NOTES FROM SCOTLAND

Abstract: Some observations on Scots law and Scottish lawyers

Author: Stephen Woolman

Introduction

The Western world broadly divides into two legal camps. The civilian system is based on Roman law. The common law system has its roots in England. Scots law is one of the few mixed systems. Its jurisprudence drinks from both wells. This article is not a scholarly disquisition. Instead, it includes examples of legal Scots lore. It does not discuss the distinctive features of our criminal law, where juries (a) consist of 15 individuals, (b) have three verdicts available to them - guilty, not guilty, and not proven, and (c) can convict by a simple majority.

Origins

Early societies adopted rules that embodied customary and religious values. As trading increased, legal systems became more sophisticated. In particular, the jurists of ancient Rome fashioned a clear scheme. They divided the law into persons, property, things and actions. They also devised elegant solutions to many tricky problems. Students today find that their approach repays study. It stands in marked contrast to the complexity of modern systems.

We can trace modern Scots law to 1681, when Viscount Stair published the *Institutions of the Law of Scotland*. It has been described as:

> 'an original amalgam of Roman law, feudal law and Scottish customary law, systematised by resort to the law of nature and the Bible, and illuminated by many flashes of ideal metaphysics'

At about the same time, Sir George Mackenzie founded the Advocates Library. Under copyright laws, it was entitled to receive a free copy of any book (legal and non-legal) published in Great Britain. That created a wonderful repository for research for the legal profession in Scotland. Eventually, however, the burden of managing the vast holdings became too great. In 1926 the Faculty of Advocates donated the non-legal books to the nation, forming the National Library of Scotland.

Some Enlightenment figures

In the 18th century, Scotland produced two intellectual titans: David Hume and Adam Smith. They acquired their renown in the fields of history, philosophy and economics. But they also had an impact on the law. Hume was the Keeper of the Advocates Library. Smith lectured in jurisprudence at Glasgow University. Both men were members of the Select Society, which met below the Court of Session. Today, there are statues of both men in Edinburgh's Royal Mile. The sculptor (Sandy Stoddart) has partly cloaked Smith's right hand to represent the 'invisible hand' of the market made famous by the *Wealth of Nations*.

Other figures who came to prominence included the eccentric judge, Lord Monboddo. He spent much of his time off the bench in two pursuits. First, tracing the missing link between man and ape. Second, feuding with another judge, Lord Kames, who wrote at length on agriculture. Legal scholars, notably Bell and Erskine, published important works. Together with Stair, they are known as the institutional writers. Bell's *Commentaries* has an interesting arrangement centring on bankruptcy. He considered that to be the one time in an individual's life that called for a precise balance sheet of assets and liabilities. The only other time for such an audit is death.

Although we claim Lord Mansfield as a Scotsman, he was in fact one of the most distinguished English judges of the 18th century. He famously declared slavery to be unlawful in *Somersett's Case*. He had great confidence in his judgment. At the end of one appeal, he invited counsel for the losing party 'to tell us your real opinion and whether you don't think we're right'. Counsel replied that 'he always thought it his duty to do what the court desired and … he did not think that there were four men in the world who could have given such an ill-sounded judgment as you four, my Lords judges, have pronounced.'

The 19th Century

Three colourful figures

In the early 19th century three lawyers were more famous for their literary endeavours. Sir Walter Scott published many novels with legal characters or legal twists. He believed, however, that: 'A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect.' Before becoming a distinguished judge, Francis Jeffrey edited the *Edinburgh Review* at its influential peak. His most devastating review was of Wordsworth's poem *Excursion*, which began: 'This will never do'. Given the asperity of Jeffrey's pen, it's not surprising that he fought a duel with pistols against another author following another withering review.

Henry Brougham is arguably the most colourful character of the three. He began his career at the Scots bar before leaving to seek his fortune in England where he reached the high office of Lord Chancellor. His route to the Woolsack was studded with achievement. Here is a list of the highlights. At the age of 16, he read a scientific paper on the properties of light to the Royal Society. He stung Lord Byron into writing a poem *English Bards and Scotch Reviewers* after writing a hostile critique in the *Edinburgh Review*. He designed the Brougham carriage mentioned in the Sherlock Holmes stories. He helped found the University of London. He gave the longest speech in British parliamentary history about law reform. His rhetoric is too rich for modern tastes. He began his closing speech on behalf of Queen Caroline, whom he defended on charges of infidelity before the House of Lords, with a sentence of 242 words:

> 'The time is now come when I feel that I shall truly stand in need of all your indulgence. It is not merely the august presence of this assembly which embarrasses me; for I have oftentimes had experience of its condescension — nor the novelty of this proceeding that perplexes me; for the mind gradually gets reconciled to the strangest things — nor is it the magnitude of this cause that oppresses me; for I am borne up and cheered by that conviction of its justice, which I share with all mankind; but, my lords, it is the very force of that conviction, the knowledge that it operates universally, the feeling that it operates rightly, which now dismays me with the apprehension, that my

> unworthy mode of handling it, may, for the first time, injure it; and, while others have trembled for a guilty client, or been anxious in a doubtful case, or crippled with a consciousness of some hidden weakness, or chilled by the influence, or dismayed by the hostility, of public opinion, I, knowing that here there is no guiltiness to conceal, nor any thing, save the resources of perjury to dread, am haunted with the apprehension, that my feeble discharge of this duty may for the first time cast that cause into doubt, and may turn against me for condemnation those millions of your lordships' countrymen, whose jealous eyes are now watching us, and who will not fail to impute it to me, if your lordships should reverse the judgment which the Case for the Charge has extorted from them.'

Brougham conceived himself to be a great figure. No doubt he expected a slew of biographies after his death. That did not happen. He is largely a forgotten figure, a footnote in history. But he has two unusual consolations. First, a fine statue in Cannes, which he turned into a fashionable resort by building a villa in what was then a fishing village. Second, in the 1950s the car manufacturer Cadillac named one of its models after him.

A colourful case

The case of *Steuart v Robertson*[1] 80 involves gallantry, dissipation, a disputed marriage, entailed estates, and a lengthy lawsuit. It arose out of the death of Major Steuart, the oldest son of an ancient family. He served with distinction in the 93rd Highlanders, being awarded the Victoria Cross. But after leaving the army he fell into a life of dissolution. Alcoholism resulted in attacks of delirium tremens before he died aged 37. A young woman came forward and made a claim on the estate. Mary maintained that she was the major's widow, having wed him two years earlier when she was 16.

The circumstances were these. Major Steuart had boarded with Mary's family in a flat above her father's fishing tackle shop in Edinburgh. One evening after supper he told the major that he could no longer stay under their roof, because his presence was tarnishing Mary's reputation. Major Steuart sat quietly for a minute or two. Tears came into his eyes. He then said 'I am poor now and cannot marry, but I will marry her in the Scotch fashion. He went down on his knee, put a ring on the third finger of Mary's left hand and said you are my wife before Heaven, so help me, oh God'. The couple then embraced, kissed and went to bed together. She gave birth to their child about 14 months later. During the remainder of the major's life, the couple's conduct followed an uneven pattern. Sometimes he acknowledged that he was married to Mary. Sometimes he did not. She likewise claimed to be his wife, but also held herself out as single.

A narrow majority of a full bench of the Court of Session held that the couple were man and wife. Lord Justice Clerk Moncreiffe was 'unable to resist the large and consistent mass of evidence on which the pursuer's case depends'. The House of Lords, however, unanimously reversed that decision. The speeches contain great rolling passages of morality. Here, for example, is Lord O'Hagan: 'It does seem somewhat startling to give such an effect to such doubtful words, spoken, if at all, at a nocturnal carouse by a habitual drunkard, even then emerging from a state of intoxication, weak in mind and body, and weeping maudlin tears.'

[1] (1875) 2R (HL).

Steuart isn't an influential decision. It's rarely cited today. But it reminds us that litigation is about human problems. It could and should have provided the engine for a great Victorian novel. Incidentally, the case illustrates the saying that the House of Lords was the most expensive jury in the world.

Some closing thoughts

I finish with five disparate remarks. First, Scotland continues to generate many important cases. In the 20th century, *Donoghue v Stevenson*[2] established manufacturers' liability. This century, the court had to decide the validity of the United Kingdom government's decision to prorogue parliament: *Cherry v Advocate General for Scotland.*[3]

Second, Scots law prefers 'the sense to the subtilty *(sic)* of law and do seldom trip by niceties or formalities'[4].

Third, Scottish judges aim to follow by issuing judgments that are accurate, brief and clear (the 'abc' approach).

Fourth, oral tradition is integral to the practice of advocacy. The more implausible the story, the more likely it is to be repeated. Here is a well-known Scottish anecdote. Defence counsel opened an appeal by stating that she intended to advance three submissions. One was a sure-fire winner. The second had 50:50 prospects of success. The third was a 'no-hoper'. The bench invited her to start with the best point. The advocate paused and then said 'you don't think I'm going to tell you which one is which?'

Finally, there is the motto of Robert Louis Stevenson, an advocate, but first and foremost a great writer. He said: 'Our business in life is not to succeed, but to continue to fail in good spirits'.

[2] 1932 SC (HL) 31.
[3] [2019] CSIH 49, 2020 SC 37.
[4] Viscount Stair.