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Citation for published version:

MacQueen, H 2014, 'Invincible or Just a Flesh Wound? The Holy Grail of Scots Law' Legal Information Management: Journal of the British and Irish Association of Law Librarians, vol. 14, no. 1, pp. 2-14. DOI: 10.1017/S1472669614000048

Digital Object Identifier (DOI):

[10.1017/S1472669614000048](https://doi.org/10.1017/S1472669614000048)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Publisher's PDF, also known as Version of record

Published In:

Legal Information Management: Journal of the British and Irish Association of Law Librarians

Publisher Rights Statement:

© MacQueen, H. (2014). Invincible or Just a Flesh Wound?: The Holy Grail of Scots Law. Legal Information Management: Journal of the British and Irish Association of Law Librarians, 14(1), 2-14.
10.1017/S1472669614000048

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Invincible or Just a Flesh Wound? The Holy Grail of Scots Law

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Legal Information Management / Volume 14 / Issue 01 / March 2014, pp 2 - 14
DOI: 10.1017/S1472669614000048, Published online: 12 March 2014

Link to this article: http://journals.cambridge.org/abstract_S1472669614000048

How to cite this article:

Hector MacQueen (2014). Invincible or Just a Flesh Wound? The Holy Grail of Scots Law . Legal Information Management, 14, pp 2-14 doi:10.1017/S1472669614000048

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THE 4TH WILLI STEINER MEMORIAL LECTURE

Invincible or Just a Flesh Wound? The Holy Grail of Scots Law

Abstract: This paper, by Hector MacQueen, assesses the current state of Scots law and the Scottish legal system, arguing that as a small legal system which cannot be self-contained it is inevitably in a state of crisis, from which, however, it will not be rescued by Scotland becoming independent.* Whatever happens after the referendum concerning Scottish Independence on 18 September 2014, the law is in need of active legislative reform, possibly codification, while the courts must become more positive in the attraction of business rather than, as it sometimes seems, seeking to push it away. Mere defence of the status quo will end in disablement and defeat.

Keywords: constitutional law; legal systems; independence; Scots law; Scotland

*This text is a rewritten and lightly up-dated version of the Willi Steiner Memorial Lecture given at the 44th Annual Conference of the British and Irish Association of Law Librarians held in Glasgow on 13 June 2013. I have tried to retain something of the informality of a lecture presentation. The views expressed herein are personal and should not be attributed in any way to the Scottish Law Commission.

SCOTS LAW – THE BLACK KNIGHT

My title refers to the famous “Black Knight” scene in the film “Monty Python and the Holy Grail” (1975). The Black Knight (played by John Cleese) stands guard over a short wooden bridge crossing a very small stream. King Arthur (played by Graham Chapman), accompanied by his trusty serf Patsy (Terry Gilliam), witnesses the Black Knight efficiently seeing off a Green Knight’s attempt to cross the bridge and decides to recruit him for the Round Table of knights that the king is trying to put together. The remainder of the scene is described like this in Wikipedia:

[T]he Black Knight only stands still, holding his sword vertically, and makes no response until Arthur moves to cross the bridge. The Black Knight moves slightly to block Arthur and declares “None shall pass”. King Arthur, in a conciliatory manner, asserts his right to cross and praises the evident bravery of the Black Knight. Arthur then again moves to pass and the Black Knight moves to stand firm and declares again, “None shall pass”. Reluctantly, King Arthur fights the Black Knight and, after a short battle, the Knight’s left

arm is severed. Even at this the Knight refuses to stand aside, insisting “‘Tis but a scratch”, later insisting that he has “had worse”, and fights on while holding his sword with his remaining arm. Next his right arm is cut off, but the knight still does not concede. As the Knight is literally disarmed, Arthur assumes the fight is over and kneels to offer a prayer to God. The Black Knight interrupts Arthur’s prayer of thanks by kicking him in the side of the head and accusing him of cowardice. When Arthur points out the Black Knight’s injuries, the Knight insists “‘It’s just a flesh wound!” In response to the continued kicks and insults, Arthur chops off the Black Knight’s right leg. At this point, the Knight still will not admit to defeat, instead he replies by saying, “Right, I’ll do you for that”, and attempts to ram his body into Arthur’s, by hopping on his left leg. Arthur is incredulous at the Black Knight’s persistence, and angrily asks the Black Knight if he is going to “bleed on me” to win. The Black Knight replies by saying, “I’m invincible!” to which Arthur replies “You’re a loony!” With an air of resignation, Arthur finally cuts off the left leg as well and sheathes his sword. With the Black Knight now reduced to a mere stump of a man, he says, “All right, we’ll call it a draw.” Arthur then summons Patsy and “rides” away, using coconuts to simulate the sound of a horse galloping, leaving the Black Knight’s limbless torso screaming threats at him (“Running away, eh? You yellow bastards! Come back here and take what’s coming to ya! I’ll bite your legs off!”).¹

I want to suggest that the Black Knight can be seen in some ways as a metaphor for the present state of Scots law, or, perhaps, for the way in which some of us think about Scots law, especially, but not exclusively, in its relation to English law. I say, not exclusively, because I believe some of the Black Knights of Scots law think in this way also about human rights law, the Scottish Government and the Scottish Parliament, and the United Kingdom Supreme Court when that body is ruling on the closely inter-twined matters of human rights and devolved competence and powers. My own view, for what it is worth, is that the system is in crisis; but that crisis is in some respects an inevitable feature of a small legal system that cannot be self-contained. The crisis existed before devolution in 1999; it has if anything intensified since then; and it will not be solved by the Scottish people voting for independence on 18 September 2014.

“‘TIS BUT A SCRATCH”

On what basis might it be said that a legal system which has operated for around a thousand years is in crisis? After all, its existence is guaranteed by no less than two of the 25 articles of the 1707 Union between Scotland and England & Wales,² while there is no suggestion in the relevant Treaties that the “ever-closer union” envisaged for Europe entails the removal of the domestic legal systems within Member States.³ Moreover, what might have been thought the most obvious gap in a legal system in Scotland, the absence of a legislature dedicated exclusively to its maintenance and development, has been substantially (if not fully) filled in as a result of devolution. In all other relevant respects, the system continues to function as it has done for centuries: an autonomous court structure and legal profession, a distinct structure of education, training and qualification in law, and, perhaps most strikingly of all from a library perspective, a vigorous legal literature (although this last today admittedly contrasts sharply with the all but moribund situation which prevailed in Scottish legal publishing for a decade and more immediately after the Second World War).

The starting (or perhaps scratching) point might however be said to begin with that guarantee of 1707. It is not always realised that discussions of, and, indeed, negotiation towards, voluntary Anglo-Scottish Union had taken place on numerous occasions since the late thirteenth century.⁴ These usually involved marriages between heirs of the English and Scottish royal houses which would in course of time produce a single heir to both Crowns; which would thereafter be unified. In such negotiations prior to the ones that led to the 1707 Union, however, the Scots always maintained the separate-ness of their law and legal system even after such a unification, with a particular point always being the exclusion of any appeal from Scotland to any court sitting in England. In the 1707 Union, however, the Scots abandoned this traditional negotiating position. In Article XVIII of the Union Agreement of 1707 we find the idea

that “public right” is henceforth malleable to make it the same throughout the new United Kingdom, whereas “private rights” are to be changed only where that is for the “evident utility of the subjects within Scotland”.⁵ There was a vital contrast here: change to Scots law was envisaged, albeit with public law more susceptible to alteration than private law; indeed, Article XVIII itself authorized immediate Anglicisation in that “the Laws concerning Regulation of Trade, Customs, and . . . Excises . . . [was to] be the same in Scotland, from and after the Union as in England”. Further, while the courts of both Scotland and England were expressly to retain their separate jurisdictions under Article XIX, nothing was said (probably deliberately) to prevent appeals from the Scottish courts to the House of Lords; and these quickly became established practice in civil cases, to the extent indeed that there were more House of Lords appeals from Scotland than from England by the end of the eighteenth century.⁶ But a parallel appeal in criminal cases did not establish itself, although rejected decisively only as late as 1876.⁷

These provisions for change to Scots law by the legislature sowed the seeds from which grew much legal development that was not so much actively hostile to the Scottish legal system as simply by-passed it.⁸ From the nineteenth century on legislation sought to deal with pressing social issues to which traditional legal analysis of any kind, Scottish or English, seemed quite irrelevant if not inimical – notably social and welfare law, but also the taxation which provided the resources with which to tackle these problems. The rise of the welfare state was the rise of the British state, not of distinct English and Scottish ones. Likewise the growth of commerce within the single market that now existed in the United Kingdom did not respect and was indeed rather impatient with jurisdictional divides, and the Westminster Parliament responded with measures which, while sometimes recognising Scottish differences, tended to treat them as peculiarities rather than as affecting the fundamentals of unifying schemes.⁹ Commerce also threw up new ideas – corporations, insurance, intellectual property, consumer protection – which seemed to require new law altogether; and there also seemed to be little point in spending time devising distinct legal responses that would accord with either English or Scottish legal traditions. But English law and lawyers tended to have the lead in taking such developing law forward, the inevitable result of a much larger population and economy south of the continuing jurisdictional border. Scottish freedom of manoeuvre thus tended to be pre-empted by decisions and practice in England.

The rise of the state entailed the rise of public law, which, it will be recalled, might under the Union Agreement be changed to make it the same throughout the United Kingdom. Public law could not be seen as wholly un-Scottish; for example, local government continued to be Scottish rather than brought into line with England or re-created along new British forms,¹⁰ while

the constitutional question of the relationship between church and state in Scotland would be a fundamental issue dividing Scottish society throughout the nineteenth and into the twentieth century.¹¹ The emergence of a Secretary for Scotland as a UK Government post in 1885 (to become a Secretary of State in 1926) was also important recognition that the governance of Scotland could not be completely subsumed within an overall United Kingdom structure. But other great matters of state by and large fell to be played out elsewhere than in Scotland or the Scottish courts, and the big books on the subject were mostly written and published south of the border, only rarely considering the Scottish dimension or indeed the Union of 1707 unless to dismiss it or minimise its significance. Dicey's characterisation of the Act of Union as merely another statute which the Westminster Parliament could amend or repeal in the simple exercise of its own absolute sovereignty is the best-known example.¹²

In the relatively recent past, the process of legal integration in social and commercial matters has been renewed by the processes of "Europeanisation" following the United Kingdom's accession to what is now the European Union on 1 January 1973. This affects English as much as Scots law, and it may give the historically aware Scots lawyer a certain *Schadenfreude* to hear the cries of protest emanating from English lawyers against European Union proposals for changes to the law. Indeed, similar cries come from France and Germany. If Scotland is more muted, it may not be so much the product of greater Europhilia as of, for once, longer experience of power to change the law being exercised elsewhere than within its own jurisdiction.

The domestication of the European Convention on Human Rights, partly through the Human Rights Act 1998 but more significantly through the Scotland Act 1998, has to some extent brought the agency of change back to Scotland, inasmuch as the Scottish courts have been given the power to determine the meaning of Convention rights for themselves and indeed, at least initially, embraced the opportunity with enthusiasm, notably in the early decision which rid the legal system of the phenomenon of "temporary sheriffs" appointed by the Law Officer who was also ultimately responsible for the public prosecution system by which accused persons were brought before the self-same appointees.¹³ Some at least of the judges may also have relished the opportunity to keep the new Scottish Parliament and Government under control by means of their requirement to respect Convention rights.¹⁴

Some of the enthusiasm faded, however, as it became clear, not only that criminal law and procedure, hitherto one of the main bastions of Scottish legal autonomy, was subject to review for consistency with Convention rights, but also that for most purposes, the final say on these matters lay, not in the High Court of Justiciary as hitherto, but in either the European Court of Human Rights or, more concerningly, in Westminster, in the form of the

House of Lords, the Judicial Committee of the Privy Council, or, after 1 October 2009, the new UK Supreme Court. The culmination of this was the Supreme Court's decision in the *Cadder* case, handed down on 26 October 2010,¹⁵ that the Scottish legislation which allowed the prosecution to rely on confessions made by a suspect without access to legal advice during police interviews was contrary to that individual's right to a fair trial under Article 6 of the ECHR as authoritatively defined by the European Court on Human Rights in *Salduz v Turkey*.¹⁶ This not only over-ruled the High Court's view of the question, but also led instantly to a significant legislative reform of Scots criminal procedure in the form of the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act, which was put through the Scottish Parliament in a single day as an emergency measure on 27 October, receiving the Royal Assent just two days later.¹⁷ Further, a High Court judge, Lord Carlway, was asked to carry out a general review of Scottish criminal procedure with two main objectives in mind: compliance with the ECHR and ensuring a fair balance between the interests of prosecution and defence. One of his Lordship's central recommendations when he reported in November 2011 was the abolition of the distinctive requirement of corroboration (the need in a criminal trial to have two independent evidential sources to establish any fact relevant to a criminal charge).¹⁸ Another Bill implementing this recommendation is now under consideration in the Scottish Parliament,¹⁹ amidst huge public controversy which includes the argument of criminal defence lawyers and some others that one of the law's most important safeguards of individual liberty is being swept away in the interests of legal uniformity rather than substantive justice.

The Black Knight dismisses the loss of his left arm as but a scratch, and goes on fighting. The autonomy of Scots law and the Scottish legal system is certainly less than it was; but the essentially external factors just discussed have simply forced upon the players within the system the need to change approach rather than give up the game altogether. Many of the same factors impact upon other legal systems in similar ways. Patched up, and with some rehabilitative treatment, the Scottish version can continue to perform in a useful way, even to the extent of using its limited but none the less still real autonomy to influence those wielding the power of final decision-making, whether legislative, executive or judicial.

"IT'S JUST A FLESH WOUND!"

Things become progressively more difficult for the Black Knight, however, as one by one his limbs are severed; and however much he may dismiss each of his losses as just flesh wounds, the reality is that they eventually deprive him of any capacity to guard the bridge. Is there any reason to think that Scots law and the Scottish legal system are on their way to a parallel fate?

So far as the law itself is concerned, my concerns are perhaps primarily those of an academic whose main areas of interest outside the law's history lie in private and commercial law. While the internationalisation that has taken place in the Scottish law schools over the last twenty years is to be welcomed, one side-effect seems to be an increasing lack of engagement with Scots private law on the part of academics and students. Researchers are discouraged from writing on the subject, and from publishing in Scottish academic and practitioner journals, on the basis that by definition such research cannot be of "international" or "world-class" quality as demanded by the Research Assessment Exercises of the recent past and now by their replacement, the Research Excellence Framework. Academic Scottish private lawyers have responded by engaging vigorously with comparative law and European private law, but it cannot be said that there has been much reciprocal engagement with Scots private law by those joining Scotland's law schools from other jurisdictional backgrounds.²⁰

But the concerns are not simply academic. There are signs that even practitioners are averse to using or investigating the Scots law that is their *raison d'être*. In a lecture to the Trusts Bar in the Faculty of Advocates delivered on 24 October 2013, former Lord President Hamilton described how, in an important appeal on the liability of company directors in breach of their fiduciary duties,²¹ counsel declined prompts from the bench to argue the case on Scots law enrichment principles, and focused entirely on the doctrine of "knowing receipt", hitherto unheard of in Scotland, but which would have been the basis for discussion in English law.²² The problem for counsel, of course, was that the English law, however unsatisfactory, is at least set out in textbooks and discussed in cases making it relatively easy to establish a baseline for argument; whereas there was at the time no complete text on Scots enrichment law and virtually no case law on its application in the context of fiduciary duties. No doubt counsel could have carried out the necessary research and thinking but it would have taken more time and money than perhaps the clients would have wished.

In the world of commercial contracts it is common for Scottish practitioners to advise parties to make the governing law of the contract English rather than Scottish. This can be to avoid practical difficulties, as has been made clear to me by my work on the reform of Scots contract law for the Scottish Law Commission. Thus, for example, there has been a widespread view in the profession that Scots law does not recognise "counterpart execution" – that is, the completion of formal documents by each of the parties signing a copy (or copies, as the case may be) and then exchanging these copies so that each has a copy signed by the others but there is no single version which all parties have signed. Today this is a commonplace method of completing agreements around the world for business parties unable to meet in person; non-recognition is pretty disastrous

for Scots law, since parties would either be advised to execute documents under English law or, where this was not possible because property located in Scotland was involved in the transaction, use complicated work-arounds. The Scottish Law Commission's recommendation for legislation to deal with the issue has been accepted by the Scottish Government, and a Bill will come before the Scottish Parliament in the course of 2014.²³ But the Commission's researches showed that actually counterpart execution had been accepted in the Scottish common law before the 1707 Union, before being lost to sight (apart from an isolated sheriff court case in 1957) sometime in the later eighteenth century.²⁴ Since the Commission's investigation began with a simple search for "execution in counterpart" on Westlaw's Scottish library, one cannot but feel that this story too illustrates the modern Scottish profession's apparent unwillingness to investigate in any depth the law in which it was educated.

My own mission in the Commission is generally to review contract law and, in particular, seek to rid it of any rules which, like the supposed non-recognition of counterpart execution, cause practitioners to switch to English law as the governing law when Scots law would otherwise apply, or that might cause others to avoid Scots law where a choice was either open or being sought, or that are simply out-of-date and inconsistent with modern business conditions. One example of the last at which we have looked is the postal acceptance rule, established since the nineteenth century in, first, English, then, a little later, in Scots law. By this rule a postal acceptance concludes a contract at the moment of posting, although obviously the offeror knows nothing of it at that moment. For that reason, professionally advised offerors commonly require that the other party's acceptance reach them for a contract to be concluded. The Commission has therefore proposed that the postal rule be abolished.²⁵ While consultees were generally in agreement with this, there was concern for some at least that Scotland should not act unilaterally on this subject. It would seem that there is business benefit for Scots lawyers in a commercial perception that Scots law is not so very different from English law, so that any reform which conspicuously moved away from the English position would be a cause for concern, even if it actually modernised or simplified the law.

Something similar can be found in the courts, in particular the Commercial Court set up within the Court of Session in 1994. This has undoubtedly been successful in attracting business into the Scottish courts which might readily have gone elsewhere. The commercial judges have told me that many if not most of the contracts which they see in their cases are expressly governed by English law and subject to the jurisdiction of the English courts, but that no reference is made to this by counsel or the parties. It is assumed that a choice to litigate in Scotland has been made because the process is generally cheaper and mostly quicker than it would be in London, along

with a perception that the outcome is likely to be much the same on either side of the border. In commercial cases the law to be applied is indeed often the same because based on a statute applying throughout the United Kingdom. But there is also an assumption on the part of advisers and their clients that the respective laws of contract are likewise very much the same in substance. So again any reform that took Scots contract law to a position visibly different to that existing in England would not be especially welcome.

A final observation on this commercial setting is the attitude of the funders and the insurers without whose support and engagement commercial activity and development generally becomes difficult at best and impossible at worst. While Scotland once provided enough of a market place for banks and others to run independent and successful businesses there, survival in the conditions of the last couple of decades has required expansion far beyond the Scottish market,²⁶ and by and large this has led to abandonment of Scots law as the basis for commercial transactions and the adoption, at least within the United Kingdom, of English law instead. This is what funders and insurers know and expect to see in the projects they are supporting: if English law presents difficulties, established solutions are usually available, while the English courts generally have judges with enough commercial experience to provide robust solutions to new issues if they arise. This, rather than any perceived deficiency in Scots law as such, is the main reason for non-use of Scots law; English law is simply better known.

The flesh wounds from which I think Scots law is suffering at present in the commercial context can thus be summarised as a combination of impotence (the brute economic facts of a United Kingdom marketplace), inaccessibility (where is Scots law to be found?); ignorance (partly a concomitant of the inaccessibility); impatience (if an answer can be found in the much more abundant English sources, why take the time to see whether the Scottish sources tell a different story?); and, perhaps, indifference (why does or should it matter which law applies?). It is more than disconcerting that those with the power and knowledge to choose their law and legal system on the whole go elsewhere. When all this is coupled with the academics' fear of being thought parochial or local in one's concerns if focusing at all on Scots law, the resultant mix is pretty toxic.

Other symptoms of difficulty extend far beyond the contract and commercial law, however. The business problems of solicitors' firms have manifested themselves most dramatically in the sudden closures of well-known names such as Semple Fraser (March 2013) and Ross Harper Solicitors (May 2012). They may also underlie defensive inter-Scottish mergers such as those between Burness of Edinburgh and Glasgow and Paull & Williamson of Aberdeen late in 2012, and the disappearance of such leading lights as McGrigors (2012) and Dundas & Wilson (late 2013) within the multi-national conglomerates of Pinsent Masons and CMS Cameron

McKenna respectively.²⁷ At the foot of the professional ladder it has also been a hard time for would-be entrants to the profession since 2008, with training places drying up, and a lack of newly qualified (NQ) positions and prospects for those who have managed to complete traineeships. Some firms have come through the financial crisis of the last few years in better shape than others; but none have been unaffected.

There has likewise been a steady decline in the amount of civil business in the Scottish courts over the last four years.²⁸ For a system which places a good deal of weight on judicial precedent as a source of law, this is a particularly worrying trend. One has only to look comparatively at the neutral citation case numbers in Scotland and England to see how poorly off we are. The highest number I could find on the BAILII website for [2012] EWCA Civ was 1,865, while for [2012] CSIH it was 102. The highest number for [2012] CSOH was 197, which is far outstripped by the 4,000 plus in [2012] EWHC. In other words, for England & Wales BAILII shows a major Common Law system in operation, while the low Scottish numbers reinforce a concern well expressed in a Joint Advice on a possible Common European Sales Law prepared by the Law Commissions but having a wider significance:

For a legal system to succeed it needs to develop a critical mass. It needs to be sufficiently popular and important for lawyers and judges to study it. It needs to develop case law to guide its interpretation, and put flesh on the bare bones of the text.²⁹

Does Scots law itself match up to such requirements? Other evidence that suggests not can be found in the Consultation Paper published in November 2011 by the Review of Expenses and Funding of Civil Litigation in Scotland. The Review, led by Sheriff Principal James Taylor, was to consider the affordability of litigation and "other factors and reasons why parties may not litigate in Scotland". Discussing the existence or not of a "compensation culture", Sheriff Principal Taylor remarked:

[T]he number of claims made with respect to all liabilities in Scotland and England was considerably lower in Scotland than would be expected for a country with one tenth of the population (5.2 million in Scotland compared with 51 million persons in England). Over a 3 year period in Scotland (from 2008–11), the total number of claims for clinical negligence in Scotland was one thirtieth of all claims made in England (1,194 compared with 29,388), the total number of claims for employer liability in Scotland was one twelfth of all claims for employer liability made in England (17,235 compared with 211,488), the total number of claims for motor liability in Scotland was one twenty fourth of all claims made in

England (76,740 compared with 1,904,298), and the total number of claims for public liability in Scotland was one fifteenth of all claims made in England (15,844 compared with 236,801).³⁰

Sheriff Principal Taylor went on to draw a parallel with the 2001 findings of Hazel Genn and Alan Paterson that only 26 per cent of the Scottish population reported experiencing one or more problems or events for which a legal remedy was available compared to 40 per cent in England and Wales.³¹ He expressed agreement with their suggestion that these figures showed, not a lesser level of potentially justiciable incidents in Scotland, but rather a difference in the country's social structure and culture in which "prevailing economic conditions, legal institutions and the availability of alternatives to the civil courts for dispute resolution" all played their part.³² It may well also be, however, that the way in which people in Scotland view courts as a forum for resolving their disputes and difficulties is not defined only by the perceived expense of taking legal action. One would not wish to encourage ambulance chasing by judges as well as practising lawyers, but something may need to be done to make going to court less off-putting for the ordinary person.

This problem was, however, not one addressed at all in the Scottish Civil Courts Review led by Lord Gill (now Lord President), which was published in 2009 and is now beginning to be implemented by legislation in the Scottish Parliament.³³ The chief concerns of that Review are evident in the chapter headings of its report: the structure of the civil courts, a new case management model, information technology, mediation and other forms of dispute resolution, facilitating settlement, and enhancing case management. In other words, it is about how to handle rather than how to attract business. One could be forgiven for thinking indeed that the chief aim is to drive business away from the courts, especially the Court of Session. Its privative jurisdiction is to be increased from the current £5,000 to £150,000, with cases whose value is less to be decided in the sheriff courts (which will remain largely unreformed, apart from the introduction of a specialist personal injuries court and a sheriff appeal court, from which leave to appeal further to the Court of Session will be required).

This, in the language of the Report, will leave the Court of Session to deal only with major litigations. But litigations are classed as major only in terms of their value, not their possible significance for legal development. Under a scheme of this kind, would a modern May Donoghue get to the Supreme Court with her complaint about the decomposed remains of a snail in a bottle of ginger beer?³⁴ She would be lucky, one fancies, to get as far as Parliament House in Edinburgh. Not only was her claim not allowable under the authorities up to the date of bringing her action,³⁵ but the real May's damages claim of £500 translates into about £25,000 today applying the retail prices index, or £77,000 applying an average earnings multiplier,³⁶ i.e. either way, well below the Gill

threshold for first instance actions in the Court of Session. Yet May's claim in 1929 led to one of the most significant legal advances in the Common Law world in the twentieth century.

None of this is to say that the present civil courts system is incapable of improvement or greater efficiency. There are clearly many problems needing to be tackled, but the Review did not touch upon those which seem to matter most for the courts as vehicles for the development of the law. The late Lord Rodger of Earlsferry, one of the Scottish Supreme Court Justices and before that a Lord of Appeal in Ordinary as well as, even earlier, Lord President of the Court of Session, clearly found that distance did not lend enchantment to the judicial styles of his former colleagues on the Scottish bench:

[I]t occurs to me when I read Court of Session judgments that many judges spend an enormous amount of time simply recounting the submissions of the parties. ... It does not appear to serve any very useful purpose. What matters is not for the judge to tell the parties what counsel argued, but to tell them what the judge has decided in the light of the argument.³⁷

His successor as a Scottish Supreme Court Justice, Lord Reed, has also explained what Lord Rodger taught him about the writing of judgments:

... the intended reader should be borne in mind. ... [I]t was important to avoid being tedious. ... In a judgment, rehearsal of the arguments *ad longam*, in the manner which was then (and largely remains) the almost universal practice of the Scottish Bench, was considered a grave fault: not only tedious but a waste of time, since the reader would simply skip all that and go to the court's own discussion of the issues. Opinions which set out over many pages the submissions of junior counsel for the appellant, then junior counsel for the respondent, then senior counsel for the appellant, followed by senior counsel for the respondent, only to announce a preference for one view or the other without any substantial analysis of either position, were a particular bugbear.³⁸

Despite these strictures from above, judicial practice in the Court of Session has (with honourable exceptions) remained unchanged and laborious. The justification for it is the need to show the evidence and an understanding of the legal argument upon which a decision is based and render it appeal-proof at least on those kind of grounds; but this user can testify that his practice as a reader is indeed as Lord Reed describes it, only going back to the summary of the arguments if one wonders whether or how a particular point was made, or to check if something has been missed by counsel.

The Scottish Supreme Court Justices have also in recent times offered severe criticisms of sheriff court procedures and judgment styles, and the lack of case management in the lower courts.³⁹ But I have seen no sign of any change of approach, at least in the relatively few sheriff court judgments which make it on to the Scottish courts website. There is at least some evidence, however, that more heed is being paid to the Justices' strongly stated objections to the present rather lax approach (certainly by comparison with the rest of the United Kingdom) to enabling appeals to the Supreme Court from Scotland in civil matters – certification of reasonableness by two counsel rather than leave from either the Court of Session or the Supreme Court itself on the ground that the case raises an arguable point of law of general public importance.⁴⁰ The Scottish Government published a consultation in August 2013 on whether a leave requirement should be introduced, giving a fairly clear indication that the answer Yes was expected.⁴¹

“I'M INVINCIBLE!”

The one-legged Black Knight can still stand, hop about, and proclaim himself unconquerable; but this simply invites his reluctant opponent to complete the job of rendering him helplessly incapable of any motion at all. Is there any room for thinking that despite all the “flesh wounds” just described Scots law and the Scottish legal system still have more than one leg to stand on; that, despite all the problems, this is a case for treatment rather than one awaiting the moment of release or merciful despatch?

The first thing to say is that people have been proclaiming the imminent death of Scots law for at least the last hundred years. Yet the law and the legal system which sustains it continue to exist in internationally meaningful ways. Whatever you may think were the rights or wrongs of the compassionate release of Abdelbaset al-Megrahi from a Scottish prison in 2009, for example, there was nothing that the governments of the United Kingdom or the United States of America could lawfully do about a decision made under Scots law by a Scottish Justice Secretary exercising powers which had in fact been conferred upon him by legislation passed by the pre-devolution Westminster Parliament.

The mixed system of Scots private law, combining the supposedly fundamentally different and incompatible elements of Civilian and Common Law thinking, has attracted substantial interest in other jurisdictions: notably the other mixed systems such as South Africa and Louisiana, but also in Continental Europe where it serves as a possible exemplar for a future European private law.⁴² Scottish practitioners play an active part in international (and especially European) legal associations; Scottish law firms have offices outside Scotland, reflecting the international nature of their businesses; and where thirty years ago it was exceptional for Scottish academic lawyers to travel internationally to talk about Scots law,

today it is rare indeed to find a colleague who is not either recently returned from doing so or contemplating an imminent departure on such a mission or, perhaps, a period of research leave in a foreign law school.

Legislative devolution has done much to invigorate the legal system; again, whether or not one approves of all the results. The editors of a collection of essays on law-making in the first ten years of the Scottish Parliament note that early optimism has been tempered by experience, so that while there has been far more legislation than initially anticipated, much of it has been ad hoc and reactive rather than bold or principled in nature. But, they add,

... a number of the contributors also express admiration for the Parliament's legislative skill and respect for its achievements. In particular, as Robert Rennie's study of property law, Gavin Little's chapter on the reform of the judiciary, Stuart Cross's analysis of charities and David Cabrelli's discussion of arbitration indicate, there are important areas where careful technical revision and well debated, thoughtful legislation have significantly improved legal provision for Scotland.⁴³

For my own current institution, the Scottish Law Commission, the existence of the Scottish Parliament and past success with land law has encouraged ambitious projects for the comprehensive modernisation of other significant areas of law such as land registration, trusts, moveable securities, incapable adults and, of course, contract. The realistic prospect of legislation also encourages the active participation of stakeholders in the Commission's efforts to gain understanding of present practice and problems as well as to produce principled yet realistic solutions. The Land Registration etc (Scotland) Act 2012 is a recent example of what can be achieved by reform processes of this kind, and others may follow over the next few years.⁴⁴

Sometimes, of course, the legislative solutions can seem to some to be simply bringing Scots law into line with the position in England. At a recent seminar in Aberdeen on counterpart execution of documents, for example, such a criticism was offered of the Commission's Report on the subject (although the speaker also conceded that he thought the present Scots law on the execution of documents archaic). Criminal lawyers also often make remarks of the same nature about Commission reforms on topics such as double jeopardy and similar fact evidence.⁴⁵ Yet, as the late Tony Weir once remarked, “it may be useful to consider how very different, after nearly three centuries of political unification in an unquestionably single market, the laws of Scotland and England continue to be”.⁴⁶ English lawyers continue to find whole areas of Scots law – for example, property, unjustified enrichment, family, succession, and (still) criminal law – quite foreign, while even in contract and delict substantial differences remain to puzzle from

time to time. Scots law is also still capable of innovation. So a distinctive Scottish public law had begun to emerge even before devolution,⁴⁷ and it cannot be assumed any more that there are no significant differences with English law in this field despite the Supreme Court's ultimate control in relation to devolution issues. The latter are not the whole of public law in Scotland.⁴⁸

On contract law, where the parties perhaps uniquely have a real freedom to choose their law and do not, as already discussed, tend to plump for the Scottish version, one can comfort oneself with various further thoughts also gleaned from the Law Commission review of contract law. Contracts for the transfer of immovable property located in Scotland mostly have to be subject to Scots law. Scottish local authorities contract only under Scots law, and are obviously major players in terms of the economic activity they engender in Scotland. Small businesses whose markets are limited to the local will probably find themselves contracting mainly under Scots law if simply because unaware of any entitlement to choose another law. Likewise private individuals contracting with each other, say, in buying and selling a car; but dealing as a consumer can happen under another law (for example, the law of Luxembourg if one is contracting with Amazon), even if he or she can choose to sue the supplier, and can only be sued by that supplier, in a Scottish court.⁴⁹ So the Scots law of contract and its application within the Scottish legal system is certainly still alive.

The Black Knight is finally reduced to a limb-less stump of a human being who, however, loses nothing of his defiance and bravado in the face of impossible odds. "All right," he cries, "we'll call it a draw. Come back here and take what's coming to ya! I'll bite your legs off!" He too is still alive and he still has teeth which can be sunk into any assailant coming close enough to let that happen. His problem, however, is that he can simply be ignored by anyone who wants to do so; and he cannot join the search for the Holy Grail unless carried there by others.

THE HOLY GRAIL OF SCOTS LAW

It is more than time to leave the Black Knight and Monty Python, and move on in conclusion to more scholarly territory – the British Library website. It tells us:

The search for the [Holy Grail] became the principal quest of the knights of King Arthur. It was believed to be kept in a mysterious castle surrounded by a wasteland and guarded by a custodian called the Fisher King, who suffered from a wound that would not heal. His recovery and the renewal of the blighted lands depended upon the successful completion of the quest. Equally, the self-realisation of the questing knight was assured by finding the Grail. The magical properties attributed to the Holy Grail have been plausibly traced to the magic vessels of Celtic myth that

satisfied the tastes and needs of all who ate and drank from them.⁵⁰

It would be rash indeed for a Scottish Law Commissioner to think of himself as a questing knight, or of the Commission as a mysterious castle surrounded by a waste land – and even more so to cast Scots law and the Scottish legal system as a Fisher King.⁵¹ For my part, the point of departure is that Scots law and the Scottish legal system exist, with there being no prospect or serious fear of their outright abolition or disappearance. Indeed there is some possibility – not very strong, if the opinion polls are to be believed, but real nonetheless – that in the near future their current relative autonomy will be reinforced by the political independence of the jurisdiction within which they operate. It thus behoves the participants in the system – the people who live under it as well as legislators, judges, lawyers and law reformers – to make it and the law it operates as good as can be, matching and where feasible surpassing international standards of excellence and justice. If the outcomes attract others to make use of it in some way, that will be all to the good; but the primary aim must be the best possible service to the people of Scotland.

In thinking about what this might entail, I often find myself reflecting on the wise words of those who have gone before. I agree with the late Lord Cooper, Lord President of the Court of Session 1947–1954, that the first concern should be with "the matters which inevitably touch the lives of all citizens from the cradle to the grave", i.e. not the criminal law or the control of government, but rather "the body of principles and doctrines which determine personal status and relations, which regulate the acquisition and enjoyment of property and its transfer between the living or its transmission from the dead, which define contractual and other obligations, and which provide for the enforcement of rights and the remedying of wrongs".⁵² In this lens, since everybody dies, the law of succession is much more important than, for instance, the law of corroboration, which affects only those who investigate and prosecute crime, those accused of crime, and the victims of crime – important groups each, but even all together still a small minority of the population. It is a serious reflection on the social understanding of those responsible for taking these things forward to legislation that two Reports on the subject of succession from the Scottish Law Commission – one published in 1990, the next in 2009 – each remains unimplemented despite the major difficulties caused by the present unreformed rules in modern social conditions.⁵³

Again, take James Dalrymple, Viscount Stair, also a Lord President of the Court of Session, writing towards the end of the seventeenth century:

No man can be a knowing lawyer in any nation, who hath not well pondered and digested in his mind the common law of the world, from whence

the interpretation, extensions and limitations of all statutes and customs must be brought.⁵⁴

By the “common law of the world” Stair meant “material justice ... orderly deduced from self-evident principles, through all the several private rights thence arising, and ... the expedients of the most polite nations, for ascertaining and expediting the rights and interests of mankind”.⁵⁵ In other words, he thought that good law was produced by a mixture of internal reflection on justice between persons and external comparison with the answers provided in other legal systems. For Stair, England was one but by no means the only possible comparator. He might also, incidentally, have asked us to consider why Scotland is one of the very few jurisdictions in the Western world still to have a requirement of corroboration in criminal cases.

In the mid-twentieth century, J J Gow, who learned his law and taught it in Aberdeen as well as practising and teaching it in Australia and Canada, said somewhat similar things to Stair in criticism of the approach of his legal contemporaries in Scotland:

In this exceedingly complex society of ours what the lawyer dare not be without is a knowledge of the economic, political and social facts of his civilisation. He needs this knowledge not as a dilettante, not even as a matter of personal cultivation, important though that may be, but as a matter of professional competence. ... Our society is changing faster than I write. In so far as it has or will have room for a legal profession, it is and will be for a profession which is not excessively concerned with the pathological processes of the law conducted in a manner which often exhales the odour of antiquity, but which is prepared to go out into the social field, ascertain the facts of life, gauge the needs and aspirations and seek to furnish efficient answers through the courts and otherwise. ... Society does not owe us a living and certainly not on the excuse that because a nineteenth- or earlier-twentieth-century judge said otherwise we are powerless to act. Nor is the timidity and evasiveness of politicians a pretext for doing nothing.⁵⁶

One specific lesson which I draw from all these observations is the need, not just to reform the law, but also to think hard about the need for doing it by way of legislation or even codification. The difficulty of saying what Scots law is in many areas of current concern has borne itself in upon me repeatedly in writing national notes for Scotland for European private law publications and even more urgently in making contributions to joint projects with the Law Commission of England & Wales. Far too often one is left making extrapolations from nineteenth-century or earlier cases or drawing upon isolated (and not infrequently unreported) single judge decisions of

more recent provenance. If the relatively time-rich professor or Law Commissioner finds such exercises problematic, what of the hard-pressed practitioner advising clients? The difficulties can be exacerbated by the writers of legal textbooks and treatises taking widely divergent views of such authorities as exist in the sources. A code – or quasi-codifying statutes in particular area – would at least have the merit of stating authoritatively what the law is, for good or ill. And if it turned out to be ill, it could then be reformed with better understanding of what the problems for solution are. That is a solution not readily available in a Common Law system.

For example, the project on which I am working at present in the Commission – third party rights in contract – is an area of essentially judge-made law, the problems with which could conceivably be sorted out by the courts themselves; but for such judicial adjustment the right case would have to emerge and its potential significance be recognised by advisers, pleaders and judges, while the parties would also have to be ready, financially and in other aspects, to take it all the way to the Supreme Court to have a previous decision of the House of Lords over-turned.⁵⁷ The chances of all these things occurring simultaneously in a small legal system are, however, remote indeed. A small piece of legislation could, I think, easily put right the particular problem which makes the present law unfit for modern conditions; but will Parliamentary time be found amongst so many other competing priorities? In some ways it could be politically more straightforward to put the matter on the legislative agenda of the Scottish Government and the Scottish Parliament as part of a larger and more ambitious scheme such as a contract or more general private law code, should such a thing ever get off the ground.

Such codifications are not, of course, short-term projects. Unless we were simply to adopt some already codified system, substantial human and other resources over a long period of time would be required. But new and re-codifications are taking place all over the world at the moment; where the will and the need exist, the means can be found. But until these things come together, and indeed in anticipation of these things coming together, we must do more in the reform of the courts to attract and retain business, not drive it away, and so improve the chances of developing our common law. Judges, court administrators, and court practitioners need to face outwards as well as dealing with the specifics of the case before them in the time-honoured ways.

All of this applies, I think, whether or not Scotland becomes an independent country after 18 September 2014. Many of the problems I have described are those of any small legal system in the modern world and its globalised economy. They will not loom any less largely because the system is that of a small independent state, whether or not that state is the best of its kind in the world. Despite the fact that an already distinct law and legal system has long been one of the primary reasons

for supposing that Scotland could indeed become an independent state once more, the subject is not addressed until the seventh of the ten chapters altogether in the White Paper produced by the Scottish Government in November 2013.⁵⁸ The document there tells us that an independent Scotland will be a member state of the European Union and the Council of Europe, meaning amongst other things that the new written constitution which it also promises will probably bear a close family resemblance to the European Convention on Human Rights. There will no longer be an appeal to the UK Supreme Court, however; it will be replaced by a court combining the present Inner House of the Court of Session with the Court of Criminal Appeal.⁵⁹ But there is next to nothing in the White Paper about civil or non-criminal law, and not much more on criminal law and procedure. If there was ever a thought that a great project of reforming statutory restatement or codification of the law could follow independence, it has clearly been discarded, at least at this stage.

FINAL THOUGHTS...

Speaking as one who has yet to make up his mind on independence, I believe we must, whatever happens,

consider what is needed, and what we may want, from a small legal system and its law, especially its civil law. We must think in particular whether we can really manage to operate consistently with the rule of law and human rights as a Common Law system in the areas covered by the headings of “Private Law” and, indeed, “Criminal Law”. Too much of our law is uncertain; and where it is known, it is often too inflexible and so difficult to apply in modern social conditions. We have not been bold enough in thinking about what modernisation requires, or in trying to use our traditional sources in less traditional ways – for example, in thinking what specific statutory changes might imply for neighbouring parts of judge-made law.⁶⁰ If we take Scots law seriously, and want it to have a good and useful future rather than merely go on existing because it does, we need to stop being Black Knights, remind ourselves again and again of what Stair and Gow said in the passages I quoted above, look around us, and act in their spirit – not to defend the status quo or to seek a restoration of the status quo ante, but rather to respond as well as we can to the economic, political and social facts of our civilisation and make our law fit for consideration as part of the common law of the world.

Footnotes

¹ [http://en.wikipedia.org/wiki/Black_Knight_\(Monty_Python\)](http://en.wikipedia.org/wiki/Black_Knight_(Monty_Python)). The scene can be viewed on You Tube: <http://www.youtube.com/watch?v=zKhEw7nD9C4> (accessed 3 January 2014)

² Union with England Act 1707, Articles XVIII and XIX.

³ Consolidated Version of the Treaty on the Functioning of the European Union, preamble (“DETERMINED to lay the foundations of an ever closer union among the peoples of Europe”); Treaty of the European Union, preamble (“RESOLVED to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity”). Official Journal of the European Union C115/4; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF> (accessed 3 January 2014)

⁴ See Ford 2011; MacQueen 1995.

⁵ The Union Agreement is here used as a verbal formula to embrace the Treaty of Union and the Acts of Union by which each Parliament involved gave effect to the Treaty. See generally Ford 2007; Cairns 2007.

⁶ See most recently Ford 2009; Finlay 2011.

⁷ *Mackintosh v Lord Advocate* (1876) 3 R. (H.L.) 34. See further MacLean 1985.

⁸ For an interesting recent analysis of the nineteenth-century Anglicisation of Scots law see Fry 2013, pp 126–136.

⁹ The classic example is the Sale of Goods Act 1893.

¹⁰ See Whetstone 1981.

¹¹ See Rodger 2008a.

¹² Dicey 1st ed, 1885; 10th ed, 1959, ch I. See also Dicey and Rait 1920.

¹³ *Starrs v Ruxton* 2000 J.C. 208.

¹⁴ See e.g. *A v Scottish Ministers* 2001 S.C. 1, affirmed 2002 S.C. (P.C.) 63; *Whaley v Lord Watson of Invergowrie* 2000 S.C. 340.

¹⁵ *Cadder v Her Majesty's Advocate* [2010] UKSC 43; 2011 S.C. (U.K.S.C.) 13.

¹⁶ *Salduz v Turkey* (2008) 49 E.H.R.R. 421. The relevant Scottish legislation at the time of *Cadder* was ss 14 and 15 of the Criminal Procedure (Scotland) Act 1995 but in form it was introduced under the Criminal Justice (Scotland) Act 1980.

¹⁷ For the Bill's passage see the Scottish Parliament website at <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/22586.aspx>

¹⁸ See The Carloway Review: Report and Recommendations 2011, accessible at <http://www.scotland.gov.uk/About/CarlowayReview>

¹⁹ See the Criminal Justice (Scotland) Bill 2013 Chapter 8 Part 2 for the abolition of corroboration, accessible at <http://www.scottish.parliament.uk/parliamentarybusiness/Bills/65155.aspx>

- ²⁰ A notable exception is Pierre de Gioia-Carabellese, an Italian private and commercial lawyer working in the Department of Business Management at Heriot-Watt University in Edinburgh. See his articles [2011](#) and [2013](#).
- ²¹ *Commonwealth Oil & Gas Ltd v Baxter* [2009] CSIH 75; 2010 S.C. 156; critically discussed by Whitty [2013](#); Carr [2010](#).
- ²² As of 3 January 2013 this lecture had not been published.
- ²³ Scottish Law Commission [2013](#); and see Scottish Government September 2013.
- ²⁴ See in particular *Smith v Duke of Gordon* 1701 Mor. 16987; Bankton [1751–3](#), I, xi, 36; and *Wilson v Fenton Brothers (Glasgow) Ltd* 1957 S.L.T. (Sh. Ct.) 3.
- ²⁵ Scottish Law Commission [2012b](#), paras 4.8–4.14.
- ²⁶ See Perman [2012](#); Martin [2013](#).
- ²⁷ But merger talks between the long-established Edinburgh firm of Simpson & Marwick and the English firm Kennedys came to naught at the beginning of December 2013.
- ²⁸ See the statistics for the period 2008–9 to 2011–12 graphically illustrated at <http://www.scotland.gov.uk/Topics/Statistics/Browse/Crime-Justice/TrendCivil>
- ²⁹ Law Commission and Scottish Law Commission [2011](#), para 7.94.
- ³⁰ Taylor Review [2011](#), para 2.9. This passage is repeated in the foreword to Taylor Review [2013](#), pii.
- ³¹ See Genn and Paterson [2001](#), chapter 8.
- ³² Taylor Review [2011](#), para 2.14 (reiterated in Taylor Review [2013](#), p iii).
- ³³ Gill Review [2009](#); Scottish Government [2013a](#).
- ³⁴ *Donoghue v Stevenson* 1932 S.C. (H.L.) 32. For the full story of the case as so far as modern research has gone, see E Reid [2010](#). See also a special issue of the Juridical Review published in 2013 marking the eightieth anniversary of the House of Lords' decision in the case.
- ³⁵ Although it should be noted that Mrs Donoghue succeeded at first instance in the Outer House of the Court of Session.
- ³⁶ The modern values quoted relate to 2011 values, the latest available on the website <http://www.measuringworth.com/>; to which I was directed by Chapman [2010](#), p 22, n 14.
- ³⁷ Rodger [2008b](#).
- ³⁸ Reed [2013](#), p 122.
- ³⁹ See *NJDB v JEG* [2012] UKSC 21; 2012 S.C. (U.K.S.C.) 293, paras 20–37 (Lord Reed), 40–48 (Lord Hope); *Davies v Scottish Care Commission* [2013] UKSC 12; 2013 S.C. (U.K.S.C.) 186, para 6 (Lord Hope).
- ⁴⁰ See *Hamilton Ltd v Highland Council* [2012] UKSC 31; 2013 S.C. (U.K.S.C.) 45 (Lord Hope); *Uprichard v Scottish Ministers* [2013] UKSC 21; 2013 S.C. (U.K.S.C.) 219 (Lord Reed).
- ⁴¹ Scottish Government [2013b](#).
- ⁴² See e.g. Zimmermann, K Reid and Visser [2004](#); MacQueen and Zimmermann [2006](#); Vagni [2008](#); Palmer and E Reid [2009](#).
- ⁴³ Sutherland, Goodall, Little and Davidson [2011](#), p 4.
- ⁴⁴ See Scottish Law Commission [2010](#).
- ⁴⁵ See Scottish Law Commission 2009, implemented by the Double Jeopardy (Scotland) Act 2011; Scottish Law Commission [2012a](#), where the particular issue is the admissibility as evidence of an accused's previous convictions.
- ⁴⁶ Weir [1998](#), p 565.
- ⁴⁷ See *West v Secretary of State for Scotland* 1992 S.C. 385.
- ⁴⁸ See e.g. Himsworth and O'Neill [2009](#), chapter 13.
- ⁴⁹ Brussels I Regulation art 15; Civil Jurisdiction and Judgments Act 1982. Sch 8, rule 3.
- ⁵⁰ See <http://www.bl.uk/onlinegallery/features/mythical/grail.html>.
- ⁵¹ On the myth of the Fisher King see http://en.wikipedia.org/wiki/Fisher_King. It may be noted that Python Terry Gilliam directed a film entitled *The Fisher King* released in 1991 – see [http://en.wikipedia.org/wiki/The_Fisher_King_\(film\)](http://en.wikipedia.org/wiki/The_Fisher_King_(film)).
- ⁵² Cooper [1957](#), p 174.
- ⁵³ Scottish Law Commission [1990](#); Scottish Law Commission 2009.
- ⁵⁴ Stair [1693](#), I, I, proemium.
- ⁵⁵ Stair [1693](#), Dedication to the King.
- ⁵⁶ Gow [1964](#), pp vi, ix.
- ⁵⁷ The decision in question is *Carmichael v Carmichael's Executrix* 1920 S.C. (H.L.) 195.
- ⁵⁸ See Scottish Government [2013c](#).
- ⁵⁹ This news will not please at least those members of the Faculty of Advocates who spoke from the platform at a debate on the implications of independence for Scots law held in the Faculty on 18 September 2013. Those against independence gave the removal of the UK Supreme Court as their chief cause of concern, while those not against independence likewise thought that an appeal to the Supreme Court should be retained, akin in form to the right of appeal in some Commonwealth jurisdictions to the Judicial Committee of the Privy Council.
- ⁶⁰ I have attempted to use this approach in MacQueen [2009](#).

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Biography

Hector MacQueen has been a Scottish Law Commissioner since 2009 and is Professor of Private Law at the University of Edinburgh. He has written widely on the law of obligations, intellectual property and legal history, generally with a focus on Scotland informed by a comparative approach. He is a Fellow of the British Academy and was President of the Society of Legal Scholars in 2012–2013.