

## **King James Lecture**

**“The best of any Law in the world” – was King James right?**

**Middle Temple – 20 October 2008**

“The best of any law in the world”. What a wonderful observation to conjure with! Especially if, like me, you come from Scotland and you appreciate that it was uttered by a King of England who, by birth at least, was a Scotsman. What did he mean? Which system of law was he referring to? What qualifications did he possess to make such a judgment? And, most of all, was he right?

King James I was known as “the cradle king”. I always think of him as King James VI, as I first heard of him when I was being taught history at a very young age at The Edinburgh Academy. He was the first monarch to style himself as King of Great Britain. But he was already King in Scotland well before that happened. He was born in Scotland on 19 June 1566, the son of Mary Queen of Scots and Lord Darnley. It is said that five hundred bonfires were lit in Edinburgh and the surrounding hills to celebrate the birth of a male heir, and that the entire artillery of Edinburgh castle was discharged that night in his honour. Such a demonstration of firepower is now commonplace throughout the city on various occasions to please the tourists, especially when midnight strikes on Hogmanay. But it was a unique event in those days. South of the border Queen Elizabeth cried out “Alack, the Queen of Scots is lighter of a bonny son, and I am but of

barren stock.” This was not just the complaint of a childless woman. The birth of a son greatly enhanced Mary’s merits as a candidate for the English throne in succession to Elizabeth<sup>1</sup>.

As everyone knows, however, that is not how things turned out. Mary’s life was soon turned upside down by a series of violent events that were soon to rob her of any chance of becoming Queen of Great Britain. In March 1566, three months before James’s birth, Mary’s Italian secretary and companion David Riccio was murdered in her presence in the Palace of Holyroodhouse. Darnley was consumed by jealousy as he believed rumours that the Queen was having an affair with Riccio, and he was implicated in the murder. Mary for her part believed that Darnley intended to get rid of her too, and her unborn child, so that he could become King of Scotland in his own right. For a while, until the child was born, she maintained an uneasy relationship with him. But about two months after the child’s birth, following a very public argument, she decided that she wanted to have nothing more to do with him<sup>2</sup>. She arranged for the child to be taken to Stirling Castle, the traditional nursery of royal princes, and to be handed over to the care of the Erskine family as his hereditary governors. She herself became seriously ill, and shortly afterwards in February 1567 Darnley in his turn was murdered.

One of those implicated in Darnley’s murder was the Earl of Bothwell. He was put on trial before the Parliament for the murder but was acquitted as his accuser failed to appear to give evidence at the trial. Bothwell’s reaction to his acquittal was to suggest to the

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<sup>1</sup> Antonia Fraser, *Mary Queen of Scots* (1969), p 268.

<sup>2</sup> *Ibid*, p 271.

Queen that she needed a husband. On 15 May 1567, just three months after Darnley's death, they were married. Her agreement to this marriage was her crucial mistake. Bothwell had many enemies and it was not long before the Queen herself was vilified as an adulteress and the willing bride of a murderer. Weakened by a miscarriage, she was persuaded by an alliance of powerful nobles and protestant clerics (she was, of course, a catholic) to abdicate in favour of her infant son. She had last seen him in April 1567 during a brief visit to Stirling Castle when he was ten months old. So it was that on 29 July 1567, at the age of just thirteen months, James was crowned King of Scotland outside the gates of Stirling Castle. Thirty six years were to go by before, on 25 July 1603, he became King of England too. He was welcomed by the Lord Mayor on his arrival in London, and was quick to adopt the style of King of Great Britain.

Four years later, on 31 March 1607, he addressed a joint session of both Houses of the English Parliament<sup>3</sup>. It had been his practice, since he became King, to deliver speeches at the opening and the end of the session. It was, of course, with this in mind that Guy Fawkes and others devised the Gunpowder Plot in 1605 to inflict the maximum damage, as the explosion was to coincide with a State Opening. These speeches were not Queen's, or King's, Speeches as we know them today. The thoughts and words were his, not those of a democratically elected government. This was the man, after all, who declared in his pamphlet entitled *the Trew Law of Free Monarchies or The Reciproock and mutuall duetie betwixt a free King and his naturall Subjects* "The King is above the law, as both the author and giver of strength thereto."<sup>4</sup> He believed in a monopoly of political

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<sup>3</sup> King James VI and I, *Political Writings* (ed by J P Somerville, 1994), pp 159 et seq.

<sup>4</sup> *Ibid*, p 63 at p 75.

power, which the King derived from God alone, although he also believed that it was his duty to rule in the public interest and to abide by the law. As he explained, “a good king will not onely delight to rule his subjects by the law but will even conforme himselfe in his owne actions thereunto, always keeping that ground, that the health of the commonwealth be his chiefe law.”<sup>5</sup> Nevertheless Parliament was a vigorous institution with which he had an uneasy relationship. He had to be careful what he said, and one can trace touches of self-deprecating humour as he set out to win the attention of his audience. He was, I think, remarkably outspoken on this occasion. “It is the best of any Law in the World”, he said<sup>6</sup>. Brave words, indeed. But be reassured. It was the common law of England of which he was speaking.

His message was clear. He wanted a truly united Kingdom. He told Parliament that he desired a perfect Union of laws and persons and such a naturalising as might make one body of both kingdoms under him, their King, so that he and his successors, if it so pleased God, might rule over them to the world’s end. He did not want to see a union with Scotland as if it had been got by conquest, but by such a conquest as be so counted by love. “For no more possible it is for one King to govern countries contiguous, one a great, the other a less, one rich, the other poorer, than for one head to govern two bodies or one man to be husband to two wives.”. “When I speak of a perfect union,” he went on, “I mean such a general union of laws as may reduce the whole land, that as they have already one Monarch, so they may all be governed by one law; for I must confess by that little experience I have had since my coming hither, and I think I am able to prove it, that

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<sup>5</sup> Ibid, p 75.

<sup>6</sup> Ibid, p 162.

the grounds of the common law of England are the best of any law in the world, civil or municipal.” Why then should Scotland not be subjected to the laws of England, he asked, and so with time it would become as Cumberland and Northumberland and those other remote Northern Shires?<sup>7</sup>

The compliment which he paid to the common law of England was not unqualified. I am not sure that he had really grasped the true nature of the common law, which was made after all by the judges. For him laws made by judges were by far less than perfect. “The law should be clear and full, and not the law to the pleasure of the judges,” he said. “I desire not the obscurity of the law, but only that clear and surveying of the rule of law and that by Parliament.” He seems to have had in mind a codification of the law by statutes made in Parliament, no doubt under his direction as the sovereign. “And may you now have a fair occasion of perfecting your laws, when Scotland is to be visited with you under them: for who can blame Scotland to say, if you will take away our own law, I pray you give us a better and clearer in place therefore.”<sup>8</sup>

At that time the perfect union of the two kingdoms that he was suggesting was a distinct possibility. He was, as you will have gathered, an enthusiast for the project. It had attractions for him personally. It would confirm the dynasty to which he belonged as that of the sovereigns of a major European power. Commissions had already been appointed by the Parliaments of both nations in 1604 to examine the possibilities.<sup>9</sup> But it was soon

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<sup>7</sup> Ibid, pp 161-162.

<sup>8</sup> Ibid, p 163.

<sup>9</sup> Acts of the Parliament of Scotland IV, 263-4, c 1 (1604). See John W Cairns, *A History of Private Law in Scotland* (ed by Kenneth Reid and Reinhard Zimmermann, 2000), *Historical Introduction*, p 78.

to be discovered that there were formidable difficulties. The Scots Commissioners, not surprisingly, were directed by the Scots to protect the fundamental laws, ancient privileges, offices and liberties of the kingdom of Scotland. English lawyers, on the other hand, saw Scots law as civil law imported from the Continent. It was not common law, and they considered it to be a threat to their own system. Others argued the contrary. They said that the laws of the two countries were fundamentally the same. This was on the view that Norman law, or the *jus feudale*, could provide common ground or, if that was not acceptable, this could be found in the *ius commune* which was widely accepted as the modern inheritance of the Roman law throughout the Continent. But the English common lawyers would have none of this<sup>10</sup>.

King James did what he could to keep the idea alive by setting up his stall with the English. But by 1608 his project for a more perfect union was effectively at an end. It was not until nearly one hundred years later, after a revolution, a civil war, a protectorate, a restoration and the end of the Stewart dynasty, that the idea was revived. Then, as we all know, a Union between the Parliaments of the two countries was agreed to on a basis which enabled each country to keep its own systems of private law, its own courts and its own offices. His only lasting legacy to the Scottish legal system was the introduction<sup>11</sup> of the English idea of inviting unpaid, voluntary people to sit as justices of the peace – a

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<sup>10</sup> B P Levack, “The Proposed Union of English Law and Scots Law in the Seventeenth Century” (1975) 20 JR 97-115.

<sup>11</sup> By the Justice of the Peace Act 1609.

system which still survives today for the provision of summary justice in the District Courts throughout Scotland.<sup>12</sup>

Why was King James such a strong advocate for the supremacy of English law? Given his origins, would it not have been more natural for him to have supported the Scots, who feared the imposition of English law? To understand his way of thinking we need to know more about what happened to him during the thirty six years before he became King of England. He had, you will remember, been crowned King of Scotland in 1567 when he was only thirteen months old. He never saw his mother again. After ten and a half months in captivity on an island in Loch Leven she escaped and tried to reclaim the Crown. But her supporters were defeated and she escaped to England, where she was placed under house arrest. Twenty years later, having been convicted of treason – probably contrary to law, as she was the queen of a foreign country and had never been allowed to live at liberty in England<sup>13</sup> – she was executed on 8 February 1587 at Fotheringhay. Left behind in Scotland King James was educated by George Buchanan, one of the foremost classicists of the age, and was cared for by a regent until he attained majority. He was well read, wrote poetry and was not short of ideas about how the country should be run.

But these were turbulent times in Scotland. There was, in effect, a civil war going on. It was between those members of the protestant nobility who supported the King and

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<sup>12</sup> See the District Courts (Scotland) Act 1975, as amended by the Criminal Proceedings etc (Reform) (Scotland) Act 2007.

<sup>13</sup> Antonia Fraser, *Mary Queen of Scots* (1969), p 504. Although she was a catholic, there was no evidence that she was implicated in a catholic plot to rescue her from prison, remove Queen Elizabeth and place her on the English throne in Queen Elizabeth's place.

members of the catholic nobility who had supported the Queen<sup>14</sup>. His first regent, the Earl of Morton, was driven from power by other members of the Scottish nobility, including the Earl of Arran, in 1578 when the King was 12 years old. Four years later they too were removed by another faction, and the 16 year old King was seized and imprisoned at Ruthven Castle, near Perth<sup>15</sup>. There was a counterplot. The Earl of Arran was restored to power as regent. But a year later the faction which had removed him returned with a large army. The Earl of Arran surrendered to them and was banished. And so it went on. Even after the King had reached full age and was no longer exposed to the risk of capture by those who wished to assume the regency there were various treasonable attempts to remove him. And when they were suppressed, he became engaged in prolonged ecclesiastical disputes with the protestant clergy in Scotland. The issues were whether the government of the church was to be Presbyterian or Episcopal and whether the Crown had supremacy in the affairs of the Church. Ultimately James VI was successful in asserting his ideas of unlimited monarchy and of an Episcopal church under royal supremacy<sup>16</sup>. He was efficient and systematic. But progress had been slow and difficult, and a hundred years later everything had changed. The Church of Scotland had become overtly Presbyterian, and in all spiritual matters sovereignty lay with the Church and her own courts<sup>17</sup>. It must have been a relief to the King when, on the death of Queen Elizabeth in 1603, he was able to settle in somewhat more peaceful

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<sup>14</sup> Michael Lynch, *Scotland: A New History* (1991), pp 203-204.

<sup>15</sup> Later renamed Huntingtower.

<sup>16</sup> King James VI and I, *Political Writings* (ed by J P Somerville, 1994), p xvi; John W Cairns, *op cit* (n 5), *Historical Introduction*, p 77.

<sup>17</sup> T C Smout, *A History of the Scottish People 1560-1830* (1969), p 70; Lord Rodger of Earlsferry, *The Courts, the Church and the Constitution* (2008), pp 2-3.

circumstances in England. He returned to Scotland only once, for the briefest of visits, during the rest of his lifetime.

The legal system that he had encountered in the country of his birth was very different from that which he found in London. The Scottish legal system had only recently emerged from the middle ages. In the thirteenth century the law of Scotland, such as it was, was thought to be closely akin to English law<sup>18</sup>. But it was not very accessible. According to a seventeenth century commentator, the whole of the laws of the Kingdom of Scotland was written in Latin until the time of James I of Scotland. “That custome being introduced be the pope and clergie,” he protested, “that the laiks (who for the most part understood not the Latin tonge) might be misled in the mist of ignorance; and the clergie might have the better occasion to prey on them.”<sup>19</sup> It was only during the reigns of James I to James V, between 1406 and 1542, that a distinct system of law began to emerge and the increasing centralisation of various territorial jurisdictions produced at last a recognisable structure of civil and criminal justice<sup>20</sup>.

Scots common law was developed in the institutions that the Kings adopted for the government of the realm, the Privy Council and Parliament<sup>21</sup>. Parliament had acquired a role as a court as well as that of a legislature, although it did not sit very often. Its civil jurisdiction was as a court of review and of first instance<sup>22</sup>. The Privy Council had been

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<sup>18</sup> John W Cairns, p 32.

<sup>19</sup> Hope, *Major Practicks* (1608-1633), I, 1.

<sup>20</sup> John W Cairns, op cit (n 5), *Historical Introduction*, p 52.

<sup>21</sup> *Ibid*, p 31.

<sup>22</sup> R K Hannay, *The Sources and Literature of Scots Law* (Stair Society, 1936), *Early Records of Council and Session*, p 19.

developed into a central court by the institution of “sessions” to hear causes and complaints, to the gradual relief of Parliament<sup>23</sup>. The roll of civil causes in Parliament was reduced by increasing activity in a separate institution which became known as the Council and Session. During the reign of James IV it became the practice to appoint to the Council men who had been specially recruited to deal with judicial business. By the time of his death there was a core of eight ecclesiastics and nine learned laymen on the Council. They were known as the Lords of Session. The procedure of the Council was Romano-canonical, and the absence of an organised secular legal profession made Scots common law open to influence from Continental civil law in the form of the *ius commune*.<sup>24</sup> Then in 1531 Pope Clement VII issued a bull narrating that James V intended to found a College of Justice in Scotland. He called on the bishops to contribute funds to its support. In 1532, the money having been forthcoming, effect was given to this initiative by the Parliament. It enacted a measure instituting a new supreme civil court, the Court of Session, over which the Lord Chancellor of Scotland was to preside if he was present, and on which Lords from the King’s Council were appointed to sit.<sup>25</sup> In the ratifying Act of 1541<sup>26</sup> the College of Justice was described as having a President and fourteen ordinary Senators. This nomenclature survives to the present day. Judges of the Court of Session are still known as Senators of the College of Justice, and the Head of the Court is known as the Lord President. The Judges, including the Lord President, are still referred to collectively as the Lords of Council and Session. It is for this reason that they

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<sup>23</sup> Ibid, p 20.

<sup>24</sup> John W Cairns, op cit (n 5), *Historical Introduction*, p 45.

<sup>25</sup> APS, II, 335-6 (c 2).

<sup>26</sup> APS III, 71 (c 10).

assume the judicial title of Lord, or Lady<sup>27</sup>, on their appointment to the Court of Session bench.

The fact that so many litigants were determined to bring their cases before the Council suggests that there was a lack of confidence in the ordinary sheriff and burgh courts in the localities prior to the institution of the Court of Session. The new system had had little time to settle down by the time when James VI succeeded his mother to the throne of Scotland. Access to the law was still problematical. Much of it was located in two books of “auld lawes” written in Latin, *Regiam Majestatem* and *Quoniam Attachamenta*, and much it was obsolete. It was being gradually supplemented, updated and reformed by legislation, but the process was far from complete. There was also a quantity of manuscript material, which suffered from the obvious disadvantage that versions of it varied from text to text. Proposals were made in the Parliament from time to time to examine the law in a systematic way and to suggest how it might be remedied, but they had come to nothing. So Scotland had a new central court, but the texts were difficult to understand and much if was out of date. It lacked the unified and rigorous body of knowledge of the law that existed in contemporary England. Professional “men of law” acting on behalf of clients were to be found by 1445<sup>28</sup>. But they were not members of an organised legal profession, bound together by a shared education and by professional experience<sup>29</sup>. It was not until 1610 that control over the qualifications of those seeking to become advocates passed from the Lords of Council and Session to the advocates and

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<sup>27</sup> Royal Approval was given to the use of the honorary title by Lady Cosgrove, the first woman to become a Senator of the College of Justice, on her appointment in 1996.

<sup>28</sup> R K Hannay, *The College of Justice* (1933), p 135.

<sup>29</sup> John W Cairns, op cit (n 5), *Historical Introduction*, p 68.

advocates were required to wear black gowns, said to have been designed by King James who had seen those worn by lawyers in England<sup>30</sup>.

The King was sufficiently closely in touch with the Scots legal system to offer advice about it to his eldest son, Prince Henry, who was made Prince of Wales in 1610 but died of typhoid in 1612 before he could become King. In 1598, when his son was just four years old, King James wrote in his own hand perhaps his best known work of literature, *Basilicon Doron*, “The Princely Gift”. Written originally in Scots, it was translated into English, became a best seller in England and circulated widely on the Continent<sup>31</sup>. It bore the sub-title “His Majesty’s instructions to his dearest son, Henry, the Prince.” He began with two sonnets, in the familiar style, that he had written himself. Then he got down to detail. “Next to the scriptures” he said, “study well your own laws”. But this was not just an encouragement to know what the law was. There was practical advice here too, which gives us some insight into what the King thought of lawyers and of judges. “Assure yourself the longsomeness of both right and processes breedeth their unsure looseness and obscurities – the shortest being ever both the surest and plainest forms, and the longsomeness serving only for the enrichment of the Advocates and Clerks, with the spoil of the whole country; and therefore delight to haunt your Session, and spie carefully their proceedings; taking good heed, if any bribery may be tried among them, which cannot over seriously be punished.”<sup>32</sup> This was a theme that he was to return to a few years later in his speech to both Houses of Parliament, when he said that

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<sup>30</sup> *Faculty of Advocates Minute Book, vol 1, 1661-1712* (Stair Society 1976), ed J M Pinkerton, pp viii-ix.

<sup>31</sup> King James VI and I, *Political Writings*, p xv.

<sup>32</sup> *Ibid*, p 45.

he desired not the obscurity of the law but only that clear and surveying of the rule of law and that by Parliament.<sup>33</sup>

The Court of Session, “your Session” in his advice to the Prince, was becoming established as the successor to the King’s Council.<sup>34</sup> Measures were being taken to improve its independence and its methods of operation. From about the 1560s onwards the judges had begun to delegate the hearing of evidence to one of their number in what came to be referred to as the Outer House. His task was to report his decision to the Inner House where issues of law were discussed and decided. In 1579 the Parliament passed an Act the effect of which was that it was no longer necessary for the Lord President to be a member of the clergy, as it had been when the College of Justice was instituted.<sup>35</sup> In 1594 an Act of Sederunt was passed which prohibited a Lord of Session from sitting on a case where one of the litigants was his father, brother or son (the possibility of a litigant being his mother, sister or daughter seems not to have been contemplated), and another forbade them from purchasing land or other property that was the subject of litigation before them. By the end of the century men practising before the Court of Session were beginning to form a recognisable and independent legal profession. Even so, this was a court that was only just finding its feet. And it is not until well on into the seventeenth century that clear evidence emerges of the existence of the Faculty of Advocates headed

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<sup>33</sup> *Ibid*, p 163.

<sup>34</sup> *Ibid*, p 45.

<sup>35</sup> APS III, 153 (c 38).

by a Dean<sup>36</sup> who was recognised by the court as head of the Bar and responsible for its discipline<sup>37</sup>.

The situation that King James left behind him when he became King of England in 1603 was therefore of a legal system that was still in the process of development, rather than one that was already mature and complete in its own right. Furthermore, as he told his son Prince Henry, the greatest hindrance to the enforcement of laws was the fact this was largely in the hands of the heritable jurisdictions, the legacy of feudalism – “those heritable Sherifdoms and Regalities, which being in the hands of the great men do wracke the whole countrie.”<sup>38</sup> It is not difficult to understand his reaction when he encountered the English legal system, which was several centuries ahead of Scotland in its institutional development. He was described by Sully in a famous phrase as “the wisest fool in Christendom”, but he was certainly not without intellectual ability. He was a patron of the arts too, of music – John Dowland, John Blow, Thomas Tomkins and Orlando Gibbons were among his contemporaries – and of poetry. Many of William Shakespeare’s plays, such as *Measure for Measure* and *King Lear*, had still to be written when King James came to the throne, and the King too turned his hand to writing sonnets in the style of the period. Macaulay said that he was made up of two men: “a witty, well-read scholar who wrote, harangued and disputed, and a nervous, drivelling idiot.” In the present context I would regard him as a well-read scholar, not a fool.

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<sup>36</sup> The term “Dean” seems to have been taken from the Netherlands, as the Heads of the Bars in The Hague, Amsterdam and Rotterdam are known as “Deken”. The Dean’s symbol of office is a baton, taken from the Heads of the French Bar who are known as “Bâtonnier”.

<sup>37</sup> *Faculty of Advocates Minute Book, vol 1, 1661-1712* (Stair Society, 1976), ed J M Pinkerton, p iii.

<sup>38</sup> King James VI and I, *Political Writings*, p 29.

I think that King James was as well placed as anybody to pass judgment on the relative merits of the Scottish and the English legal systems at the start of the seventeenth century. Whether he was as well equipped to compare the English legal systems with those of Continental Europe, let alone the wider developed world beyond Europe, is less clear. But he would have been familiar with the *ius commune* and with the canon law, both of which were becoming increasingly influential in Scotland and which he distrusted. The flexibility and vigour of the common law must have been striking in comparison. In *Basilicon Doron* he told the Prince to be aware of the distinction that was to be drawn between justice and equity, a concept which would have been familiar to lawyers in England but was not to be found in the *ius commune*. “For justice, by the law, gives every man his own; and equity gives everyone that which is necessary for him.”<sup>39</sup> So, on the whole, I would be inclined to accept that there was only a small element of wishful thinking in his declaration in 1605 that English law was indeed the best of any law anywhere in the world.

If King James had had his way before he died on 27 March 1625, England and Scotland would have become one country and Scots law would have been subsumed into English law “by such a conquest as be so counted by love”, as he put it. I do not think that, if it had really been pushed to this, Scots law would have been strong enough at that time to maintain its independence. Had a union been forged at that time the Scottish legal system as a separate institution would probably have ceased to exist – and I would not have been standing here before you. Why then was it all so different in 1707 when, by the Acts of

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<sup>39</sup> Ibid, p 45.

Union, the two Parliaments were combined into the Parliament of Great Britain and the two kingdoms became truly united?

The intervening century was a period of development and consolidation, as well as of civil war and the Protectorate. The Cromwellian system, as extended to Scotland, was based on military occupation. In 1655 the Commissioners for the Administration of Justice sent to Scotland were told to ensure that the laws of England as to matters of government and legal practice be put into execution in Scotland. But the judges' commissions required them to administer justice according to Scots law and equity.<sup>40</sup> Because of a significant increase in academic learning, the civil law was by now sufficiently well established to fulfil that function. There was still very little literature of indigenous Scots law. However, frequent reference was now being made to the texts of the *ius commune* and the canon law that were to be found on the Continent. In 1661, following the Restoration, the union with England under military occupation ended and development of an independent Scottish system resumed. The Court of Session sat again, and the legal profession began to assert its independence in defence of the liberty of the subject through the Faculty of Advocates. Steps were taken to try to improve access to the sources of law by reducing them to printed written form.

These steps produced no immediate result, as to produce a complete statement of the law would have required codification – a huge task, even then. But in 1681 Viscount Stair came to the rescue. He published the first edition of his book, *The Institutions of the Law of Scotland*, which was followed by a second edition in 1693. In his *Institutions* he

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<sup>40</sup> John W Cairns, op cit (n 5), *Historical Introduction*, p 105.

sought to present for the first time in narrative form a systematic account of the whole of Scots private law. What he did was to present Scots law, still in the process of development, as a rational system based on principle. This was followed by Sir George Mackenzie of Rosehaugh's *Law of Scotland in Matters Criminal*, published editions of the statutes and the first printed collection of the decisions of the Lords of Session. Scots law was now being presented as an integrated whole, as a coherent and logical national law – nearly a century before the publication in 1765 of Sir William Blackstone's *Commentaries*.

So the stage was set for the Union agreement that was reached in 1707. The law of Scotland had just acquired a structure and an intellectual vigour which had been almost entirely absent a hundred years before. The perfect union which King James was advocating – one country, one law – was always going to be difficult to achieve, except by conquest. But by now it had become impossible. So it came about that article XVIII of the Acts of Union states that, apart from laws concerning the regulation of trade and customs and excise, which were to be same in Scotland from and after the Union as in England, all other laws in use within the Kingdom of Scotland were to remain in the same force as before. They were to be alterable by the Parliament of Great Britain, but no alteration was to be made in laws which concerned private right except for the evident utility of the subjects within Scotland. And article XIX declared that the Court of Session or College of Justice was after the Union to remain in all time coming in Scotland as it was then constituted with the same authority and privileges as before the Union.

King James would not have approved. This was a declaration that there was to be one country, two systems – the same ungovernable regime, as that of one man trying to be husband to two wives, that he had warned against. But it was a freely negotiated settlement, by which the Commissioners for each country were under instruction to present agreed terms to Queen Anne, who was to exercise the prerogative treaty making power, and to the respective Parliaments. In his famous work, *Leviathan*, published in 1651, Thomas Hobbes lamented the fact that “our most wise king James” was unable to obtain the union in 1605 that he aimed at, as this would in all likelihood have prevented the civil wars which made both kingdoms miserable<sup>41</sup>. But those times had passed by 1707. The civil wars were over, and both countries had entered upon a new system of constitutional monarchy. Perhaps, if he had been able to come back from the dead and survey the scene as it now was, King James would have been willing to concede that Scotland had at last acquired laws and a legal system that could stand comparison with those of England. I, for one, would not expect him to say that Scots law was the best law anywhere in the world. But I hope that he would be willing to accept that it was the best for Scotland and that it was, after all, just as well for the Scots that there was delay of a hundred years before the Union was eventually entered into.

20 October 2008

Lord Hope of Craighead

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<sup>41</sup> Thomas Hobbes, *Leviathan*, ch 19, para 23.

