERKS TO THE SIGNET 5 (1796).

309. 1 HUME, *supra* note 268, at 11-14; *see also* 1 WALLACE, *supra* note 116, at xvii. The terminology using "*lex*" is Hume's. Detailing this change, anticipated by STAIR, *supra* note 23, at 87 (I.i.16), is not feasible here. For example, LOUTHIAN, *supra* note 178, at 14, 111, 114, 118, 142, and 153, continues to use "common law" to refer to the Romano-Canonical *ius commune*, once in his text and then in his sample "Informations". His second edition, JOHN LOUTHIAN, THE FORM OF PROCESS BEFORE THE COURT OF JUSTICIARY IN SCOTLAND. IN TWO BOOKS 14 (1752), still uses it in the text in this sense, but no longer has sample "Informations"; on the other hand the second edition now shows awareness of the meaning of "common law" in England: *id.* at 17, 164, 211. PATRICK TURNBULL, ANALOGIA LEGUM: OR, A VIEW OF THE INSTITUTES OF THE LAWS OF ENGLAND AND SCOTLAND, SET ONE AGAINST THE OTHER; TO SHEW WHEREIN THOSE TWO LAWS AGREE AND DIFFER, at viii (1745), stated that in Scotland (and Holland) the civil law "is the common Law by Adoption".

made law was superior, being responsive to social change and economic need.[310]

This view of the significance of case-law had developed of necessity, as the significance given to Roman law diminished and the Westminster Parliament neglected Scots law: lawyers were compelled to seek for development through the working of the Court of Session. Moreover, the path taken by natural jurisprudence in Scotland reinforced and validated this approach. One need not be of the opinion that, by the 1820s, all lawyers in Scotland had come to accept Hannay's view of the artificial reason of Scots law, in which analogical reasoning led lawyers to solutions of all problems relying on their knowledge of Scots law as a closed system; yet the focus on the significance of case-law was universal.

Reinforcing this were developments on Continental Europe. In the later eighteenth century, Roman law as a study was in retreat in much of Europe.[311] In this respect, Scotland was no different; but at the same time, the practice of the élite of the Scottish legal profession studying Roman law abroad had come to an end.[312] Meanwhile, Wolffian natural law and Enlightened despotism had placed codification very much on the agenda in northern Europe, to be achieved in some of the German lands. The success of Napoleon and of his armies had also led to codifications in many parts of Europe, even if of a rather different type from those of the last half of the eighteenth century.[313]

The same era in Scotland saw a focus on reform through the operation of the courts that resulted in an emphasis on improving legal education, so that lawyers were made fit for the role of promoting necessary legal development in line with a historically dynamic natural jurisprudence. This in turn led to a realisation of the need for reform of the courts and their procedures. The first thirty years of the nineteenth century accordingly saw a whirlwind of change in the Scottish courts and their procedures. By 1830, Romano-Canonical procedure had essentially disappeared. Jury trial had been introduced.

B. Reactions Against Reform

So much legislative change caused reaction. The abortive proposals of 1807 for jury trial had already provoked much upset. Professor Hume

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310. CASES . . . 1790-1792, *supra* note 267, at vi-x.

311. J.Q. WHITMAN, THE LEGACY OF ROMAN LAW IN THE GERMAN ROMANTIC ERA 41-65 (1990).

312. For some discussion of this, see Cairns, *supra* note 123, at 69-74.

313. *See, e.g.*, WIEACKER, *supra* note 61, at 257-75.

commented that while the Treaty of Union meant Scotland had to accept "cautious and successive alterations of her ancient laws," the proposals amounted "to *as much as all* the changes taken together, that have been made in the law of Scotland for the last two hundred years." Rather than "an *improvement* of our law," they were "a subversion of our law."[314] Walter Scott saw the same proposal as essentially introducing English law and as "calculated to . . . give to [England] . . . the insolent air of a conqueror, imposing his laws and customs on a colony."[315] Rebuking Francis Jeffrey for levity in discussion of reforms in the Court, Scott remarked: "No, no—'tis no laughing matter, little by little, whatever your wishes may be you will destroy and undermine, until nothing of what makes Scotland Scotland shall remain."[316] As a Principal Clerk of Session, Scott was well able to judge the advantages and disadvantages of procedural reforms. At the time of the 1823 Commission, he commented on "the interference of these Englishmen," who thought they were "only modelling our poor system after their own fashion."[317] Scott's view, after the reforms of 1825 had come into operation, was that the new rules were too strict, so they were evaded by fictions; further, cases now ran too quickly through the Session and as a result went "by Scores" on appeal to the House of Lords. There they were currently dealt with swiftly in a satisfactory fashion, so that "[t]he consequence will in time be that the Scottish Supreme court will be in effect situated in London." In apocalyptic mood, he mused that then "down fall—as national objects of veneration—the Scottish bench—the Scottish Bar—the Scottish Law herself—And—And—there is an end of an auld Sang." This was "a catastrophe which the great course of events brings daily nearer."[318]

Scott and Hume were famously conservative, but members of the Faculty generally found it difficult to adapt to the new style of procedure and to discard old practices.[319] By 1827, the Faculty of Advocates could complain in a report:

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314. *Quoted in* PHILLIPSON, *supra* note 115, at 101.

315. Walter Scott, *View of the Changes Proposed and Adopted in the Administration of Justice in Scotland*, 1 EDINBURGH ANNUAL REGISTER FOR 1808 342, pt. 2, at 358 (1810), *reprinted in* KENNETH CURRY, SIR WALTER SCOTT'S EDINBURGH ANNUAL REGISTER 170, 192 (1977).

316. 2 J.G. LOCKHART, LIFE OF SIR WALTER SCOTT, BART. 284-85 (1902); HENRY COCKBURN, MEMORIALS OF HIS TIME 207 (1909).

317. W. Scott to Colin Mackenzie, 30 Oct. 1823, *in* THE LETTERS OF SIR WALTER SCOTT, 1823-1825, at 113, 115 (H.J.C. Grierson ed., 1935) [= Centenary Edition, 9].

318. Entry of June 9, 1826, *in* THE JOURNAL OF SIR WALTER SCOTT 179-80 (W.E.K. Anderson ed., repr. 1998) (1972) [= Canongate Classics 87].

319. [CHARLES HOPE], NOTES BY THE LORD PRESIDENT, ON THE SUBJECT OF HEARING COUNSEL IN THE INNER HOUSE 6 (1826).

> No Society of Advocates ever were tried more severely than the members of this Faculty have been, by the great and manifold changes in the practice of the profession which have taken place, for the benefit of the public during the last twenty years. Those of them who were educated in an earlier period have been obliged to unlearn all their former habits, and, to train themselves to new and frequently varied systems: and the younger members of the profession have had no means of education at all, from any previous practice or rules of court.[320]

In 1830, even one of the supporters of the introduction of jury trial could write: "During the last twenty years one experiment after another has been made on the administration of justice here. Practitioners have no sooner learned the forms of court, than a new set of forms is introduced." He thought that such a level of alteration might be tolerable at the end of a century, but that now the Scots had such changes inflicted on them every two or three years.[321] By 1830, Scots lawyers were weary of so much—arguably "Anglicising"—change.

It was also clear by 1830 that, if the eighteenth century had been an era when the Westminster legislature had left Scots law largely alone, this was not at all likely to be the case in the nineteenth. Phillipson has commented that the final introduction of the jury trial into the Court of Session in 1830 "signalled the arrival of a new relationship between, government, parliament and Scotland."[322] These changes undoubtedly raised anxieties in Scotland, or at least among Scots lawyers, about the survival of Scots law.

C. Conflicts of Law and the Integrity of Scots Law

Over the same thirty-year period, the different jurisdictions in the same state had led, for the first time, to significant—and at the time notorious—conflicts between Scots and English law. These arose in the area of marriage, divorce and legitimacy. Both Scotland and England had continued the pre-Tridentine Canon law of marriage after the Reformation, with its focus on mutual consent and acceptance of the validity of clandestine marriages. In 1753, however, Lord Hardwicke's Act had required the calling of banns, public marriage, and parental consent (if a party were under twenty-one years of age) for the validity of

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320. REPORT OF A COMMITTEE OF THE FACULTY OF ADVOCATES APPROVED AND ADOPTED AT A MEETING OF FACULTY HELD FEBRUARY 10TH, 1827, at 28 (1827), *quoted in* PHILLIPSON, *supra* note 115, at 1.

321. *Quoted in* PHILLIPSON, *supra* note 115, at 163-64.

322. *Id.* at 176.

a marriage celebrated in England.[323] Scots law was left unchanged, however, so that individuals, unable to marry in England, took advantage of this situation and married north of the border. Such marriages were accepted as valid in England.[324]

After the Reformation of religion, English law did not recognise judicial divorce entitling at least one of the parties to remarry.[325] On the other hand, Scotland did recognise judicial divorce, initially on the ground of adultery, but soon also on that of desertion.[326] The temptation this presented to English people was obvious, and between 1789 and 1826 a number of English men and women sought a divorce in Scotland.[327] The numbers were relatively few, however, probably because, when one individual, after his Edinburgh divorce, remarried in England, he was arrested and tried for bigamy, being sentenced to transportation for seven years (though subsequently released).[328] English courts thus did not recognise Scottish divorces of individuals domiciled in England, creating the circumstance that couples were regarded as divorced and free to remarry in Scotland, but still married in England, with potential consequential uncertainties and conflicts over the legitimacy of children.[329]

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323. Statute 26 Geo. II, c. 33 (1753); *see* R.B. OUTHWAITE, CLANDESTINE MARRIAGE IN ENGLAND, 1500-1850, at 75-97 (1995); Leah Leneman, *The Scottish Case That Led to Hardwicke's Marriage Act*, 17 LAW & HIST. REV. 161 (1999); David Lemmings, *Marriage and the Law in the Eighteenth Century: Hardwicke's Marriage Act of 1753*, 39 HIST. J. 339 (1996); Eve Taylor Bannet, *The Marriage Act of 1753: "A Most Cruel Law for the Fair Sex"*, 30 EIGHTEENTH-CENTURY STUDS. 233 (1997).

324. *See, e.g.*, Leah Leneman, *English Marriages and Scottish Divorces in the Early Nineteenth Century*, 17 J. LEGAL HIST. 225 (1996). For a general overview of Scots practice taken from the court records, see LEAH LENEMAN, PROMISES, PROMISES: MARRIAGE LITIGATION IN SCOTLAND, 1698-1830 (2003).

325. R.H. HELMHOLZ, THE CANON LAW AND ECCLESIASTICAL JURISDICTION FROM 597 TO THE 1640S, at 540-56 (2004) [= 1 THE OXFORD HISTORY OF THE LAWS OF ENGLAND (Sir John Baker, gen. ed.)]; RODERICK PHILLIPS, PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY 227-41 (1988); LAWRENCE STONE, THE ROAD TO DIVORCE: ENGLAND 1530-1987, at 301-67 (1990).

326. W.D.H. Sellar, *Marriage, Divorce, and the Forbidden Degrees: Canon Law and Scots Law*, *in* EXPLORATIONS IN LAW AND HISTORY: IRISH LEGAL HISTORY SOCIETY DISCOURSES, 1988-1994, at 59, 70-76 (W.N. Osborough ed., 1995); David Baird Smith, *The Reformers and Divorce: A Study on Consistorial Jurisdiction*, 9 SCOTTISH HIST. REV. 10 (1912); C.J. Guthrie, *The History of Divorce in Scotland*, 8 SCOTTISH HIST. REV. 39 (1911); LEAH LENEMAN, ALIENATED AFFECTIONS: THE SCOTTISH EXPERIENCE OF DIVORCE AND SEPARATION, 1684-1830 (1998).

327. They are detailed either in Leneman, *supra* note 324, or in LENEMAN, *supra* note 326, at 218-32.

328. See, e.g., Leneman, *supra* note 324, at 232-33; LENEMAN, *supra* note 326, at 223-24; STONE, *supra* note 325, at 358-59.

329. There is a good discussion of the legal issues in 1 HUME, *supra* note 268, at 185-89.

Finally, Scots law accepted the Canon law's rules on legitimation by subsequent marriage that England famously had supposedly rejected at the Council of Merton.[330] It was evident that the illegitimate child of Scots, domiciled in England, who subsequently married in England, would not be legitimated and the Scots courts would not recognise that child as having a right to succeed in Scotland.[331] It is easy, however, to imagine other potential problems and a number of difficult cases arose. Two cases litigated during the 1820s deserve particular attention. In the first, *Rose v. Ross*, the majority of the Court of Session (in fact no less than ten judges, a full bench having been convened) found for the legitimacy of a child born in England to parents domiciled in England, who had married in Scotland, where the father was a landowner. Great stress was placed on the father's continued connections with Scotland and on the location of the land in Scotland.[332] The House of Lords disagreed and overturned this decision on appeal.[333] At the same time as the Court of Session dealt with this case, the English courts dealt with *Birtwhistle v. Vardill*. This case involved the entitlement to succeed to an estate in England of a man born illegitimate in Scotland to a couple domiciled in Scotland who subsequently married. The child was undoubtedly legitimate in Scots law; but the English courts decided in 1826 that he could not succeed to an estate in England as, in English law, for inheritance to real property, the place where the property was situated was to govern the question of who was heir. This was ultimately affirmed by the House of Lords.[334]

All of these conflicts of law were well publicised: indeed, they were also to be the foundation of the discussion of these areas of law by Joseph Story in his famous work on international private law.[335] What were perceived to be the problems with Scottish irregular marriages had been well, indeed spectacularly, canvassed in the famous case of

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330. *See id.* at 205-06. On England, see F.W. MAITLAND, ROMAN CANON LAW IN THE CHURCH OF ENGLAND: SIX ESSAYS 52-56 (1898); J.D. White, *Legitimation by Subsequent Marriage*, 36 LAW Q. REV. 255 (1920). On the general context of the Council of Merton, see R.H. Helmholz, *Bastardy Litigation in Medieval England*, 13 AM. J. LEGAL HIST. 360 (1969).

331. 1 HUME, *supra* note 268, at 205-06.

332. Rose v. Ross, (1827) 5 S. 605. See the speeches of the Commissaries and of the Lords of Session in (1830) 4 W. & Sh., apps. III-IV, at 33-89.

333. Rose v. Ross, (1830) 4 W. & Sh. 289.

334. Doe, on the demise of John Birtwistle v. Vardill, 5 B. & C. 438; 6 Bligh (N.S.) 479; 9 Bligh (N.S.) 32.

335. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS 81-87, 90-94, 101-103, 108-109, 117-18, 168-89, 277 (1834).

Dalrymple v. Dalrymple, litigated before Sir William Scott in London in 1811.[336] It created the very stuff of which popular novels were made.[337] The view of the Inner House in *Rose v. Ross* attracted the attention of *The Times*;[338] the progress to the House of Lords of the two cases on the effects of legitimation created a pamphlet literature.[339] Further, the possibility for English people of defeating the English law controlling marriage by elopement to Scotland was already part of popular culture. The issue came starkly to the fore in the well-publicised trial of Edward Gibbon Wakefield, Frances Wakefield, and Edward Thevenot, at the Lancaster assizes on 23 March 1827, for the abduction from her school of an heiress aged fifteen, with whom Edward Gibbon Wakefield had gone through a ceremony of irregular marriage at Gretna Green, just over the border in Scotland.[340] The events and trial were closely followed in the newspapers.[341] This scandalous case caused a significant outcry against the Scots law on marriage, which broadened to take account of that on divorce and legitimation, calling for a reform of Scots law along English lines.[342]

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336. 2 Hag. Con. 54; *see also* THE TIMES (July 17, 1811); JOHN DODSON, A REPORT OF THE JUDGEMENT, DELIVERED IN THE CONSISTORIAL COURT OF LONDON, ON THE SIXTEENTH DAY OF JULY, 1811, BY THE RIGHT HONOURABLE SIR WILLIAM SCOTT, CHANCELLOR OF THE DIOCESE, IN THE CAUSE OF DALRYMPLE THE WIFE, AGAINST DALRYMPLE THE HUSBAND. WITH AN APPENDIX, CONTAINING THE DEPOSITIONS OF THE WITNESSES, THE LETTERS OF THE PARTIES, AND OTHER PAPERS EXHIBITED IN THE CAUSE (1811).

337. *See* John W. Cairns, *A Note on the Bride of Lammermoor: Why Scott Did Not Mention the Dalrymple Legend Until 1830*, 20 SCOTTISH LITERARY J. 19 (1993); John W. Cairns, *The Noose Hidden Under Flowers: Marriage and Law in Saint Ronan's Well*, 16 J. LEGAL HIST. 234 (1995).

338. THE TIMES (May 25, 1827).

339. ERASMUS ROBERTSON, THE LAW OF LEGITIMATION BY SUBSEQUENT MARRIAGE: ILLUSTRATIVE OF THE VARIANCES BETWEEN THE LAWS OF SUCCESSION TO PROPERTY IN ENGLAND AND SCOTLAND (1829).

340. THE TRIAL OF EDWARD GIBBON WAKEFIELD, WILLIAM WAKEFIELD, AND FRANCES WAKEFIELD, INDICTED WITH ONE EDWARD THEVENOT, A SERVANT, FOR A CONSPIRACY, AND FOR THE ABDUCTION OF MISS ELLEN TURNER, THE ONLY CHILD AND HEIRESS OF WILLIAM TURNER, ESQ., OF SHRIGLEY PARK, IN THE COUNTY OF CHESTER (1827); PAUL BLOOMFIELD, EDWARD GIBBON WAKEFIELD: BUILDER OF THE BRITISH COMMONWEALTH 1-14, 53-74 (1961); IRMA O'CONNOR, EDWARD GIBBON WAKEFIELD: THE MAN HIMSELF 39-45 (1928); A. J. HARROP, THE AMAZING CAREER OF EDWARD GIBBON WAKEFIELD 28-42 (1928); R. GARNET, EDWARD GIBBON WAKEFIELD: THE COLONIZATION OF SOUTH AUSTRALIA AND NEW ZEALAND 29-49 (1898). There is a recent attempt to get to grips with this episode in Wakefield's career in GED MARTIN, EDWARD GIBBON WAKEFIELD: ABDUCTOR AND MYSTAGOGUE 14-26 (1997).

341. *See, e.g.*, THE TIMES (Mar. 22, Mar. 28, 1826; Mar. 7, Mar. 26, Mar. 27, Mar. 29, Aug. 26, 1827); THE MORNING CHRONICLE (June 9, 1827).

342. *See* PATRICK IRVINE, CONSIDERATIONS ON THE INEXPEDIENCY OF THE LAW OF MARRIAGE IN SCOTLAND (1828); [Henry Brougham], *Scottish Marriages of English Persons*, 47 EDINBURGH REV. 100 (1828).

The debate provoked raised a more general issue that threatened the integrity of Scots law. This revolved around whether or not the Scots or English knew most about Roman law. This strange competition arose because Henry Brougham, in the House of Commons, opposed the appointment of a Scots advocate, William Menzies, to the bench of the Cape Colony.[343] This touched on a very sensitive issue for the Faculty of Advocates, who tended to think that the English bar was unjustly favoured for colonial judicial appointments.[344] The issue took an interesting twist, however, when Henry Brougham claimed that, if judges were needed who knew Roman law, the evidence from the trial of the Wakefields at Lancaster showed that the Scots were ignorant of it.[345] In an era of reform of Scots law, which could be considered as "Anglicisation" (and indeed overtly was by some), to attack the Scots' knowledge of Roman law was to attack what was seen as one of Scots law's defining characteristics in contrast with English law. To impugn Scots lawyers' knowledge of Roman law was to suggest that knowledge of Roman law was unimportant in Scotland. This was very threatening. Should Scots law come to be perceived as not being grounded in the Civil law, it was but a short step to arguing, especially given the reforms in the courts and procedure in the period 1800-1830, that its differences from English law were too slight for it to be worth preserving.[346] This was why the near-contemporary comment in the *Westminster Review* that "[t]he Scotch Law Books, whenever they profess to treat of the Roman Law, manifest only a superficial acquaintance with it, which is evident on the slightest inspection," was one that provoked great offence.[347]

D. Struggle over Codification

These anxieties about the continued survival of Scots law were rendered even more acute by the codification debates in England in the 1820s.[348] These raised the obvious question: if Parliament reformed and

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343. Stephen D. Girvin, *William Menzies of Edinburgh: Judge at the Cape 1827-1850*, 38 JURID. REV. (n.s.) 279 (1993).

344. John W. Cairns, *A History of the Faculty of Advocates to 1900*, 13 STAIR MEMORIAL ENCYCLOPAEDIA 499-536 (§§ 1239-1285) and 534 (§ 1284) (1992).

345. J. BROWNE, REMARKS ON THE STUDY OF THE CIVIL LAW; OCCASIONED BY MR BROUGHAM'S LATE ATTACK ON THE SCOTTISH BAR 10-11 (1828).

346. See the remarks by J.P.T., *Marriage, Legitimation, and Divorce*, 29 THE LAW MAGAZINE; OR QUARTERLY REVIEW OF JURISPRUDENCE 267, 275 (1843).

347. *Quoted in* BROWNE, *supra* note 345, at 41-42 n.*.

348. MICHAEL LOBBAN, THE COMMON LAW AND ENGLISH JURISPRUDENCE, 1760-1850, at 185-222 (1991); David Lieberman, *Legislation in a Common Law Context*, 28 ZEITSCHRIFT FÜR NEUERE RECHTSGESCHICHTE 107, 117-22 (2006).

codified English law, why should it not apply that code to Scotland, if there was nothing particularly distinctive about Scots law? This explains the worries that a number of Scots expressed about codification in that decade. For example, Sir Walter Scott, in his seven-volume biography of Napoleon published in 1827, devoted twenty pages to demonstrating the superiority of judge-made law to legislation and codification, very much drawing on the language of the Scottish Enlightenment thinkers. He placed his discussion overtly in the context of the current English codification debates.[349] Scott's attack on codification led to a critical review in *The Jurist*, an English legal periodical that favoured codification.[350]

One area of English law that had especially attracted the attention of those interested in codification was property law. In 1826, James Humphreys had proposed that it should be codified.[351] Almost immediately, this generated an extensive literature in pamphlets and the developing periodical literature.[352] One man who intervened in that debate was John Reddie, a Scots advocate who had studied at Göttingen under Gustav Hugo, there writing a thesis on the praetor's edict.[353] On his return to Edinburgh, Reddie published a work on the history of Roman law and the recent developments in its study in Germany.[354] In this

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349. 6 WALTER SCOTT, LIFE OF NAPOLEON BUONAPARTE, 44-65 (2d ed. 1827).

350. *Scott's Napoleon: Certainty of English Law*, 1 THE JURIST, OR QUARTERLY JOURNAL OF JURISPRUDENCE AND LEGISLATION 405 (1827).

351. JAMES HUMPHREYS, OBSERVATIONS ON THE ACTUAL STATE OF THE ENGLISH LAWS OF REAL PROPERTY: WITH THE OUTLINES OF A CODE (1826); *see* Bernard Rudden, *A Code Too Soon: The 1826 Property Code of James Humphreys: English Rejection, American Reception, English Acceptance*, *in* ESSAYS IN MEMORY OF PROFESSOR F.H. LAWSON 101 (Peter Wallington & Robert M. Merkin eds., 1986).

352. *See, e.g.*, [C.E. Dodd], *Humphreys on the Laws of Real Property*, 34 QUARTERLY REV. 540 (1826); *Bentham on Humphrey's Property Code*, 6 WESTMINSTER REV. 446 (1826); EDWARD B. SUGDEN, A LETTER TO JAMES HUMPHREYS, ESQ. ON HIS PROPOSAL TO REPEAL THE LAWS OF REAL PROPERTY, AND SUBSTITUTE A NEW CODE (1826); JAMES HUMPHREYS, A LETTER TO EDWARD B. SUGDEN, ESQ. IN REPLY TO HIS REMARKS ON THE ALTERATIONS PROPOSED BY JAMES HUMPHREYS, ESQ., IN THE ENGLISH LAWS OF REAL PROPERTY (1827); *System and Administration of English Law*, 45 EDINBURGH REV. 458, 474-75, 480-82 (1827). On the development of legal periodicals in this era, see David Ibbetson, *Legal Periodicals in England 1820-1870*, 28 ZEITSCHRIFT FÜR NEUERE RECHTSGESCHICHTE 175, 179-84 (2006).

353. JOHN REDDIE, DE EDICTIS PRAETORUM SPECIMEN PRIMUM ILLUSTRI IN ACADEMIA GEORGIA AUGUSTA JURISCONSULTORUM ORDINI PRO SUMMIS IN UTROQUE JURE HONORIBUS RITE OBTINENDIS OFFERT (1825). On Hugo, see WIEACKER, *supra* note 61, at 300-03; WHITMAN, *supra* note 311, at 87-91. On Scots who studied in Germany, see Alan Rodger, *Scottish Advocates in the Nineteenth Century: The German Connection*, 110 LAW Q. REV. 563 (1994).

354. JOHN REDDIE, HISTORICAL NOTICES OF THE ROMAN LAW, AND OF THE RECENT PROGRESS OF ITS STUDY, IN GERMANY (1826). On the development of Scots interest in the German Historical School, see John W. Cairns, *The Influence of the German Historical School in Early Nineteenth Century Edinburgh*, 20 SYRACUSE J. INT'L L. & COM. 191 (1994).

Reddie stressed that his teacher Hugo had declared himself against codification and he claimed that F.C. von Savigny had successfully refuted A.F.J. Thibaut's call for codification in Germany.[355] Reddie criticised Humphrey's codification proposal in a pamphlet in 1828.[356] His work was very heavily influenced by Savigny's pamphlet of 1814 attacking Thibaut.[357] Indeed the extent of the influence was such that a hostile reviewer of both pamphlets accused Reddie of plagiarism of the German scholar.[358] The vituperation heaped on Reddie reflected the reviewer's strong favour for codification.[359]

It is telling that Reddie's criticism of codification of English land law digressed into a discussion of the need to protect Scots law from legislative reform, and in particular, he referred to the pressure, arising from the trial of the Wakefields, to change the law on marriage: "Particular circumstances have recently called the attention of the public to the Scotish [*sic*] law of marriage, and doubtlessly, the preponderancy of voices in the Hall of St. Stephens, could at once alter it, and cause the English form to be adopted in its stead." He commented that the "forms of an institution, which is the root of society, . . . sanctioned and hallowed by a nation's religion, are of too serious a nature, to be sacrificed to the evanescent prejudice of a day."[360] He placed these remarks in the context of the legal theory he adopted from Savigny. Law was national and arose from the activities of the people. He accordingly questioned "the propriety of an attempt, which has recently been made, by some learned

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355. REDDIE, *supra* note 354, at 87-133. On Savigny, see WIEACKER, *supra* note 61, at 303-16; WHITMAN, *supra* note 311, at 102-12; Susan Gaylord Gale, *A Very German Legal Science: Savigny and the Historical School*, 18 STAN. J. INT'L L. 123 (1982). An elegant, brief account of this dispute is found in Reinhard Zimmermann, *Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Legal Science*, 112 LAW Q. REV. 576, 577-80 (1996).

356. JOHN REDDIE, A LETTER TO THE LORD HIGH CHANCELLOR OF GREAT BRITAIN, ON THE EXPEDIENCY OF THE PROPOSAL TO FORM A NEW CIVIL CODE FOR ENGLAND (1828).

357. F.C. VON SAVIGNY, VOM BERUF UNSERER ZEIT FÜR GESETZGEBUNG UND RECHTSWISSENSCHAFT (1814; 2d ed. 1828; repr. 1997), *translated as* F.C. VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE (Abraham Hayward trans., 1831; repr. 1975).

358. *Written and Unwritten Law*, 2 THE JURIST, OR QUARTERLY JOURNAL OF JURISPRUDENCE AND LEGISLATION 181 (1828).

359. It is not appropriate here to go into all the debates Reddie's pamphlet generated, other than to remark that A.C. Holtius defended him against the unjust charge of plagiarism: 10 THÉMIS, OU BIBLIOTHÈQUE DU JURISCONSULTE ET DU PUBLICISTE 351, 353-54 (1830-31). On Holtius, see A. Korthals Altes, *Adrianus Catharinus Holtius 1786-1861: Het allereerste handelsrecht*, *in* RECHTSGELEERD UTRECHT: LEVENSSCHETSEN VAN ELF HOOGLERAREN UIT DRIEHONDERDVIJFTIG JAAR FACULTEIT DER RECHTSGELEERDHEID IN UTRECHT 57 (G.C.J.J. van den Bergh, J.E. Spruit & M. van de Vrugt eds., 1986).

360. REDDIE, *supra* note 356, at 86-87.

lawyers, to assimilate the English and Scottish systems of jurisprudence, or rather, perhaps, to render everything English."[361] It was to be expected that different nations should have different laws:

> Long habitual customs, incorporated with the national character, assert a stronger sway than even specious and plausible metaphysics; and whilst a nation is satisfied with its own law, and feels no hardships arising from it, on the contrary, is convinced, that it answers every purpose which is required, that law ought not to be changed. And where alterations are found to be requisite, such only ought to be introduced, as coalesce and harmonize with the principles and doctrines of the whole system; and the extent of these alterations, and the mode in which they are to be effected, ought principally to be left to those, who are best qualified to appreciate the change, and whether it is "for the evident benefit of the subject."[362]

Furthermore:

> As a Scotsman, but in the spirit of the British Constitution, I will say, let our doctrines of private Jurisprudence, be framed of the same materials, which we have used for ages, let them be reared by the hands, of the successors of the original workmen, and let the solid foundation which supports the National fabric be undermined by no impolitic attempts at speculative uniformity. With the inhabitants of Scotland, the Scotish [*sic*] private and municipal law has arisen and been developed, and by them been improved; with them, let it remain, and with them, let it take its chance of being forgotten.[363]

Reddie's remarks, with their evident allusion to the Articles of Union, indicate one way in which Scots were able to respond to what they saw as the menace of English threats to Scots law. Savigny's pamphlet was viewed as providing arguments against unification of the law in Great Britain and as providing an ideological defence for Scots law in an era of legislation and centralisation. Moreover, his thinking could be and was interpreted as following on from the historical thinking of the Scottish Enlightenment. Thus, Hugo and Savigny were viewed as carrying on a project developed in eighteenth-century Scotland by Kames, Millar, and others.[364] One of Millar's students, who described himself in 1841 as "[h]aving been a pupil of the Scotch Historical School of Law,"

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361. *Id.* at 83.

362. *Id.* at 85-86.

363. *Id.* at 90-91.

364. See REDDIE, *supra* note 354, at 106 n.8, 125-26 n.32. Reddie also referred to the interesting, if tragic, figure of John Wilde, Professor of Civil Law in Edinburgh, 1792-1800, who shared many of the ideals of the German Historical School. *Id.* at 93 n.94. On Wilde, see Cairns, *supra* note 354, at 193-94; Cairns, *Rhetoric, Language, and Roman Law*, *supra* note 225, at 43-46; Cairns, *The Face That Did Not Fit*, *supra* note 169, at 21-22.

accordingly portrayed Hugo as having had "the merit of completely changing the method of teaching law in Germany," at the same time as "similar views of the mode of studying law, were inculcated in Scotland, by Lord Kames, Gilbert Stuart, and John Millar."[365]

Thus validated as compatible with Scottish tradition, the approach of the German Historical School supported an argument that Scots law could and should carry on as an independent and uncodified system in the manner in which it had in the eighteenth century. In the era of codification, a Scottish legislative science suggested development through the work of the courts. The ambitions of James VI and I to unify the laws of his realms were not to be fulfilled in the reign of his descendant Victoria. Scotland was now considered to have a fundamental law in its common law. Further, as Scott put it in his *Life of Napoleon*: "the opinion of a judge, given *tota re cognita*, must always be a more valuable precedent, than that which the same learned individual could form upon an abstract and hypothetical question."[366] Justice emerged best through the operation of the common law.

365. JAMES REDDIE, AN HISTORICAL VIEW OF THE LAW OF MARITIME COMMERCE, at ix (1841); JAMES REDDIE, INQUIRIES IN THE SCIENCE OF LAW 52 (2d ed. 1847) (1840).

366. 6 SCOTT, *supra* note 349, at 58.