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# Legal Nationalism: Lord Cooper, Legal History and Comparative Law

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This paper is one of a set of studies on the contribution of Lord Cooper of Culross (1892–1955) to the development and understanding of Scots law, including its history, and to the phenomenon of Scottish legal nationalism.<sup>1</sup> Cooper is one of the major figures of Scots law in the twentieth century. He practised at the bar between the two world wars, became an MP and Lord Advocate (the principal Scottish Law Officer) in the 1930s, and in 1941 was appointed to the Court of Session bench, first as Lord Justice Clerk and, then, in 1947, as Lord Justice General and Lord President, head of the Scottish judiciary. He was also, in 1934, one of the founders of the Scottish legal history society, the Stair Society, and made significant contributions to its early volumes, in particular with editions of the medieval texts *Regiam Majestatem*, *Quoniam Attachiamta* and the “Register of Brieves”.<sup>2</sup> Cooper was also a prolific writer and commentator on the law in aspects other than its history, and a collection of his papers appeared after his premature death following a cerebral thrombosis.<sup>3</sup>

My principal reason for first becoming interested in Cooper many years ago was his work on the medieval history of Scots law, and the English influences which were so important to that history. He had certain theories on this subject with which I soon found myself in significant (although not total) disagreement. I do not wish to elaborate further on this theme here; most of my observations on the

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1 For the identification of the phenomenon see initially J P Grant’s Introduction to the collection which he edited, *Independence and Devolution: The Legal Implications for Scotland* (1976) ix. See also H L MacQueen, “*Regiam Majestatem*, Scots law and national identity” (1995) 74 *Scottish Historical Review* 1, and L Farmer, “Under the shadow of Parliament House: The strange case of legal nationalism”, in L Farmer and S Veitch (eds), *The State of Scots Law: Law and Government after the Devolution Settlement* (2001) 151. For other relevant papers of mine see below, notes 8 and 29.

2 T M Cooper, *The Register of Brieves 1286–1386*, (Stair Society, vol 10, 1946); T M Cooper, *Regiam Majestatem and Quoniam Attachiamta*, (Stair Society, vol 11, 1947).

3 *Selected Papers 1922–1954* (1957). The book is prefaced with a biographical memoir written by Cooper’s brother.

subject can be found in other, earlier writings of mine.<sup>4</sup> Instead, I intend here to look at Cooper's historical work in its own historical context, and in its relation to his other contributions to thought about Scots law, especially to Scottish legal nationalism.

Nearly thirty years ago, on what appeared to be the eve of devolution of legislative power to a Scottish Assembly, Ian Willock published a paper, entitled "The Scottish Legal Heritage Revisited", in which he argued that Scots law had been fitted out with an ideology since the Second World War.<sup>5</sup> This ideology had two prime begetters. One was Professor T B (later Sir Thomas) Smith. The other was Lord Cooper, who had been Smith's guide and mentor. What Willock therefore dubbed "the Cooper-Smith ideology" could be summarised broadly as follows. Modern Scots private law was a "mixed" system, in which a basically Civilian structure had been overlaid since the Union of 1707 by influence from the English Common Law, through the agencies of Westminster, UK government departments in Whitehall, the common appeal court in the House of Lords, and the ignorance and apathy of Scots lawyers. The English influence had almost never been for the good. Scots law could only be saved by drawing upon its own historical roots and the experience of other "mixed" systems, such as those of South Africa and Louisiana, where too a basically Civilian system was threatened by infiltration from alien traditions.

Since Willock wrote, there has been much debate about and discussion of the "Cooper-Smith ideology" in Scotland, with supporters and critics in more or less equal measure.<sup>6</sup> My own contribution to date has been to confirm what others have also noted, that many elements of the "Cooper-Smith ideology" can actually be found in articulate existence long before the Second World War: a particularly striking statement of it is the manifesto of the Stair Society, published in 1934.<sup>7</sup> Further, Cooper himself appears to have formulated most of the elements of the ideology between 1945 and 1949, before Smith made his bow in legal literature, and the latter seems to have seen himself as picking up the former's standard after his death in 1955, rather than as having been an equal partner in its creation. But further, despite his involvement in the founding of the Stair Society, Cooper

4 In particular, my *Common Law and Feudal Society in Medieval Scotland* (1993), and "Scots law under Alexander III", in N H Reid (ed), *Scotland in the Reign of Alexander III* (1990) 74.

5 "The Scottish legal heritage revisited", in Grant (ed), *Independence and Devolution*, note 1 above.

6 See e.g. A. Rodger, "Thinking about Scots law" (1996) 1 *EdinLR* 3; Farmer, "Under the shadow of Parliament House", above note 1; K G C Reid, "The idea of mixed legal systems", (2003) 78 *Tulane Law Review* 5. Many of the papers in e.g. R Evans-Jones (ed), *The Civil Law Tradition in Scotland* (1995), H L MacQueen (ed), *Scots Law into the Twenty-first Century* (1996), and D L Carey Miller and R Zimmermann (eds), *The Civilian Tradition and Scots Law* (1997) are also, directly or indirectly, contributions to that discussion.

7 For the proposal see (1934) 46 *JR* 197.

himself does not appear to have taken up the ideology in any published work of his own until after 1945. Before then, his writings suggest rather a Savigny-esque sense that Scots law reflected something of the spirit of the Scottish people, along with anxiety about the contemporary submersion of Scottish distinctiveness in general.<sup>8</sup>

In contrast to others such as Lords Macmillan and Normand,<sup>9</sup> however, Cooper seemed to attach little importance in this regard to the Civilian dimension of Scots law. His concerns were more over what the English Lord Chief Justice, Lord Hewart, had called the “new despotism” of the burgeoning State,<sup>10</sup> and the need to reform Scots private law and court procedures if they were to continue to meet the requirements of the Scottish people. When Cooper publicised the new Stair Society to the Scottish legal profession in 1934, for example, it was to argue for the role the Society could play in engendering a modern rebirth of Scots law:<sup>11</sup>

[T]his project may pave the way to an expansion of beneficent activities in many directions—leading, perhaps, with the assistance of the universities and the legal societies, to an improved system of legal education, to large-scale legal reforms, and eventually to a Scottish legal renaissance ...

What is also apparent is that, while Cooper was clearly always interested in the history of the law, the medieval law with which he would later be strongly associated did not attract him initially. His few early writings on, or references to, history are concerned, conventionally enough, with the Institutional Writers of the seventeenth and eighteenth centuries (Stair, Erskine and Bell), and praise the way in which they developed the law to meet the needs of their times (i.e., did what he thought lawyers of his own day should be doing).<sup>12</sup>

Indeed, so far as I have discovered, Cooper wrote nothing about medieval law until an article published in 1936 in the first volume of the Stair Society. The volume took the form of a survey of the sources and literature of Scots law, and

8 For what follows see my “Legal nationalism: The case of Lord Cooper”, in N M Dawson (ed), *Reflections on Law and History* forthcoming (2006); also “Two Toms and an ideology for Scots law: T B Smith and Lord Cooper of Culross”, in E Reid and D L Carey Miller (eds), *A Mixed Legal System in Transition: T B Smith and the Progress of Scots Law* (2005) 44.

9 The theme of Scots law as a mixed system worthy of comparative study in an international context had been picked up by Lord Macmillan in an address to the International Congress of Comparative Law at The Hague in August 1932, published as “Scots law as a subject of comparative study” (1932) 48 LQR 477, and reprinted in Lord Macmillan’s collected papers, *Law and Other Things* (1937), 102. The theme also featured in his Rede Lecture, “Two Ways of Thinking”, delivered in Cambridge in May 1934, and also published in *Law and Other Things*, 76. For Lord Normand, see his foreword to J S Muirhead, *Outline of Roman Law* (1937) and his “Consideration in the law of Scotland”, (1939) 55 LQR 358.

10 Lord Hewart, *The New Despotism* (1929).

11 T M Cooper, “The Stair Society” 1934 SLT (News) 113.

12 See e.g. “Some classics of Scottish legal literature” (1929–1930) 21 *Scottish Bankers Magazine* 259; reprinted in *Selected Papers*, 39.

Cooper's contribution, possibly one to which he had been assigned, was on the medieval texts, in particular *Regiam Majestatem*.<sup>13</sup> It is worthy of note that he appears to have acquired copies of Sir John Skene's Latin and English editions of *Regiam* only in 1934, very possibly the year in which he began work on his contribution.<sup>14</sup> The article was a highly competent summary of the then state of knowledge of the subject, and pointed out that, although much of *Regiam* was derived from the twelfth-century English work known as *Glanvill*, it had been treated as authoritative in Scotland since at latest the early fifteenth century, and that in it "some of the rules which ultimately became cardinal doctrines of Scots Law are identifiable in embryo form, and occasionally in well advanced stages of development".<sup>15</sup> Cooper advocated the publication of a new edition of *Regiam*, and evidently began the task himself in the years which followed.

The most striking passage in his 1936 discussion, however, runs as follows:<sup>16</sup>

There is here a rich and almost unexplored field for the investigator – the law of Scotland as it was before it became deeply permeated by the law of Rome, the Canon Law, and the law of the feus. ... There is indeed a sense in which Stair is open to the criticism which Dutch lawyers have directed against Grotius and Voet—that he enslaved his country to an alien system, or at least that he largely discarded or ignored its native rules, and sought to break the natural continuity of their development.

The significance of this quotation is Cooper's recognition that there had been a Scots law before Stair, and that it might be more truly indigenous—and therefore closer to, or more reflective of, the authentic spirit of the Scottish people—than the law after it had been "Civilian-ised" in the institutional texts. In later years, Cooper was to point out how it was Craig, writing in his *Jus feudale* at the beginning of the seventeenth century, and Stair, who had been the first to denounce *Regiam* as a work of plagiarism and damn it as therefore an inauthentic source of Scots law. Cooper's phrasing of his account of this is again significant:<sup>17</sup>

13 T M Cooper, "Regiam Majestatem and the Auld Lawes", in H McKechnie (ed), *The Sources and Literature of Scots Law*, (Stair Society, vol 1, 1936) at 70.

14 This information comes from the catalogue of a sale of printed books, manuscripts, maps and atlases by Messrs Lyon & Turnbull, 33 Broughton Place, Edinburgh. The sale, which was held on 1 February 2005, included a number of books from the library of Mr and Mrs Robert Maxtone Graham, which had once belonged to Lord Cooper (see items 253, 265, 268, 272, 274, 278, 286, 288, 289, 292, 298, 301, 307 and 310). Item 303 was a Latin *Regiam* of 1613, signed by Cooper and dated by him "Dec 1934", as well as containing many of his marginal annotations. Items 304 and 305 were copies of the 1774 reprinting of Skene's English *Regiam*, also signed and annotated by Cooper, with one being dated "Jan 1934". I was able to confirm these details by personal inspection, but was unfortunately unsuccessful in my attempt to buy these books; their present ownership and whereabouts are unknown to me.

15 Cooper, "Regiam Majestatem and the Auld Lawes", at 76.

16 Cooper, "Regiam Majestatem and the Auld Lawes", at 77.

17 Cooper, *Regiam Majestatem*, Introduction, at 6, 7.

Craig's distaste for the historical method and his preference for expounding law as a cosmopolitan system must in any event have predisposed him against the surviving relics of medieval Scots Law ... Under [his] sweeping condemnation Stair evidently included not only *Regiam Majestatem* but everything else bearing on the history of his country's institutions, for he hardly spares them a second glance. His judgment might have carried more weight if he had been consistent in founding on principle and ignoring history; but it forfeits much of its value when we find him laboriously tracing the origins of civilian doctrines to their roots in Roman antiquities, and tracking legal doctrines to a far-fetched source in the Old Testament or the classics of Greece and Rome. It was probably on this account that the later institutional and other writers, though ready to sit submissively at the feet of Stair when he was expounding legal doctrine, tacitly ignored his pronouncements on legal history.

Cooper goes on, in the publication from which this quotation is taken, to point out the continuing acceptance of *Regiam* in legal practice despite Craig and Stair; while his own implicit criticism of preference for cosmopolitan systems of law and lack of interest in native institutions and their history is surely indicative of the author's views on such matters in general. Certainly it is another sign that in the 1930s he was not wholly in sympathy with the ideology that has since come to be associated with his name.

The realisation that Scots law had a possibly "native" or non-Roman history before Stair, I suggest, is what led Cooper to further researches into medieval law in the years after 1936, work which in some sense culminated in his editions of *Regiam* and *Quoniam*, published by the Stair Society in a single volume in 1947.<sup>18</sup> But the fruits of these researches did not begin to appear until after he was raised to the bench in 1941, when perhaps he began to have a little more leisure time than the role of Lord Advocate had allowed.

His first medieval paper appeared in the *Juridical Review* at the beginning of 1943: it was a study of an early thirteenth-century litigation between Melrose Abbey and the Earl of Dunbar, based mainly upon the material contained in the charters of the abbey as printed in the nineteenth century.<sup>19</sup> This was a precursor of a short book which appeared in 1944, entitled *Select Scottish Cases of the Thirteenth Century*, performing a similar exercise for some 79 litigations conducted between 1200 and 1300. He described this work as the product of an experiment testing the extent to which the law in practice reflected the law described in *Regiam*. Also published in 1944 was an article on the important 1318 legislation of Robert I, from which he sought retrospective light upon thirteenth-century law.<sup>20</sup> In 1945

18 See above, note 2.

19 "Melrose Abbey versus the Earl of Dunbar" (1943) 55 JR 1; reprinted in *Selected Papers*, 81.

20 "The first Law Reform (Miscellaneous Provisions) Act", (1944) 56 JR 1, reprinted in *Selected Papers*, 88. Cooper's title was possibly a little tongue-in-cheek, since as Lord Advocate he had been responsible for the first modern Law Reform (Miscellaneous Provisions) (Scotland) Act, passed in 1940. This reflected the work of the Law Reform Committee, which Cooper established in December 1936.

Cooper raised some questions in an article on freehold (*liberum tenementum*) in Scots law,<sup>21</sup> (to which his friend William Croft Dickinson, Professor of Scottish History at Edinburgh University, very quickly produced an authoritative answer<sup>22</sup>), as well as a lecture to the Royal Philosophical Society of Glasgow with the slightly unfortunate title “Curiosities of Medieval Scots Law”.<sup>23</sup> In 1946 came his edition of the “Register of Brieves”,<sup>24</sup> and *Regiam* and *Quoniam* appeared the following year.

Cooper next located this medieval work in the overall context of Scottish legal history in his influential Saltire Society pamphlet, *The Scottish Legal Tradition*, which came out in 1949.<sup>25</sup> He continued to write papers until a year before his death, and the Stair Society published a final statement of his views on the thirteenth century in its twentieth volume, *Introduction to Scottish Legal History*, which appeared in 1958. As finally presented in this posthumous paper, Cooper’s thesis was that in the course of the thirteenth century the law of Scotland developed under three main influences: the Common Law of England, the Canon law, and the feudal law. By the reign of King Alexander III (1249–1286) there had emerged a system which Cooper called Scoto-Norman law and which was a distinctive blend of all three influences. Its starting point had been in borrowing from the law of twelfth-century England; but in the thirteenth century English law became increasingly complex and Scots lawyers began to turn elsewhere for a model for the development of their law. The relative weakness of the secular judicial machine meant that already much business which would have been conducted in the royal courts in England was dealt with in Scotland by the ecclesiastical courts. Hence, in Cooper’s words:

By the middle of the thirteenth century Scottish lawyers were already deeply imbued with the methods of the *Curia Romana* and the Romano-Canonical procedure and had thereby become habituated to the civilian idiom of legal thinking and to a habit of mind which led to reasoning from principles to instances, to reliance upon syllogisms rather than precedents, and to concentration not upon remedies but on rights and duties. Such characteristics have been typical of Scots law throughout its later history and persist strongly to this day. Under such influences it would only be natural that from the time of Alexander III onwards the Scottish lawyers, nearly all of whom were then ecclesiastics, would view with instinctive distaste the later trend of English developments and particularly the empirical effort to contrive a new tool for every job, to use that tool only for that job, and to circumvent occasional obstacles by legal fictions.<sup>26</sup>

21 “Freehold in Scots law”, (1945) 57 JR 1.

22 “Freehold in Scots law”, (1945) 57 JR 135. The answer probably explains why the paper raising the question was omitted from Cooper’s *Selected Papers*.

23 (1945) 69(5) *Proceedings of the Royal Philosophical Society of Glasgow* 51, reprinted in *Selected Papers*, 93.

24 Note that Cooper only discovered the existence of the “registers of brieves” in 1944: see T M Cooper, *Select Scottish Cases of the Thirteenth Century* (1944), introduction postscript, lv.

25 Reprinted in *Selected Papers*, 172.

26 “From David I to Bruce 1124–1329”, in *Introduction to Scottish Legal History*, (Stair Society, vol 20, 1958) at 15.



Crucial to this analysis was the date of composition of *Regiam Majestatem*, the most important work of medieval Scots law, but one which, as already noted, drew extensively on the late twelfth-century English work, *Glanvill*. Cooper's tests of *Regiam* against the evidence of contemporary practice as expressed in cases and legislation led him to conclude that *Regiam* had been produced around 1230, just before Scoto-Norman law began to diverge notably from the Anglo-Norman law set out in *Glanvill*. There were signs within *Regiam*, notably in its incorporation of Romano-canonical material, of the incipient Scoto-Norman law, but in essence the text belonged to the period when Scots law still relied heavily upon English law for its development.

Cooper's analysis also shows that he had largely given up on any idea of medieval law as representing a "pure" native tradition (although he would observe in 1949 that the then still-surviving feudal land law was the most "distinctively Scottish" branch of Scots law which had evolved "without the intrusion of alien influence for some eight hundred years"<sup>27</sup>). Early legal development was essentially dependent upon English law, while Scoto-Norman law was the product of mixing those early developments with the influence of Canon law. Cooper found the native tradition lying rather in lawyers' attitude or approach to law and its development. There never had been much indigenous Scots law; it had always developed by borrowing from other systems; and that borrowing had been characterised by "effort ... to attain simplicity, flexibility and directness, and to attain these things systematically"; or to use the smallest number possible of legal tools to do the largest number of jobs.<sup>28</sup>

The link between this historical interpretation and the "ideology" which Cooper also began to develop during and immediately after the Second World War becomes apparent when considering the view of comparative law which he also began to promulgate at this time.<sup>29</sup> In private correspondence in 1943 with his friend Andrew Dewar Gibb, Regius Professor of Law at Glasgow University, he wrote of the need of the Scots lawyer to know more about foreign law in order to develop, reform and modernise Scots law—perhaps indeed to save it from extinction.<sup>30</sup> On 15 April 1947, two months after becoming Lord Justice General and Lord President, Cooper delivered a lecture in Aberdeen University, entitled "The Importance of Comparative Law in Scotland". The University had just

27 *Selected Papers*, 185.

28 *Selected Papers*, 178, 179.

29 See my "A picture of what will be some day the law of the civilised nations': Comparative law and the destiny of Scots law", forthcoming in a festschrift in honour of Professor Jerzy Rajski (Warsaw), to be published by C H Beck.

30 National Library of Scotland, Acc 9188 (papers of Andrew Dewar Gibb), folder 3/2, 3.



created a lectureship in comparative law, the first of its kind in Scotland.<sup>31</sup> In the lecture, Cooper emphasised the especial importance of comparative law in the development and reform of the Scottish legal system, in which so “little ... could justly be described as aboriginal and indigenous” and so much “can be traced to an alien source”.<sup>32</sup> On 10 October 1947 Cooper addressed another university audience, this time in Edinburgh, on “The Future of the Legal Profession”. Amongst other points, he commended his listeners to follow the example of Aberdeen in establishing a lectureship in Comparative Law, “for the Scottish lawyer has been first and foremost a comparative lawyer since the thirteenth century, and when he ceases to be a comparative lawyer Scots Law will die.”<sup>33</sup>

In both his Aberdeen lecture and his Saltire Society pamphlet Cooper referred to the report on Scots law which had been given to the General Assembly of the Society of Comparative Legislation in Paris on 16 February 1924 by Henri Lévy-Ullmann, Professor of Comparative Civil Law at the Sorbonne.<sup>34</sup> Originally published in French, an English translation by F P Walton appeared in the main Scottish academic law journal, the *Juridical Review*, in 1925.<sup>35</sup> In the lecture Lévy-Ullmann had discussed the varied historical sources and development of Scots law, drawing attention in particular to Roman, feudal and English influences. He summarised his overall view of the law as follows:

[I]t is a law of Roman and feudal origin which has been adapted in the course of eight centuries by legislation and by judicial decisions to the needs of the Scottish people, and during the last century has, little by little, been combining with the English law by a slow operation of fusion. ... [The adaptation has been carried out] with extraordinary skill. In the whole field of private law the Scots have revealed themselves admirable makers and adapters of laws.<sup>36</sup>

Lévy-Ullmann’s lecture has become famous, at least amongst Scots lawyers, for the statement that “Scots law as it stands gives us a picture of what will be some day (perhaps at the end of this century) the law of the civilised nations, namely a combination between the Anglo-Saxon system and the continental system”.<sup>37</sup> While Cooper himself never subscribed to this optimistic view, it is clear that he

31 For the circumstances underlying the creation of the lectureship, see J Beatson and R Zimmermann (eds), *Jurists Uprooted: German-speaking Émigré Lawyers in Twentieth-century Britain* (2004), at 741 (P Stein) and 772 (R Zimmermann).

32 *Selected Papers*, at 143.

33 *Selected Papers*, 159.

34 *Selected Papers*, 145, 198.

35 H Lévy-Ullmann (trans F P Walton), “The law of Scotland”, (1925) 37 JR 370. The original version of the article, “Le Droit écossais”, was published in the 1924 volume of the *Bulletin de la Société de Législation comparée*.

36 Lévy-Ullmann, “The law of Scotland”, 375, 384.

37 Lévy-Ullmann, “The law of Scotland”, at 390.

was inspired, as were other Scots lawyers, by Lévy-Ullmann's notion that looking outside itself for inspiration—adapting other people's laws—was the hallmark of Scots law and Scots lawyers. For Cooper, history as thus objectively verified from outside the system provided a lesson for today.

There was, of course, nothing new in Cooper's discovery of the influence of English law on the early development of Scots law. In some shape or form this had been known since the time of Craig,<sup>38</sup> and it had been discussed by later writers such as Lords Bankton<sup>39</sup> and Kames,<sup>40</sup> Walter Ross,<sup>41</sup> James Paterson,<sup>42</sup> and Cosmo Innes.<sup>43</sup> In Cooper's own lifetime, it was established orthodoxy that the history of Scots law to 1300 had involved a close relationship with English developments. In 1890 George Neilson thought that "marked English influence" could be detected in legal development after the capture of William, king of Scots, by the English at Alnwick in 1174, and dated *Regiam* to around 1230 upon comparing its contents with evidence of Scottish legal practice.<sup>44</sup> In the *History of English Law*, first published in 1893, F W Maitland observed that although English law "had no power north of the Tweed ... we may doubt whether a man who crossed the river felt that he had passed from the land of one law to the land of another", and continued: "It seems clear enough from abundant evidence that, at the outbreak of the war of independence, the law of Scotland ... was closely akin to English law."<sup>45</sup> Giving the Storrs Lectures at Yale in October 1895, Professor John Dove Wilson of Aberdeen appears to have been the first to coin the phrase "Scoto-Norman" to describe the law of the thirteenth century; and he also argued that "at the beginning of the fourteenth century, there must have been a great similarity between the laws of England and Scotland".<sup>46</sup> He accordingly placed *Regiam* at the beginning of the fourteenth century, and further maintained that there was no trace of Roman law in Scotland until much later, when there was a Reception akin to that of Germany in the sixteenth century. Any Roman law in *Regiam* was mere

38 Craig, *Jus feudale*, 1.11.33; 2.8.23; 2.8.40; 2.15.16; 2.16.1; 2.17.25; 2.20.2; 2.20.32; 3.5.2.

39 *Institute of the Laws of Scotland* (1751) (now most readily accessible as vols 41–43 of the Stair Society series, edited by W M Gordon).

40 *Historical Law Tracts*, 1st edn (1757).

41 *Lectures on the Law of Scotland*, 2nd edn (1819).

42 *Compendium of English and Scotch Law* (1865).

43 *Lectures on Scotch Legal Antiquities* (1872).

44 *Trial by Combat* (1890), 82, 99–104.

45 F Pollock and F W Maitland, *The History of English Law before the Time of Edward I*, 2nd edn (1896), vol 1, 222–223.

46 J Dove Wilson, "Historical development of Scots law", (1896) 8 JR 217, at 225. For "Scoto-Norman law", see "The reception of the Roman law in Scotland", (1897) 9 JR 361, at 366, 369, 372. These articles embody three of the six Storrs lectures: see further S D Girvin, "Professor John Dove Wilson of Aberdeen", 1992 JR 60.

ornamental matter, and the influence of Roman law in the Church courts affected only the law in which the church had exclusive jurisdiction, such as marriage and legitimacy.<sup>47</sup>

The close identity of Scots and English law around 1300 was, then, the orthodoxy firmly established in the 1890s when Cooper was in his childhood,<sup>48</sup> and it can be found accepted in the pre-1939 writing of such contemporaries as Lords Dunedin,<sup>49</sup> Macmillan,<sup>50</sup> and Normand,<sup>51</sup> Professors James Mackintosh,<sup>52</sup> John Spencer Muirhead,<sup>53</sup> and Andrew Dewar Gibb,<sup>54</sup> and E J MacGillivray, who contributed an article on the influence of English law to the Stair Society's first volume.<sup>55</sup> What was different or original in Cooper's analysis? It lay essentially in bringing forward to a much earlier point in time the divergence of Scots from English law and in highlighting the importance of Canon as well as English law in this process. So almost from the very beginning Scots law was a mixed system, developing by borrowing from other, more powerful legal cultures, but increasingly doing so in a selective and critical way.

After the publication of his edition of *Regiam* Cooper began to turn his attention to the later Middle Ages, in which he thought he detected a turning away from the Scoto-Norman law of the thirteenth century, resulting in part from the hostility to English influence which developed with the wars of independence. In his Saltire Society pamphlet of 1949 he characterised the fourteenth and fifteenth centuries as "the Dark Age of our legal history",<sup>56</sup> and he elaborated upon this theme in the David Murray Lecture which he gave in Glasgow University in 1953, under the title "The Dark Age of Scottish Legal History, 1350-1650".<sup>57</sup> There he stated his views in colourful style:

47 Dove Wilson, "Reception of the Roman law", 365–372.

48 See also J A Lovat-Fraser, "Some points of difference between English and Scotch law" (1894) 9 LQR 340, and J W Brodie-Innes, *Comparative Principles of the Laws of England and Scotland: Courts and Procedures* (1903), 4 ff.

49 *The Divergences and Convergences of English and Scottish Law*, Fifth David Murray Lecture, 21 May 1935 (1935).

50 *Law and Other Things*, at 108.

51 "Consideration in the law of Scotland", at 360.

52 *Roman Law in Modern Practice* (1933), ch 2.

53 *Outline of Roman Law* (1937), at 31.

54 *The Shadow on Parliament House: Has Scots Law a Future?* (1930); also "The inter-relation of the legal systems of Scotland and England" (1937) 53 LQR 61.

55 "The influence of English law", in *Sources and Literature of Scots Law*, at 209. MacGillivray was a barrister and an advocate: see the relevant entry in F J Grant, *The Faculty of Advocates 1532–1943*, Scottish Record Society (1944).

56 *Selected Papers*, 176.

57 Published as a pamphlet under this title in 1953, and reproduced in *Selected Papers* at 219.

It is hardly an exaggeration to say that each pursuer eventually presented himself before the tribunal in the guise of “an infant crying in the night, And with no language but a cry”, and that the whole of Scots law had been compressed into a single commandment: “Thou shalt do na wrang!” ... This was unquestionably the period when Scots Law, viewed as a science and a philosophy from the comparative standpoint, reached its low-water mark.<sup>58</sup>

His explanation for the decline and fall of later medieval Scots law went as follows:

At the risk of inviting the retort that there is nothing like leather, I make bold to assert the main source of the trouble was the persistent policy of confiding the judicial function to an unpaid, part-time, lay magistracy, masquerading as judges and engaging casually in the discharge of judicial duties in intervals snatched from their major preoccupations as territorial magnates, or statesmen, or ecclesiastical dignitaries. ... [T]he executive remained so impotent and the courts so inferior in capacity and efficiency for so prolonged a period that they gradually dragged the substantive law down to their own level.<sup>59</sup>

Only the creation of the Court of Session and the genius of one of its Presidents—Stair—would ultimately save Scots law from the extinction which otherwise must have followed after the Union of 1707.

Once again, therefore, we see Cooper’s concerns about the present—a world in which increasingly judicial tasks were assigned, not to the professional courts, but to administrative tribunals or, in the private sector, to arbitration—reflected in his history; and his use of history to make points about the implications of the current state of affairs as he saw it. He had, as already noted, expressed these concerns eloquently in the 1930s; and he went on expressing them after the Second World War.<sup>60</sup>

Much of Cooper’s work on medieval law was, therefore, deeply affected by the concerns about current law and development which he had expressed before 1939. His legal history contained a message for his own times and for the fellow lawyers he conceived as his principal audience. As he put it in *The Scottish Legal Tradition* in 1949:

The fertilising foreign contacts, upon which Scots Law has thrived for ages, can only with difficulty be maintained, and there is a visible risk that the old breadth of vision may be succeeded by an insular parochialism and a disposition to rest content with our inherited capital of ideas. The dangers of these tendencies are appreciated within the legal profession, and they can and will be resisted. If they were not, the future of Scots Law would soon lie behind it.<sup>61</sup>

58 *Selected Papers*, 229, 230.

59 *Selected Papers*, 227, 230.

60 See above, text accompanying notes 8–10; my “Legal nationalism: The case of Lord Cooper”, text accompanying notes 26–33; and (for post-war writings) *Selected Papers*, 154–155, 158–159, 200, 214–217, 244–265.

61 *Selected Papers*, 198–199.

But the medieval research did also lead Cooper to some new and useful insights into the development of Scots law from its beginnings in the twelfth century. More importantly for present purposes, it also enabled him to begin to join up his earlier thought with that of others who had promulgated Scots law as a Civilian or mixed system, with all that this entailed by way of positioning the law for further development in the future. These were the historical and comparative foundations upon which, for good or ill, Cooper's own contribution to the Cooper-Smith ideology would be built, with all its implications for Scottish legal nationalism.