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Smoothing the Rugged Parts of the Passage: Scots Law and its Edinburgh Chair¹

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^{*} Professor of Scots Law, University of Edinburgh. This is a revised version of an inaugural lecture given on 18 September 2012. The lecture itself is captured at <http://www.youtube.com/watch?v=YTFW7XXqBxY>. I am grateful to George Gretton, Elspeth Reid, and an anonymous reviewer for insightful comments.

¹ Baron David Hume, *Lectures 1786-1822* vol I (ed G C H Paton; Stair Society vol 5, 1939) 2: “The purpose then of establishing this Chair was to put young men in the best road to that knowledge [of Scots law], and to smooth for them the more rugged parts of the passage”.

A. THE CHAIR

(1) Foundation

Founded by the Town Council on 28 November 1722,² the Chair of Scots Law was the third of the law chairs at Edinburgh University,³ lagging only slightly behind the Regius Chair of Public Law and the Law of Nature and Nations (1707) and the Chair of Civil Law (1710).⁴ The name “Scots Law” was in contrast to the “Civil Law” of the chair of that name: the holder of the latter instructed students in the Civil or Roman law, the holder of the former in Scots or municipal law.⁵ The Chair of Scots Law was the first devoted solely to municipal law in Scotland – indeed the first in the United Kingdom, for the creation of the Vinerian Chair of English Law at Oxford still lay more than 30 years in the future.⁶ Before 1722 knowledge of Scots law, if it was acquired at all, had had to be acquired by independent study or – except in Glasgow where a course had been offered at the University since 1714⁷ – by attending private lectures.⁸

Further provision for the Chair was made in an Act of the new Parliament of the United Kingdom, the Edinburgh Beer Duties Act of 1722.⁹ Crucially, the Act

2 For an account of the early chairs, see Sir Alexander Grant, *The Story of the University of Edinburgh during Its First Hundred Years* (1884) vol I, 282-90.

3 Or fourth if one counts the Chair of Universal History (1719) which in due course metamorphosed into the Chair of Constitutional Law.

4 On the establishing of the Regius Chair, see J W Cairns, “The origins of the Edinburgh Law School: the Union of 1707 and the Regius Chair” (2007) 11 *EdinLR* 300.

5 Indeed, in the early years, the Chair was quite often referred to, including by its holders, as the Chair of Municipal Law.

6 On the proliferation of chairs of national law in the eighteenth century, see M D Gordon, “The Vinerian Chair: an Atlantic perspective”, in P Birks (ed), *The Life of the Law: Proceedings of the Tenth British Legal History Conference Oxford 1991* (1993) 195.

7 This was given by William Forbes, the Regius Professor of Civil Law. Indeed by the time the first lectures on Scots law were being given in Edinburgh, Forbes had published a textbook for the use of his students: see William Forbes, *The Institutes of the Law of Scotland* vol I (1722, reprinted by the Edinburgh Legal Education Trust 2012), and see in particular Forbes’ explanation, at 9-10 of the 2012 reprint. See also J W Cairns, “The origins of the Glasgow Law School: the Professors of Civil Law, 1714-61”, in Birks (ed), *The Life of the Law* (n 6) 151 at 174 ff.

8 Alexander Bayne, the first person to be appointed to the Chair of Scots Law, had indeed previously given a course of such private lectures. For the difficulties of earlier study, particularly before the publication of Craig’s *Jus Feudale* in 1655, see A Bayne, *A Discourse on the Rise and Progress of the Law of Scotland and the Method of Studying it, For the Use of Students of the Municipal Law*, included as a supplement to Bayne’s edition of Sir Thomas Hope’s *Minor Practicks* (1726) 150-87 at 183-5; Hume, *Lectures* vol I (n 1) 1-4.

9 9 Geo I c 14. In the same breath as the Chair of Scots Law, the Act confirmed the Chair of Universal History: “which Two Professions of Universal Civil History, Greek and Roman Antiquities, and of Scots Law, the Magistrates and Council of the said City, are and shall be authorized and impowered to institute and establish, and to nominate and appoint the first Professors, who shall enjoy the said Salaries, and be instituted to the whole Privileges and Immunities, that the other Professors of the said University enjoy, and are intitled to”.

made provision for payment of a salary, of £100 a year,¹⁰ from the proceeds of a continued tax of two pennies Scots (1/6 of a penny Sterling) per pint “upon all Ale brewed, brought in, tapped, or sold” in Edinburgh,¹¹ a subvention doubtless greeted with enthusiasm by the drinking classes of the city. In truth this was only one of a large number of statutory charges on the fund, which included the no less pressing matter of providing a water supply, narrowing “the noxious lake on the north side of the said city, commonly called the North Lock, into a canal of running water”, and building “a proper hall, or other conveniences, for accommodating the Court of Justiciary”.

(2) The first professor

The first person to be appointed to the Chair of Scots Law was Alexander Bayne of Rires.¹² Typically for his time, he had studied Scots law with John Spotswood in Edinburgh¹³ and Civil law at the University of Leiden before being admitted as an advocate in 1714. At the time of his appointment he was around 40 years of age although his precise date of birth is uncertain.¹⁴ The circumstances of his appointment were described by Lord Kames to James Boswell as follows:¹⁵

Lord Kames told me this evening that a Mr Bayne of Logie, known by the name of Logie Bayne, was the first regular Professor of Scots Law here. He was first an advocate at this bar, but did not succeed. He then went to London and resided some years, thinking to try the English bar. But that would not do either. He returned to Scotland in low circumstances and knew very little law. But such was the effect of a grave countenance and a slow, formal manner, a neatness of expression and the English accent, that the advocates sent a deputation to ask him to accept of being professor, which he did most readily.

10 £100 remained the salary throughout the eighteenth century and, no doubt, beyond. A list of Edinburgh University salaries is given in *The Scots Magazine* for February 1796 (at 115). The Professor of Scots Law was paid the same as the other law professors except for the Regius Professor, who received £200. In other Faculties, including Medicine, the salaries were generally lower. Overall the salaries were said to be “by far too small”, but it should be recalled that they were supplemented by class fees paid by students so that George Joseph Bell, for example, is thought to have earned about £750 from the Chair: see K G C Reid, “From text-book to book of authority: the *Principles of George Joseph Bell*” (2011) 15 *EdinLR* 6 at 8.

11 The money was not, however, to be available until 1 July 1723, and it may be that the first lectures were not given until then.

12 See R L Emerson, *Academic Patronage in the Scottish Enlightenment* (2008) 264-5.

13 On Spotswood see J W Cairns, “John Spotswood, Professor of Law: a preliminary sketch”, in W M Gordon (ed), *Miscellany Three* (Stair Society vol 39, 1992) 131. In later life there may have been a sense of rivalry between teacher and pupil: see W Menzies, “Alexander Bayne of Rires, Advocate” (1924) 36 *JR* 60 at 63-4.

14 For further biographical information, see J W Cairns, “Bayne, Alexander, of Rires (c 1684-1737)” *Oxford Dictionary of National Biography* (2004). See also Menzies (n 13).

15 C McL Weis and F A Pottle (eds), *Boswell in Extremes, 1776-1778* (1971) 213.

But this unflattering account was given more than 50 years after the events it purported to describe¹⁶ and, in any event, as Lord Braxfield was to comment to Boswell in the context of Bayne, “Kames thinks nothing of any law book but [his own] *Principles of Equity*”. For his own part Braxfield “thought well” of Bayne.¹⁷ In addition to being a lawyer of at least moderate accomplishment, Bayne was also a composer of some note¹⁸ and a painter.

Bayne’s manner of lecturing is well documented, not least by Bayne himself. “When I entred upon the Profession of the Municipal Law”, Bayne was later to write, “I thought it became me rather to take Sir George Mackenzie’s Institutions for my Text-Book, than to give one of my own, for this obvious Reason, that it was a Book of Authority, universally esteemed, and infinitely superior to any I could give”.¹⁹ But as Mackenzie’s text was too terse to be understood by those new to the law, Bayne’s “first business”, as he explained to his students in his inaugural lecture:²⁰

will be shortly to give you our Author’s Meaning in other Words . . . This being done, I retouch the same Matters in a more formal Discourse, and I add to them such other Matters as are coincident with the Subject of the Paragraph I’m upon, which are to be gathered partly from my Lord Stair’s Institutions, partly from the later Decisions, and some of the other Authors upon our Law.

Bayne’s method of proceeding was thus to go through Mackenzie’s work, paragraph by paragraph, to summarise and explain the text, and then to add new material of his own at a sufficiently slow pace that it could be taken down “as accurately as you can” by his audience. If the sets of notes which have survived are any guide, then his students were unusually careful in their transcription, for in a random comparison the passages selected were invariably identical.²¹

16 Kames had not been a pupil of Bayne. On the other hand, as he passed advocate on 22 January 1723 he would have been aware of the legal gossip of the time.

17 J W Reed and F A Pottle (eds), *Boswell: Laird of Auchinleck, 1778-1782* (1993) 239-40. I am grateful to Dan Carr for this reference.

18 Some of his cantatas for solo voice were performed at a concert held in St Cecilia’s Hall in Edinburgh on 24 November 2007 to mark the tercentenary of the Edinburgh Law School. On this aspect of Bayne’s life, too, Kames was unflattering: “He was a sort of musical composer but of no taste in music, for he was quite inattentive to the finest pieces at the concert till his own performances were played, and then he fell to the harpsichord and was all alive”: Weis & Pottle (eds), *Boswell in Extremes* (n 15) 213.

19 Alexander Bayne, *Notes for the Use of the Students of the Municipal Law In the University of Edinburgh: Being a Supplement to Sir George MacKenzie’s Institutions* (1731, with a later printing in 1749) iii.

20 Bayne *Discourse* (n 8) 169.

21 It is possible, however, that they copied from a common source. Three sets of student notes are held in Edinburgh University Library (shelf marks Gen.57D, Gen.794D, and E8411 ms 2668). The titles chosen for two of these are of interest (the third is untitled), bringing out that Bayne was doing more than commenting on the work of another writer: “The dictates of Mr Alexr Bain Professor of the Scots

Nonetheless, Bayne was so dissatisfied “by the increasing Number of written Copies, and these being become very incorrect” that in 1731 he caused his notes to be published.²² His lectures on criminal law, a topic barely touched on by Mackenzie, had been published the previous year.²³

The published notes give a reasonably clear idea of what it must have been like to attend Bayne’s class. The lectures, which took place at the invigorating hour of 7 am, were given in the vernacular and not, like those of many other professors, in Latin, and the emphasis was firmly on the transmission of information.²⁴ A surprisingly large number of Mackenzie’s paragraphs are left unadorned, but when Bayne does comment, his remarks are often extensive, bringing the law up to date and adding in material omitted by Mackenzie. His style, however, is hardly less terse than that of the text on which he is commenting. One example must suffice to give the flavour of the whole. Under the heading of “Subject-Matter of Obligations”, Mackenzie says this:²⁵

To make Obligations effectual, it is necessary, that the Subject-Matter thereof be such as will admit of an Obligation: For no Man can oblige himself to do what is either impossible, unlawful, or dishonest, nor to transmit the Property of Things sacred, (these not being *in Commercio*;) and albeit, when the Performance of Obligations becomes imprestable, the Party is liable for the Value, as Damage and Interest; yet in these the Value is not due, nor will he be liable in a Penalty, in Case of not Performance.

But yet a Man may oblige himself to do Something not in his own Power, as to cause another dispoſe Lands; and if he fail, he will be liable *pro damno & interesse*, or for the Penalty.

Law at Edinburgh being a Commentary Upon Sir George Mckenzie’s Institutes of the law of Scotland 1st Novr 1728”, and, more succinctly, “Bayne’s Notes on Mackenzie”.

²² Bayne, *Notes* (n 19) iv.

²³ *Institutions of the Criminal Law of Scotland. For the Use of the Students who attend the Lectures of Alexander Bayne, JP* (1730). This was the same year in which the Regius Professor at Glasgow, William Forbes, published the volume of his *Institutes of the Law of Scotland* concerning criminal law (reprinted by the Edinburgh Legal Education Trust in 2012). Forbes’s work was much the more substantial – 373 pages compared to the 191 pages of Bayne’s – and was based on a manuscript which was much more substantial still, the *Great Body of the Law of Scotland* (unpublished but available electronically at <http://www.forbes.gla.ac.uk/contents/>). For Bayne’s lectures on criminal law, see J W Cairns, “Teaching criminal law in early eighteenth-century Scotland: *collegia* and *compendia*” (2014) 20 *Fundamina* 90, 96-8.

²⁴ The venue was first of all the Hall of the Incorporation of Mary’s Chapel in Niddry’s Wynd and, from 1735 onwards, the University buildings. As with the private teachers of law whom Bayne replaced, the classes were essentially private “colleges” (*collegia*), based on a model popular in and familiar from the Netherlands. See Cairns (n 23) 92, 95-6.

²⁵ Sir George Mackenzie of Rosehaugh, *The Institutions of the Law of Scotland*, 2nd edn (1688) 3.3.28 and 29.

Bayne responds with a wide-ranging but unadorned list:²⁶

The chief Vices in Contracts are, *1mo.* The Want of reasonable Knowledge of the Matters transacted, occasioned by some substantial Error, or through some natural Infirmary of the Parties contracting, *2do.* The Want of Freedom and Liberty through violent Force and just Fear. *3tio.* The Want of Sincerity and Integrity, and the inducing a Consent through Fraud and Surprise, which otherways would not have been given. *4to.* The Want of Capacity to adhibit a just Consent, which is a Vice that admits of no Temperament, because, where there is no Consent, there can be no Contract. *5to.* An unlawful Subject-Matter.²⁷

Probably the dictated commentaries, which Bayne eventually printed, were accompanied by a degree of less formal exposition and explanation, although there appears to be no trace of this in the student notes that have survived.²⁸ But even so, there was little in Bayne's methods to aid understanding, and nothing to encourage speculative thought or a burning interest in the subject under discussion. Perhaps the best that can be said of his teaching is that it succeeded in attracting students;²⁹ and from this rather modest beginning was to grow a distinguished pedagogical tradition surrounding the Edinburgh Chair.

(3) Bayne and his successors

Alexander Bayne remained as Professor of Scots Law until his death in 1737, some fifteen years after his appointment. Since then there have been a further sixteen Professors, in almost uninterrupted succession.³⁰ The following is a complete list:

The seventeen Professors

1	1722-1737	Alexander Bayne
2	1737-1765	John Erskine
3	1765-1786	William Wallace
4	1786-1822	David Hume
5	1822-1843	George Joseph Bell

²⁶ Bayne, *Notes* (n 19) 107.

²⁷ Bayne then completes his commentary by setting out the legal effects: "The Vices of Contracts give either Cause to annul them, or to repair the Damages they have occasioned, or both".

²⁸ The existence of such informal material is suggested in various passages from the *Discourse* (n 8), in particular 177 and 180-1.

²⁹ Unlike William Forbes, the Professor in Glasgow: see Cairns (n 23) 98.

³⁰ There was a gap of two years between the retirement of Robert Black in 2006 and my own appointment in 2008.

6	1843-1861	John Shank More
7	1861-1863	George Ross
8	1863-1865	George Moir
9	1865-1888	Norman Macpherson
10	1888-1922	Sir John Rankine
11	1922-1947	Candlish Henderson
12	1947-1968	George Montgomery
13	1968-1972	Sir Thomas B Smith
14	1972-1977	Sir Gerald H Gordon
15	1977-1980	Eric Clive
16	1981-2006	Robert Black
17	2008-	Kenneth Reid

Bayne, as already mentioned, was appointed by the Town Council, but the founding statute, the Edinburgh Beer Duties Act of 1722, directed that, for the future, “the Faculty of Advocates shall nominate and present Two Persons, whom they shall judge qualified for supplying such Vacant Profession, to the said Magistrates and Council; and that the said Magistrates and Council shall admit One of the Two Persons so nominated and presented to supply the Vacancy”. For the University itself no role was provided other than to accept the candidate chosen by Faculty and Council.

In practice, the short list of two was produced by open election by members of the Faculty of Advocates. These were keenly contested³¹ and, until well into the nineteenth century, politics and patronage played a part even if merit was usually a prime consideration.³² To avoid the risk that the Council might override the Faculty’s choice, the practice developed of nominating as the second candidate a person whose position and status made it impossible that he would accept appointment.³³

Later, after the university reforms of 1858, the Council’s role was taken over by the Curators of Patronage, whose membership was appointed partly by the

31 But occasionally, as with Bell and Moir, the willingness of a particular candidate to stand had the effect of causing others to withdraw, leading to a unanimous election. See Reid (n 10) 7; Grant, *University of Edinburgh* (n 2) vol II, 375-6.

32 Emerson, *Academic Patronage* (n 12) 264-6.

33 Anon, “The vacant professorship of Scots law” (1861) 5 J of Juris 558, 558-9.

Council and partly by the University.³⁴ At first quiescent, in due course they sought a more active role. Following the appointment of Candlish Henderson to the Chair in 1922, the Curators asked that in future the Faculty should supply information as to the candidates' qualifications;³⁵ and in 1925 they requested that the leet of two names should be presented without indicating any preference.³⁶ Modest as they were, however, these requests do not seem to have been acted on, for when the Chair next fell vacant, in 1947, the Curators were reduced to approaching the candidates directly for an "epitome" of their careers, while the leet, as usual, indicated a preference. When the Curators remonstrated in respect of the latter, the Faculty response was uncompromising, the Dean of Faculty³⁷ expressing himself unaware "of any reasons for alteration of the longstanding practice of expressing a preference, and that on information at present available he does not feel that he could advise the Faculty to discontinue the practice".³⁸ Meanwhile, in a display of independence, the Curators had decided to interview the candidates for themselves, although in the event their unanimous decision was to appoint the candidate favoured by the Faculty.³⁹ Future disagreement was pre-empted by the repeal in 1947 of the 1722 Act,⁴⁰ thus bringing the formal involvement of the Faculty of Advocates to an end.⁴¹

34 Universities (Scotland) Act 1858 s 13. The Council had a 4:3 majority. The legislation followed decades of disagreement between the Council and the Senatus of Edinburgh University, as to which see, e.g., Grant, *University of Edinburgh* (n 2) vol II, 1 ff. The Bill was piloted through the House of Commons by John Inglis, the Lord Advocate: see J Crabb Watt, *John Inglis, Lord Justice General of Scotland: A Memoir* (1893) 172-83. For background to the reform, see R D Anderson, *Education and Opportunity in Victorian Scotland* (repr with corrections, 1989) ch 2.

35 *Sederunt Book of the Curators of Patronage* 7 July 1922, Edinburgh University Library, GB 237 EUA IN1/GEN/PAT/3.

36 *Minutes of Meetings of the Curators of Patronage* 14 July 1925, Edinburgh University Library, GB 237 EUA IN1/GOV/PAT/5/2.

37 J S C Reid, QC, shortly thereafter to be appointed straight from the Bar as a Lord of Appeal in Ordinary.

38 For all information on the deliberations in 1947, see Edinburgh University Library, GB 237 EUA IN1/GOV/PAT/5/2.

39 George Montgomery QC. The other candidate was William Garrett QC. The papers record some disagreement as to how much weight should be given to the Faculty's ranking.

40 Statute Law Revision Act 1948 s 1, sch 1.

41 Nevertheless, at least for a time the practice of providing a leet of two names continued. Perhaps no one had noticed the repeal? So for example when the Chair of Civil Law became vacant in 1958, the Faculty put forward the names of T B Smith, the Professor of Scots Law at Aberdeen University, and T L Hird, a Senior Legal Assistant with Dundee Corporation who lectured in Civil Law at St Andrews University. Smith, the Faculty's choice, was appointed. See *Minutes of Meetings of the Curators of Patronage* 14 March 1958, Edinburgh University Library, GB 237 EUA IN1/GOV/PAT3. Even today a representative of the Faculty of Advocates sits as a courtesy in what is in other respects an ordinary appointments committee.

Given that the Chair was effectively in the gift of the Faculty of Advocates, it is no surprise that the candidates were invariably drawn from its ranks.⁴² For the first 250 years every appointee was a practising member of the Faculty of Advocates, and it was not until the Faculty's role ended, in 1948, that there was appointed, first two advocates who were not then in practice⁴³ and finally, as recently as 1977, a solicitor.⁴⁴ While, however, advocates have lost their monopoly, it remains the case that all holders of the Chair have been members of one or other branches of the legal profession. Such professional dominance had an important influence on the nature of the Chair, and of the two other Edinburgh chairs⁴⁵ which were subject to appointment by the Faculty of Advocates. As lecturing duties could be disposed of before or after the court hour, and other duties were few, many of those appointed continued to practise at the bar or, like Hume and Bell, took on other positions in the profession.⁴⁶ The result was a close link between University and Parliament House, often to the benefit of both; and the teaching and writing of the Professors were informed by the experience, and the needs, of practice.⁴⁷ It is only in the last half-century that the requirements of academic and professional life have each become so exacting that it is necessary to choose between them. No Professor of Scots Law since Candlish Henderson has maintained much in the way of a legal practice.⁴⁸

Contemporary sources provide entertaining, not so say malicious, glimpses of the early professors.⁴⁹ Erskine, it was said, suffered from "extreme feebleness of his voice" and, perhaps for that reason, displayed "excessive diffidence and dislike to disputation".⁵⁰ Hume's style was "heavy and affected, his delineation of

42 There were two solicitor candidates in 1947, but they received only one vote between them: see F Craddock (ed), *The Journal of Sir Randall Philip OBE, QC* (1998) 41. Philip noted that the Chair has been "thrown open to people who would continue to practise".

43 T B Smith and Gerald Gordon. At the time of appointment both already held chairs at Edinburgh University.

44 Eric Clive. I am only the second solicitor to hold the Chair.

45 Civil Law and Constitutional Law.

46 Both Hume and Bell accepted appointments as principal clerks of session.

47 R Black, "Practice and precept in Scots law" 1982 JR 31, 35-6.

48 From the point of view of the University, full-time devotion to the Chair had come to be seen as desirable or even essential. At the time of George Montgomery's appointment in 1947, the Secretary to the University sought the assurance of the Secretary to the Curators of Patronage that Montgomery would abandon legal practice. The assurance was duly given. See letter dated 13 June 1947 from the Secretary to the Curators to the Secretary to the University, Edinburgh University Library, GB 237 EUA IN1/GOV/PAT/5/2.

49 One is reminded of Alan Rodger's account of law professors who were ill or disabled (Lorimer's weak voice and eye-sight, Gloag's withered arm, and so on), and the possible implications to be drawn from that: see A Rodger, "Savigny in the Strand" (1990-92) 25-27 *Irish Jurist* 1 at 3-5.

50 J Ramsay, *Scotland and Scotsmen in the Eighteenth Century* vol I (ed A Allardyce, 1888; repr with introduction by D J Brown, 1996) 146. On Erskine, see K G C Reid, "Introduction" to *Erskine's An Institute of the Law of Scotland* (Old Studies in Scots Law vol 5, 2014).

principle superficial, his views on all matters of expediency or reason narrow, indeed monastic”.⁵¹ Bell’s lectures “were generally considered profitless, and his class were most inattentive”.⁵² His successor, More, was scarcely better at keeping his students’ attention, his class being “disorderly and out of hand”,⁵³ no doubt partly because he was a “plodding lawyer” who “knew so many cases, and had studied so many decisions, that he could not tell what the law really was”.⁵⁴ Ross “was known as a stiff counsel and a bad pleader”.⁵⁵ Rankine’s lectures “varied little from year to year, even the jokes”.⁵⁶ As for Montgomery, “[i]f there were moments of levity they were very few – and always unintended by our lecturer”. His lectures were simply readings from *Gloag and Henderson*, “unadorned by anything that might stretch the imagination”.⁵⁷ Of course, these (selective) quotations are far from being balanced assessments of the person under scrutiny, and it would be quite wrong to suggest that the Chair was dominated by failed advocates, poor teachers, and social misfits. On the contrary, although there were some weaker brethren,⁵⁸ the holders of the Chair, taken as a whole, have been quite extraordinarily distinguished, their contribution to law and its literature incalculable.⁵⁹ And in Erskine, Hume and Bell – the trio of

51 Lord Cockburn, *Memorials of His Time* (1856) 163. For Cockburn, of course, Hume was a political and ideological opponent. On Hume, see G C H Paton, “A biography of Baron Hume”, in Baron David Hume, *Lectures 1786-1822* vol VI (ed G C H Paton; Stair Society vol 19, 1958) 327.

52 From the diary of one Thomas Fraser, quoted in T St J N Bates, “Mr McConnachie’s Notes and Mr Fraser’s Confessional” 1980 JR 166 at 176. Fraser attended Bell’s lectures during the session 1831-2. On Bell, see G W Wilton, *George Joseph Bell* (1929); Reid (n 10).

53 C Stewart, *Haud immemor: reminiscences of legal and social life in Edinburgh and London, 1850-1900* (1901) 48.

54 Crabb Watt, *John Inglis* (n 34) 45.

55 *Ibid.*

56 J A Lillie, *Tradition & Environment in a time of change* (1970) 39. The example given of a Rankine joke – “we’ve all got the seeds of dissolution in us” – does not suggest a gifted comedian.

57 Lord Hope of Craighead, “The strange habits of the English”, in H L MacQueen (ed), *Miscellany Six* (Stair Society vol 54, 2009) 309.

58 Of the professors of the mid-Victorian period it was said that even their “warmest friends” could not place them in the same category as Erskine and Bell: see Anon (n 33) 560. Two of those professors had exceptionally short tenures, Ross because he died of diphtheria at the age of 49, and his successor, Moir, because of ill health which led to his resignation after only two years. Moir’s main interests, in any event, seem to have been in literature rather than law. He translated Schiller and contributed a regular flow of essays to the main periodicals. Between 1825 and 1840 he had held the Chair of Rhetoric and Belles Lettres. For an assessment of his literary output, see E E Eigner and G J Worth (eds), *Victorian Criticism of the Novel* (1985) 39-40. From an earlier period, Wallace “was a popular and clever man but he left no works other than a few humorous verses of no distinction”: see Emerson, *Academic Patronage* (n 12) 265.

59 Brief biographical sketches of all the professors until 1865 can be found in Grant, *University of Edinburgh* (n 2) vol II, 371-6. A number, both before 1865 and since, have entries in the *Oxford Dictionary of National Biography*. Some other biographical material was indicated in previous footnotes. Two of the post-war professors have been honoured with *Festschriften*: see D L Carey Miller and D W Meyers (eds), *Comparative and Historical Essays in Scots Law: A Tribute to Professor*

institutional writers—there are three of the finest jurists in the history of Scots law. Few law chairs in Scotland or England can muster so impressive a list of incumbents.

(4) And their inaugural lectures

Until modern times an inaugural lecture was simply the first lecture of the professor's first course of lectures, in practice sometimes repeated as the first lecture for subsequent years. The very first such lecture for the Chair of Scots Law, that by Alexander Bayne, was probably given in Latin—a manuscript copy in that language is held in Edinburgh University Library⁶⁰—but when Bayne came to publish the lecture he did so in English.⁶¹ From Bayne there is a half-century gap in the sources until the reasonably reliable texts that have survived for the inaugural lectures of three consecutive Professors, Hume,⁶² Bell⁶³ and More,⁶⁴ covering the period from 1786 to 1843. Thereafter there is nothing for a further century by which time inaugural lectures had assumed their modern form. Only two of the post-war professors gave inaugural lectures—Montgomery and Black—and both lectures were subsequently published.⁶⁵

There is much interesting material in all of these lectures, and it would be possible to give an inaugural lecture simply on the topic of the inaugural lectures of one's predecessors. I will forbear from doing so, but I hope I can be forgiven for saying something at least about these earlier lectures. The two modern lectures are quite unlike the earlier ones or indeed each other: Montgomery's—despite

Sir Thomas Smith QC (1992); J Chalmers, F Leverick and L Farmer (eds), *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh Studies in Law vol 8, 2010). In addition, the volume of *Juridical Review* for 1982 was dedicated to papers in Smith's honour, and Smith's overall contribution was reassessed in E Reid and D L Carey Miller (eds), *A Mixed Legal System in Transition: T B Smith and the Progress of Scots Law* (Edinburgh Studies in Law vol 1, 2005); see also, for a generally hostile view, D J Osler, "The fantasy men" (2007) 10 *Rechtsgeschichte* 169 at 169-178.

60 The shelf mark is Dc.3.57. The title page says: "Mr Bain of Logie prof of Scots Law His Inogurall Oration in the university", and the next page is headed: "oratio Inauguralis Alex: Bain Legis Municipalis Scotiae pp Habila in Academia Edinburgi: 1724".

61 Bayne, *Discourse* (n 8). Cairns (n 23) 96 n 45 observes that the Latin and English texts are "close, but by no means identical".

62 Hume, *Lectures* vol 1 (n 1) 1-17.

63 K G C Reid, "George Joseph Bell's inaugural lecture" (2014) 18 *EdinLR* 341.

64 J S More, *Lectures on the Law of Scotland* (ed J McLaren, 1864) vol I, 1-16.

65 G Montgomery, "Ninety years of progress" (1948) 60 *JR* 173; Black (n 47). Smith's inaugural lecture for the Chair of Civil Law at Edinburgh, given in 1958, can practically be regarded as an inaugural lecture for the Scots Law Chair which he eventually assumed in 1968. See T B Smith, "Strange gods: the crisis of Scots law as a civilian system", in T B Smith, *Studies Critical and Comparative* (1962) 72 (= 1959 *JR* 119). For an assessment of Smith's remarkable lecture, some of the themes of which were taken up by Robert Black in his own inaugural lecture for the Scots Law Chair, see K G C Reid, "While one hundred remain: T B Smith and the progress of Scots law", in Reid & Carey Miller (eds), *A Mixed Legal System in Transition* (n 59) 1 at 11-21.

a title, “Ninety years of progress”, which suggests a more reflective topic—is an account of the legislation which removed legal disabilities from married women, while Black’s—entitled “Practice and precept in Scots law”—attempts to shame the legal profession into making greater use of Civilian and institutional sources.⁶⁶ With the earlier lectures, however, there is a great deal of common ground, as indeed one might expect from texts which are primarily addressed to a student audience embarking for the first time on a study of Scots law. Standard ingredients include a history of the law in Scotland, admonitions to the students, a review of sources and literature, and praise for the study of law in general and of Scots law—that “system, which, perhaps, more than any other in ancient or modern times, will be found to promote the prosperity, happiness, and freedom of the people”⁶⁷—in particular.

Many of the admonitions are timeless and would command support today. The study of law is “arduous” and “by no means seductive”.⁶⁸ It is apt to induce in the student “damp spirits”.⁶⁹ Further, as the law is “one system”,⁷⁰ mastery of a part requires mastery of the whole, for the resolution of problems often involves “a complex view of many principles at once”.⁷¹ And mastery in turn requires that the law be committed to memory.⁷² Taking a rather narrow view of his remit, More undertakes to “abstain from all mere speculative discussion or antiquarian research”,⁷³ and Hume too warns against “the debauchery of metaphysical speculation”,⁷⁴ but for Bell a lawyer must do more than collect precedents and store his note book with practical information for “I can conceive the case of the note book full while the head is empty”.⁷⁵ Bayne is profligate, if

66 A lament for the neglect of older sources is far from being a novel theme. In his own inaugural lecture from 140 years’ earlier, More said: “But I cannot pass from this reference to treatises on our law without expressing my regret that the writings of our older lawyers have been too much neglected by modern students. To this neglect it is owing that some of our modern practitioners are not so well skilled in our forensic system as their predecessors.” The writers the study of whose work he particularly advocated were Craig, Balfour and Kames—a rather miscellaneous list. See More, *Lectures* (n 64) vol I, 14.

67 Reid (n 63) 350.

68 Reid (n 63) 348.

69 Hume, *Lectures* vol I (n 1) 2.

70 Reid (n 63) 351. Bell contrasts this with the position in England where “by a perfect division of labour, each lawyer applies to one branch only of law a practice apt certainly to cramp the mind. With us it is different.”

71 Bayne, *Discourse* (n 8) 173.

72 *Ibid.*

73 More, *Lectures* vol I (n 64) 6.

74 Hume, *Lectures* vol I (n 1) 6. Nothing changes. Black returned to the subject in the most recent of the inaugural lectures, attacking the view “that it is unnecessary, and perhaps even undesirable, for law students in their degree studies to learn any law—or at least much law—which might be useful in practice”: see Black (n 45) 37.

75 Reid (n 63) 348.

repetitive, with study tips: read the text-book before the lecture; take good notes; copy the notes out again as an aid to memory; summarise the text-book, “for one can never abridge, till he comprehends well”; consult the Acts of Parliament but be sparing of other sources that might “contribute rather to perplex than to instruct you”; and finally, if you fall “a little backward”, concentrate on the present work and catch up on the rest later.⁷⁶ To assist the student in this programme of unremitting activity there stands the professor and his lectures, smoothing, as Hume put it, “the more rugged parts of the passage”.⁷⁷ Yet even the best professor can be no more than a “useful assistant and helper”.⁷⁸ “it would not be right, even if it were practicable, to relieve the student from the wholesome office of seeking for knowledge by the efforts of his own attention; nor is it the tutor’s business to save him the trouble of private research and of thinking for himself”.⁷⁹

Such self-study, of course, presupposes a literature which is available to be consulted; and if the first duty of the Professor of Scots Law is to teach, the second is to contribute to that literature: for in writing as much as in teaching, there are many “rugged parts of the passage” to be smoothed.

B. THE LITERATURE

(1) The four discouragements

The health of a legal system is tied to the state of its literature; and unless that literature is reasonably up-to-date and comprehensive, the system will struggle to attend to the affairs of its citizens or even, perhaps, to survive at all. Survival is particularly likely to be at issue if the system is small and there are other alternatives such as fusion. It is no surprise, therefore, that in Scotland the issue of a healthy literature has tended to become entangled with a fear, in some quarters at least, of Anglicisation and emasculation; for if there is no Scottish text on a topic, a practitioner will inevitably reach for one written in England.

Although a proper study of legal literature in Scotland is lacking, the broad outlines are reasonably clear.⁸⁰ Following the writing of the general, “institutional” texts in the long eighteenth century, a growing specialist literature started to appear in the nineteenth. What began as a trickle in the first quarter of the century – with the publication of treatises on conveyancing, leases, execution

⁷⁶ Bayne, *Discourse* (n 8) 169-83.

⁷⁷ Hume, *Lectures* vol I (n 1) 2.

⁷⁸ Bayne, *Discourse* (n 8) 174.

⁷⁹ Hume, *Lectures* vol I (n 1) 8.

⁸⁰ The standard bibliographical source (although with numerous omissions) is L F Maxwell and W H Maxwell, *A Legal Bibliography of the British Commonwealth of Nations* (1957) vol 5, 1-128.

of deeds, succession, and so on – had, by the second half of the century, become a veritable flood.⁸¹ After the First World War, however, the number of books fell back considerably; and after the Second there was, for a time, a serious dearth of literature followed by a remarkable revival, especially in the last 30 years.⁸² Whether that revival can be sustained is one of the questions that I will address at the end of this paper.

“If our law faculties fail to provide adequate literature” on Scots law, T B Smith warned in his inaugural lecture for the Chair of Civil Law at Edinburgh in 1958, “they are accessories to its destruction”.⁸³ Yet the academic who would seek to answer this call is faced with a number of discouragements which are different – though not, of course, necessarily more severe – than those encountered in other areas of legal scholarship. I would mention four in particular. There is a lack of publishing opportunities. There is a fear of parochialism. There is concern about readership and use. And finally, there is the question of whether the writing makes any difference, of whether – to use the jargon of the REF⁸⁴ – there is any “impact”. The four discouragements are thus: no publishers, no foreign travel, no readers, and no impact. I will consider each briefly in turn. Some, as we will see, are illusory or have been overtaken by events; others, however, continue to present an obstacle to doctrinal legal writing in Scotland.

(2) No publishers

Fifty years ago only one legal publisher was active in the Scottish market.⁸⁵ Today there are five,⁸⁶ and the environment is made more hospitable still by the existence of book series whose purpose is or includes the promotion of

81 In his biography of Lord President Inglis (n 34), published in 1893, Crabb Watt writes (at 40) of the 1830s that: “The literature of the law was then a mere rivulet compared with the many wide and branching streams into which it has since grown”. Aquatic metaphor seems irresistible in this area.

82 On the revival, and some of the reasons for it, see K G C Reid, “The third branch of the profession: the rise of the academic lawyer in Scotland”, in H L MacQueen (ed), *Scots Law into the 21st Century: Essays in Honour of W A Wilson* (1996) 39 at 43-6.

83 Smith, *Studies Critical and Comparative* (n 65) 87: “If our law faculties fail to provide adequate literature *in the Civilian tradition*, they are accessories to its destruction”. As the full quotation shows, Smith was primarily interested in literature which sought to shore up the Civilian component in Scotland’s mixed legal system.

84 I.e. the Research Excellence Framework.

85 W Green. In addition the occasional law book was published by T & T Clark and by William Hodge.

86 W Green remains a dominant presence, but it has been joined by other publishers specialising in the Scottish market, Avizandum and the Edinburgh Legal Education Trust, while Scottish law books are also issued by publishers with wider interests, the most important being Bloomsbury and Edinburgh University Press.

academic writing on Scots law: Edinburgh Studies in Law,⁸⁷ Studies in Scots Law,⁸⁸ and above all the monograph series of the Scottish Universities Law Institute (SULI),⁸⁹ which has published many fine volumes and which recently celebrated its fiftieth birthday.⁹⁰ Finding buyers for these books, however, can be a different matter. In the 1960s T B Smith complained of the “post-prandial exhortations . . . from well-remunerated and well-refreshed legal celebrities who urge others to write books, but would seldom lay down the price of their dinner to purchase a treatise on law”.⁹¹ Since that time a sharp rise in the number of law students coupled with a corresponding expansion of the legal profession has created a market of a respectable size,⁹² although for some types of academic book the sales figures remain dispiritingly small.

If books are (relatively) easy, articles—the staple diet of the academic, especially in these days of the REF—are much harder. A Scottish private lawyer who wants to publish in, say, the *Law Quarterly Review* or *Modern Law Review* must either avoid Scots law altogether or smuggle the topic in—say in footnote 420—in a manner which goes undetected by the editor and reviewers.⁹³ For purely Scottish writing the available outlets are meagre.⁹⁴ At one time a sympathetic home for serious writing, the *Journal of the Law Society of Scotland* is today a glossy magazine for practitioners. *Scots Law Times* is not peer-reviewed and so tends to be avoided by REF-conscious contributors. That leaves only the *Juridical Review*, founded in 1889 and one of the oldest surviving law periodicals in the English language, and that brash but welcome newcomer, the *Edinburgh Law Review*, which first appeared in the mid-1990s. The *Scottish Law and Practice Quarterly*, aimed bravely at academic writing of interest to the practitioner, was unable to survive the decade from its foundation in 1995.

87 Published by Edinburgh University Press and edited from the Edinburgh Law School.

88 Published by the Edinburgh Legal Education Trust and edited from the Edinburgh Law School. This series is aimed primarily at the publication of doctoral theses.

89 For SULI, see Reid (n 65) 26-7.

90 To this list one might also add the Stair Society, founded in 1934, which publishes an annual volume on Scottish legal history.

91 T B Smith, “Legal imperialism and legal parochialism” 1965 JR 39 at 53.

92 Reid (n 82) 40-3.

93 Of course there are exceptions. See e.g. A Rodger, “Scottish advocates in the nineteenth century: the German connection” (1994) 110 LQR 563; R Evans-Jones, “Receptions of law, mixed legal systems and the myth of the genius of Scots law” (1998) 114 LQR 228.

94 For a history of law periodicals in Scotland, see J C Brown, “Scottish legal periodicals, 1829-1935”, in H McKechnie (ed), *An Introductory Survey of the Sources and Literature of Scots Law* (Stair Society vol 1, 1936) 317; R Zimmermann, “Law journals in nineteenth-century Scotland” (2008) 12 EdinLR 9.

(3) No foreign travel

When I was appointed to my first Chair, in 1994, I had almost never been abroad for an academic purpose.⁹⁵ Yet by then I had been an academic for fourteen years and was not, I think, especially shy or retiring: in those days the most excitement that could be mustered was a seminar in Dundee or a lecture in Aberdeen. Admittedly, there was a certain amount of contact with the academic world beyond Scotland; and, from an earlier generation, T B Smith in particular was an inveterate traveller and a familiar presence at international gatherings. Nonetheless, in the 1980s and early 1990s, and probably for long before, Scots private law was inward-looking and isolated.⁹⁶

The change since then has been both sudden and astonishing. Today private lawyers from Scotland are found all over the world, while Scotland is a regular host for conferences and for visits by individual scholars. The reasons for the change are complex and not entirely clear.⁹⁷ One is a European-wide, perhaps even a worldwide, phenomenon: the wresting of comparative law from a narrow band of comparative lawyers and its appropriation by those who wish to study other systems so as to have a better understanding of their own.⁹⁸ In an important sense, all good lawyers are now comparative lawyers.

Another reason is the growing interest in the study of mixed legal systems – of those systems, like Scotland, South Africa, Quebec and Louisiana, which draw their law from both of the great European traditions, the Civil Law and the Common Law.⁹⁹ This takes forward an idea first developed by T B Smith in the 1950s and 1960s but which was largely lost sight of until the emergence of South Africa from Apartheid in the mid-1990s.¹⁰⁰ For Scotland the opportunity to explore the laws of its sister legal systems – of its sisters-in-law – has been invigorating and enriching. There have been major collaborative projects

95 My very first foreign trip, to Moscow (with my colleagues Hector MacQueen and George Gretton), was in December 1991. Disconcertingly, it coincided with the collapse of the USSR. A second visit followed in March 1993. There were no other overseas excursions before 1995.

96 Writing in 1947, Lord Cooper said that: “For several generations we have been yielding in Scotland to the lawyers’ besetting sin of insularity or isolationism”: see Lord Cooper of Culross, *Selected Papers 1922-1954* (1957) 144.

97 Apart from those mentioned in the text, there are obvious reasons of a practical nature such as e-mail, cheap air travel, and the emergence of English as the accepted *lingua franca* of academic exchange.

98 This idea is already present in Bayne’s inaugural lecture. See Bayne, *Discourse* (n 8) 151: “the knowledge of the laws of other countries is chiefly useful, as it may conduce to give us a more perfect knowledge of our own”.

99 See most recently V V Palmer (ed), *Mixed Jurisdictions Worldwide: The Third Legal Family*, 2nd edn (2012).

100 See K G C Reid, “The idea of mixed legal systems” (2003-04) 78 *Tulane LR* 5.

comparing the private law of Scotland and South Africa,¹⁰¹ and of Louisiana and Scotland,¹⁰² and much other activity besides.¹⁰³

Finally, there is the emergence¹⁰⁴ of the idea of European private law, complete with a hectic programme of conferences, projects, publications, and “soft law” or optional codes including the Draft Common Frame of Reference¹⁰⁵ – in substance a draft civil code for Europe – and, most recently, the Common European Sales Law.¹⁰⁶ In all of these activities the private lawyers of Scottish universities have played a role whose prominence is out of all proportion to the size of the jurisdiction. For the old adage that Scotland is a bridge system between the Common and Civil Law traditions, often expressed but never entirely believed in, at least by the Scots themselves, turns out to contain an essential truth:¹⁰⁷ in matters of European private law, Scottish lawyers, being as it were “bilingual”, are uniquely well placed to contribute to the debate.¹⁰⁸

There is more to all of this than foreign travel, good meals and gratification of the ego, agreeable as these undoubtedly are. The comparative law enterprise has changed the nature of private law scholarship in Scotland. More than half a century after Lord Cooper advocated the study of comparative law “[i]f Scots law is not merely to survive but to thrive”,¹⁰⁹ much private law writing is now informed and enriched by an understanding of how the same problems are addressed in other jurisdictions.¹¹⁰ And in this there is a revival of a much

101 R Zimmermann, D Visser and K Reid, *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004).

102 V Palmer and E Reid (eds), *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (Edinburgh Studies in Law vol 6, 2009).

103 See most recently E Reid and D Visser (eds), *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* (2013).

104 One should more properly say “re-emergence” because behind this new *ius commune* lies a long historical tradition. See e.g. J Blackie and N Whitty, “Scots law and the new *ius commune*”, in MacQueen (ed), *Scots Law into the 21st Century* (n 82) 65.

105 C von Bar and E Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (2009). Quite apart from the text of the DCFR, the assembling of this huge, six-volume commentary, running to nearly 7,000 pages, is an astonishing achievement. The key role here of Eric Clive will be noted.

106 *Proposal for a Regulation for a European Parliament and of the Council on a Common European Sales Law* Com(2011) 635 final.

107 The origins of this idea seem to lie in comments by the French comparatist, Henri Lévy-Ullmann, in his article on “The law of Scotland” (1925) 37 JR 370 at 390-1. See also e.g. T B Smith, *British Justice: The Scottish Contribution* (1961) 3-5, 214.

108 See e.g. H L MacQueen, “Scots law and European private law”, in L Farmer and S Veitch (eds), *The State of Scots Law* (2001) 59.

109 “The importance of comparative law in Scotland”, in Cooper, *Selected Papers* (n 96) 142 at 145.

110 An outstanding example of how fruitful such an approach can be is Ross Gilbert Anderson’s pioneering study of *Assignment* (2008).

older idea¹¹¹ which emphasises the unity of the European legal tradition and the importance of that tradition for Scotland.

(4) No readers

Academics today write more and, I fear, read less than once they did; and, unavoidably, the more that is written, the less, relatively speaking, will be read. But if all scholars write with the expectation, or at least the hope, of being read within the academic community, those working in private law write not just for each other but for a wider legal community. To some extent this is a matter of duty; but it is also, for many, a matter of pride. Agreeable as it is to be discussed in the academic literature, it is no less agreeable to imagine one's text as the indispensable source to which all practitioners unfailingly turn. And it may seem more agreeable still to have it read, and cited, by the courts.

For about a century, however, ending as recently as the 1990s, the judiciary in Scotland set its face again citing—or even considering—the works of living academics.¹¹² There were occasional exceptions, of course, but by and large it was only the writings of those who were safely dead—often long safely dead—which might be referred to. This “not read till dead” rule was memorably described by Bill Wilson as being “of the same order of rationality as trial by ordeal”;¹¹³ and as well as being discouraging for writers, at least if hoping for a long life, the rule was almost absurdly inconvenient, for it hardly promoted the orderly development of the law that the only books which could be referred to were already 50 or 100 years' old. The standard justification for the rule—that a living author might yet change his or her mind—was at all convincing only if the same rule were applied to living judges, which of course it was not. The true reasons, however, were harder to uncover. One was what was perceived, not always without reason, as the low quality of the literature and of those who produced it. “The gradations in intellectual ability are infinite”, wrote a serving sheriff in 1950, “and no one in their sober senses would say that a professor of law has the ability of a Master of the Rolls, or a Lord Chief Justice”—or, presumably, of a sheriff.¹¹⁴

111 But evident as recently as the inaugural lecture of Bell in 1822: Reid (n 63) 350: “the similarity among the laws of all modern Europe may be traced to the civil or Roman institutions: in Scotland the adoption of that system has been even more explicit than elsewhere”.

112 Reid (n 82) 46-9; Lord Hope of Craighead, “Helping each other to make law” (1997) 2 SLPQ 93. The rule was the same in England: for the most recent discussion of the rule there, and its later abandonment, see J Beatson, “Legal academics: forgotten players or interlopers?”, in A Burrows, D Johnston and R Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (2013) 523.

113 W A Wilson, “Knowing the law and other things” 1982 JR 259 at 267.

114 1950 SLT (News) 1 at 2. The sheriff in question was C de B Murray.

Another was a supposed lack of practical experience which was thought to hamper, if not disqualify altogether, academics from offering a view on the living law. Early on in my career, an article which I had written with George Gretton was dismissed by a Lord Ordinary as being the work of “two individuals whom I understand to be academic lawyers”.¹¹⁵ It may be assumed that “academic” was not intended as a word of praise.¹¹⁶ As it happened we were in good company, for Alan Rodger had suffered the same sort of treatment a decade earlier at a time when he had yet to embark on a career in practice.¹¹⁷ At bottom, however, the spurning of living authors may have been to do with status and with competing claims to intellectual leadership. “A text book writer”, Rankine explained to his students at the start of the twentieth century, “is much inferior to a judge”.¹¹⁸ His role is to report and to admire: it is for the judge to develop the law. For too long it was conceived to be in the interests of the judiciary to keep matters that way.¹¹⁹

Today, when living authors are routinely cited to and by the court, these arguments seem to belong to a remote past. But if “not read till dead” is an idea which has run its course, it has been replaced by the anxiety of “not read at all”. The anxiety is not of course new; but now that we know something of what courts read – because they often cite it – we also have a much better idea of what they do *not* read.¹²⁰ A systematic study of *non*-citation has yet to be made. In its absence it still seems possible to reach some tentative and impressionistic conclusions. I offer two. In the first place, while books which amount to significant studies of

115 *Deutz Engines Ltd v Terex Ltd* 1984 SLT 273 at 275 per Lord Ross.

116 Today this approach would be unthinkable. See e.g. the reference to “Martin Hogg, a much respected senior lecturer in law at the University of Edinburgh” in *Aberdeen City Council v Stewart Milne Group Ltd* [2012] UKSC 56, 2012 SC (UKSC) 240 at para 21 per Lord Hope of Craighead. Professor Hogg’s views, equally, did not command judicial support but they were treated with care and respect.

117 *Mercantile Credit Co Ltd v Townsley* 1971 SLT (Sh Ct) 37 at 39 per Sheriff Substitute Ian Dickson. Looking back near the end of his life at this “sneering abuse by a bad-tempered sheriff-substitute”, Rodger admitted that the abuse had given him “a *mauvais quart d’heure*, but not more than that, since the criticism was plainly wrong and it only came from a sheriff-substitute”: see Lord Rodger of Earlsferry, “Judges and academics in the United Kingdom” (2010) 29 *University of Queensland LJ* 29 at 33. There is probably a long tradition of thoughts of this kind even if the mode of expression is more restrained. Bell, for example, who never abandoned practice, criticised Erskine, who did, on the basis that a particular view had not been exposed to the “shock of principles” which legal practice would have engendered. Stair, by contrast, was singled out for praise. See G J Bell, *Commentaries on the Law of Scotland and on the Principles of Mercantile Jurisprudence*, 7th edn (ed J McLaren, 1870) vol I, 260 n 2.

118 *Notes on Rankine’s Lectures* (c 1905, by an unnamed student; Edinburgh University Library GEN 1992/5) lecture 4.

119 Rodger (n 49) 11: “Perhaps in a smaller jurisdiction the judges have felt that open debate would somehow lower the standing of the Court”.

120 Necessarily, these observation are confined to courts. What solicitors may read in the comfort of their own offices is difficult to determine. A starting-point for research would be an examination of the state of their libraries (as to which see also n 123 below).

their subject are certainly used, there tends to be a time lag, sometimes of several years, between publication and citation. Often indeed it takes several citations before a book becomes widely known, prompting the unworthy suspicion that counsel discover about books, not from libraries or bookshops or reviews, but from the happenstance of citation in a previous case.

Secondly, and from an academic perspective much more importantly, periodical literature is rarely cited even in the Inner House,¹²¹ a trend which is likely to be reinforced by a new rule limiting authorities in reclaiming motions to a joint bundle of ten for all parties.¹²² The position is sometimes different in the Supreme Court, but few private law cases finish up there. As for the Court of Session, if bar and bench fall eagerly on the *Juridical Review* and *Edinburgh Law Review* as each new issue is published, there is little to show for it in the law reports. Of course, some of the material which appears in academic journals has no possible practical application; but that can hardly be a complete explanation for this almost total neglect. The unwelcome truth is that, while there are many individual exceptions, practitioners as a whole are little interested in law as an academic discipline. Having taken their law degrees, they put away their books. Of course such neglect is not confined to law graduates. Alan Rodger has commented acutely on “the apparent failure of universities to win over most of their graduates to any lifelong interest in the academic aspects of the subjects which they study”, referring to “*Sir Gawain and the Green Knight* peeping forlornly out from the growing thicket of Edna O’Briens and Muriel Sparks on the shelves of someone who long ago did a course on English Language”.¹²³ But while the English Language community can withstand the loss of readers for *Sir Gawain*, for the legal community in Scotland the lack of academic engagement leads to an impoverishment of legal culture. To the extent that the fault is that of the universities, we must work harder to remedy it. But at the same time, if we seek to influence the practising community, we must consider more carefully where and how we publish.

121 Searches on the Westlaw database bear this out.

122 Court of Session Practice Note No 3 of 2011 para 91(b). A journal article or book is an “authority” for this purpose. There can be exceptions but an interlocutor is required. I am grateful to Dr Ross Anderson for drawing this rule to my attention.

123 Rodger (n 49) 5-6. He adds: “In the same way the office of many a lawyer contains a small cluster of ageing or obsolete textbooks which would allow a legal archaeologist to determine fairly precisely when the occupant graduated and thereby released himself from the painful obligation to purchase legal texts”.

(5) No impact

As will be obvious from what has been said already, private lawyers were concerned with impact on the wider community long before this became an objective of funding bodies or rewarded by points in the REF. Yet the manner in which impact might work or be calibrated has been little studied. The following are no more than some preliminary thoughts.

When academic writing is used by legal practitioners this is done, naturally enough, in a highly selective and limited way. And while the morsels of scholarship thus sampled may lead to incremental development of the law, at least if they are taken on by the courts, any impact is likely to be correspondingly small. That is fine as far as it goes, of course, but impact by morsel does little to stir the blood. The question is whether impact can be achieved on a larger scale. Can new conceptualisations and theoretical insights gain acceptance in the legal community and become, in a formal sense, a part of the law? Or must ideas remain stranded in the groves of academe so that, over time, there is an increasing disjunction between law as conceived in the universities and law as practised in the community?

Let me test these questions with an example with which I had some personal involvement. It is taken from the law of trusts. In a trust, a trustee owns property on behalf of a beneficiary; yet if the trustee becomes insolvent, the beneficiary is protected and the trust assets cannot be attached by the trustee's private creditors. This is a familiar and long-standing rule; indeed without it trusts would hardly be workable, for few people would entrust money to a person who might then proceed to lose everything in an insolvency. But while the rule is clear the reasons for it are not. In Common Law jurisdictions this "insolvency effect" is explained by recourse to equity. In Scotland, Civilian as to its property law, that explanation is not available. Yet the traditional tools of Civil Law property, with their real right/personal right dichotomy, are hardly adequate for the task. A beneficiary's right cannot be real because it does not attach to a particular thing but rather to a pool of assets which can move into or out of the trust as the trustee chooses. But if the right is only personal it could not prevail in the bankruptcy of the trustee but would rank with the personal rights of other creditors. How, then, is the insolvency effect to be explained? At best, the attempts to do this have been unconvincing;¹²⁴ at worst they have verged on the comical. Rankine's account to

124 As in W A Wilson and A G M Duncan, *Trusts, Trustees and Executors*, 2nd edn (1995) 15-18.

his students – to take just one example – is deeply confused¹²⁵ and seems to allow the beneficiary a right which oscillates between the personal and the real.¹²⁶

The beneficiary has a personal right in the trust estate which we call Equitable Estate or a *jus crediti*. This includes a real burden in the Fee. He has a real right to call on the Trustee to convey or transfer or denude himself of the subject; it is a real or personal right of property according to circumstances.

In his contribution to the Wilson memorial volume, back in 1996, George Gretton suggested that the answer might lie in the concept of patrimony.¹²⁷ In this he was drawing on an idea which was developed in the 1930s by a French jurist, Pierre Lepaulle, to explain, not perhaps very plausibly, the Common Law trust.¹²⁸ Subsequently both George Gretton and I carried out work on this idea and explored its implications.¹²⁹ The result has been the development of a new theory of trusts.¹³⁰ The ramifications are complex, but the essence of the theory can be expressed quite simply. A “patrimony” – or “estate” to use a term much more familiar to lawyers in the UK – is the sum total of a person’s assets and liabilities. Normally the rule is: one person one patrimony. A trustee, however, has two patrimonies, his private patrimony and the trust patrimony, and these patrimonies are quite separate not only as to assets – something everyone has always understood – but as to liabilities as well. This idea answers the question it set out to answer: the reason why a beneficiary prevails over private creditors of the trustee is that each must claim from a different patrimony; the beneficiary’s right is personal but it is a personal right in respect of the trust patrimony.

125 A confusion which is different but no better can be found in A Mackenzie Stuart, *The Law of Trusts* (1932) 1.

126 *Notes on Rankine’s Lectures* (n 118) lecture 40. In fairness to Rankine, it is possible that the student in question misunderstood what was said. But the notes seem generally accurate and clear, and it would be hard for a student to imagine a theory of this kind.

127 G L Gretton, “Trust and patrimony”, in MacQueen (ed), *Scots Law into the 21st Century* (n 82) 182 at 188-90.

128 P Lepaulle, *Traité théorique et pratique des trusts en droit interne, en droit fiscale international* (1932). For criticism of this theory as it applies to Common Law trusts, see L Smith, “Trust and patrimony” (2009) 28 *Estates, Trust and Pensions Journal* 332.

129 K G C Reid, “National report for Scotland”, in D J Hayton et al (eds), *Principles of European Trust Law* (1999) 67; G L Gretton, “Trusts without equity” (2000) 49 *ICLQ* 599; K G C Reid, “Patrimony not equity: the trust in Scotland” (2000) 8 *Eur Rev of Priv Law* 427; K G C Reid, “Conceptualising the Chinese trust: some thoughts from Europe”, in R van Rhee and L Chen (eds), *Towards a Chinese Civil Code: Historical and Comparative Perspective* (2012) 209. Some of the most important papers are collected in R Valsan (ed), *Trusts and Patrimony* (Edinburgh Studies in Law vol 14, forthcoming).

130 R G Anderson, “Words and concepts: trust and patrimony”, in Burrows et al (eds), *Judge and Jurist* (n 112) 347. Quite independently, and also based on the work of Lepaulle, patrimony was being used as an explanation of trusts in Latin America: see N Malumian, *Trusts in Latin America* (2009) 19-23. This topic cannot be explored further here.

More than that, however, the idea allows for a wholly new theory of allocation of liabilities.

This new theory, as it turned out, was well-timed. In international legal scholarship, trusts in Civil Law systems are one of the topics of the moment.¹³¹ Many countries in the Civil Law tradition, notably in Latin America and the Far East, have already introduced the trust;¹³² others, especially in Europe, seem poised to follow suit if they have not done so already.¹³³ But all must face up to the problem which has long exercised jurists in Scotland: how is the insolvency effect to be explained? *Ex Scotia lux*: against this promising background, the separate patrimony theory has generated considerable interest and support. It has been used in no fewer than three soft-law projects in Europe, including the DCFR,¹³⁴ and a flattering amount of admiration has been expressed for the “Scottish trust”.¹³⁵ The only trouble, of course, is that it may not be the Scottish trust at all. The dual patrimony theory is how certain scholars have chosen to conceptualise the trust. It is what we tell our students. It has been adopted by the Scottish Law Commission.¹³⁶ But, until very recently, it had made little or no mark on the case law.¹³⁷ And so just as the protagonist in *The Importance of Being Earnest* was known as Ernest in London and, more soberly, as Jack in the country, so the Scottish trust was based on dual patrimony abroad and on a less than coherent account of beneficiaries’ rights in Scotland itself.

Views, of course, may differ as to the value of the dual patrimony theory. But the question of how, if at all, new theories enter the life-blood of a legal system is a more general one. This may not often occur through case law. The task of a

131 See most recently, L Smith (ed), *Re-imagining the Trust: Trusts in Civil Law* (2012).

132 See e.g. Malumian, *Trusts in Latin America* (n 130); L Ho and R Lee (eds), *Trust Law in Asian Civil Law Jurisdictions: a Comparative Analysis* (2013).

133 See e.g. A Braun, “The framing of a European law of trusts”, in L Smith (ed), *The Worlds of the Trust* (2013) 277.

134 von Bar and Clive (eds), *Draft Common Frame of Reference* (n 105) Book X. The others are Hayton et al (eds), *Principles of European Trust Law* (n 129); S C J J Kortmann et al (eds), *Towards an EU Directive on Protected Funds* (2009).

135 See e.g. Hayton et al (eds), *Principles of European Trust Law* (n 129) 4 (“the Scottish National Report may prove to be of particular interest to civilians considering the implementation of the trust in their domestic law”); H L E Verhagen, “Trusts in the civil law: making use of the experience of ‘mixed’ jurisdictions”, in J M Milo and J M Smits (eds), *Trusts in Mixed Legal Systems* (2001) 93 at 108 (“The main source of inspiration for the third approach – the obligational approach [favoured by a group of Dutch scholars] – was Scots law”); L Smith, “The re-imagined trust”, in Smith (ed), *Re-imagining the Trust* (n 131) 258 at 265 (“The Scottish approach is winning converts”).

136 Discussion Paper on the *Nature and Constitution of Trusts* (Scot Law Com DP No 133, 2006) paras 2.16-2.28.

137 So for example in *Joint Administrators of Rangers Football Club plc, Noters* [2012] CSOH 55, 2012 SLT 599, Lord Hodge said (at para 31) that: “The right of a trust beneficiary in the estate of a trust, although a personal right, prevails over the unsecured creditors of the trustee in the latter’s insolvency .. As insolvency is the acid test of property rights, the beneficiary’s right is in that sense proprietary.”

judge – and I say this not in any spirit of criticism – is to decide the case in front of him or her and not to pursue academic theories of little relevance and, it may be, of questionable value. It is true that a theory taught so long in universities as to seem simple orthodoxy may find its way into judgments unobserved and unremarked; this is impact, albeit after a long delay. It is also true that a case or series of cases may raise a fundamental question of private law which, in the right judicial hands, prompts a rather swifter change of direction. In recent times this has been seen in the law of unjustified enrichment¹³⁸ and in the rules of transfer of ownership of heritable property;¹³⁹ and as it happens, it is also now beginning to be seen in relation to the dual patrimony theory of trusts, some two decades after that theory was first developed.¹⁴⁰ No doubt this sort of thing would occur more often if judges and counsel were willing to be bolder, as I believe they need to be in a small jurisdiction like Scotland where a case may present a once-in-a-generation opportunity. Even so, it would be unrealistic to expect too much: most change wrought by case law will inevitably be modest and incremental.¹⁴¹

The answer must lie not in case law but in legislation. If the eighteenth century was the age of the jurist, and the nineteenth and twentieth the age of the judge, the twenty-first will surely be the age of the legislator. Indeed the pattern is already clear. The encroachment of legislation into areas of private law which were once the preserve of the courts is no less important for having been largely unremarked. For this the most important single reason is the work of the Scottish Law Commission which, despite periodic lamentation to the contrary, has been remarkably successful in guiding its proposals on to the statute book. A further factor is the establishment of the Scottish Parliament in 1999.¹⁴²

138 *Morgan Guaranty Trust Company of New York v Lothian Regional Council* 1995 SC 151; *Shilliday v Smith* 1998 SC 725; *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1998 SC (HL) 90. The cases pay tribute to the academic literature and debate.

139 *Sharp v Thomson* 1997 SC (HL) 66; *Burnett's Tr v Grainger* [2004] UKHL 8, 2004 SC (HL) 19. The influence of academic writing is especially apparent from comments of Lord Hope of Craighead, writing extra-judicially: see “Helping each other to make law” (n 112) 98-100; “Scots law seen from south of the border” (2012) 16 EdinLR 58 at 69-72.

140 *Glasgow City Council v The Board of Managers of Springboig St John's School* [2014] CSOH 76 at paras 16 and 17 per Lord Malcolm (“the notion of a trustee's dual patrimony is helpful and can assist in an understanding of many of the implications and consequences of our law of trusts”). For earlier glimpses, see *Royal Insurance (UK) Ltd v AMEC Construction Scotland Ltd* [2007] CSOH 179, 2008 SC 201 at para 12(b) per Lord Emslie (summarising an argument of counsel); *Ted Jacob Engineering Group Inc v Matthew* [2014] CSIH 18 at para 90 per Lord Drummond Young (referring to “interesting academic articles” by Professors Gretton and Reid).

141 Rodger (n 117) 32.

142 For an assessment of the Parliament's legislative record, see E E Sutherland et al (eds), *Law Making and the Scottish Parliament: the Early Years* (Edinburgh Studies in Law vol 9, 2011).

The facts speak for themselves. Much of family law¹⁴³ and significant areas of property law¹⁴⁴ are now enshrined in statute. A start has been made on contract law with more almost certainly to come,¹⁴⁵ and major legislation seems probable in the fields of trusts and succession.¹⁴⁶ From the private law heartland, only delict and unjustified enrichment have been largely unaffected, at least in respect of general principles,¹⁴⁷ although the latter had what some would regard as a narrow escape.¹⁴⁸ Whether one welcomes these developments or abhors them – and I am firmly in the first camp – it is impossible to deny the significance of what, in some cases at least, is virtually codification by stealth.¹⁴⁹ Law professors in pursuit of impact should pay less attention to judges: the new rulers of the universe are the members of the Scottish Law Commission.¹⁵⁰

C. SOME CONCLUDING REMARKS

On examination, then, the four discouragements turn out to be not especially discouraging, or at least far less discouraging than once they were. Indeed conditions for private law scholarship in Scotland have probably never been better. That, no doubt, is why the last 30 years have been so wonderfully productive.

Can the position be maintained or even improved upon? In English universities there has been a sharp move away from doctrinal scholarship,

143 Divorce (Scotland) Act 1976; Marriage (Scotland) Act 1977; Matrimonial Homes (Family Protection) (Scotland) Act 1981; Law Reform (Husband and Wife) (Scotland) Act 1984; Family Law (Scotland) Act 1985; Law Reform (Parent and Child) (Scotland) Act 1986; Age of Legal Capacity (Scotland) Act 1991; Children (Scotland) Act 1995; Civil Evidence (Family Mediation) (Scotland) Act 1995; Civil Partnership Act 2004; Family Law (Scotland) Act 2006; Adoption and Children (Scotland) Act 2007; Children and Young People (Scotland) Act 2014; Marriage and Civil Partnership (Scotland) Act 2014.

144 Conveyancing and Feudal Reform (Scotland) Act 1970; Abolition of Feudal Tenure etc (Scotland) Act 2000; Mortgage Rights (Scotland) Act 2001; Land Reform (Scotland) Act 2003; Title Conditions (Scotland) Act 2003; Tenements (Scotland) Act 2004; Land Registration etc (Scotland) Act 2012; Long Leases (Scotland) Act 2012.

145 Unfair Contract Terms Act 1977; Law Reform (Miscellaneous Provisions) (Scotland) Act 1985; Contract (Scotland) Act 1997; Unfair Terms in Consumer Contracts Regulations, SI 1999/2083. The Scottish Law Commission is currently engaged on a major project on contract law in the light of the DCFR: see *Annual Report 2012* (Scot Law Com No 230, 2013) 17-18.

146 Scottish Law Commission, Report on *Succession* (Scot Law Com No 215, 2009). A Report by the Scottish Law Commission on Trusts is expected to be published towards the end of 2014.

147 There has been legislation in respect of some specific topics in the law of delict, such as product liability (Consumer Protection Act 1987) and damages (Damages (Scotland) Act 2011).

148 Report on *Unjustified Enrichment, Error of Law and Public Authority Receipts and Disbursements* (Scot Law Com No 169, 1999), especially part 5. After a prolonged review of the law, the Commission came out against significant legislation in this area.

149 The promotion of codification, of course, is one of the statutory duties of the Scottish Law Commission: see Law Commissions Act 1965 s 3(1).

150 A significant number of whom have been academic lawyers.

following a trend which was already all too apparent in the United States; and in some of the universities of Scotland too, there is an evident decline in the number of scholars working in the field of private law. The reasons for this are complex but include the internationalisation of law schools as well as a much firmer distinction – now an almost impassable bridge – between the practising and the academic professions. Above all there is the feeling, which would be puzzling to lawyers in Continental Europe, that the energy has gone out of doctrinal scholarship, that there is nothing new to be discovered, and that the whole enterprise is, in some sense, hopelessly old-fashioned.¹⁵¹ In Scotland, at least, nothing could be further from the truth. To achieve a proper understanding of our law there is still so much to be done, so many areas to be investigated, so many sources to be trawled. To research private law is to live on the edge of perpetual discovery. That the work is exacting is a further cause of stimulus, for the private lawyer must be a logician, a comparatist, a historian, a legal theorist, a law reformer and, increasingly, a social scientist.¹⁵² Private law in Scotland will thrive for as long as private lawyers are able to communicate to others the excitement of the enterprise on which they are engaged. That, I conceive, is not the least of the tasks of the Professor of Scots Law at Edinburgh.

151 Rodger (n 117) 34.

152 Comparative law and legal history have in particular claimed the attention of Scottish private lawyers in recent years. This can be seen in innumerable academic papers and books on private law as well as in works in which comparative law or legal history is the explicit focus. In addition to the works cited in nn 101-03 above, these include R Evans-Jones (ed), *The Civil Law Tradition in Scotland* (Stair Society Supplementary Series vol 2, 1995); D L Carey Miller and R Zimmermann (eds), *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays* (1997); K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000); H MacQueen and R Zimmermann (eds), *European Contract Law: Scots and South African Perspectives* (Edinburgh Studies in Law vol 2, 2006); W M Gordon, *Roman Law, Scots Law and Legal History: Selected Essays* (Edinburgh Studies in Law vol 4, 2007).