LAW, LAWYERS, AND HUMANISM

Selected Essays on the History of Scots Law, Volume 1

John W Cairns

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Preface

This is the first of two volumes of selected essays on Scottish legal history. As with many working in this field, I have sometimes published in relatively obscure collections and very specialised journals, making some of the papers presented here difficult to obtain, even in these days of the internet. But to have selected only such papers would have created rather strange and unbalanced volumes, so other articles and chapters have been included, both to form a coherent account of specific topics, and to present a picture, if limited, of my view of Scottish legal history. In each volume there is an introduction to pull the papers together and relate them both to other contributions of my own and to current thinking about legal history in Scotland and elsewhere.

In producing these volumes, I have accumulated many debts. First, I must thank Professor Elspeth Reid who encouraged me to think that the publication of such a selection was worthwhile: she has also shown forbearance towards an author who has, as they would have put it in the eighteenth century, a "delaying humour". I am grateful to Professors Kenneth Reid and Hector MacQueen who also supported me in this project. Dr Karen Baston helped administratively in a variety of ways; and I am obliged to the Editorial Board of *Edinburgh Studies in Law* for accepting these two volumes.

The earliest of the essays in these two volumes was published as long ago as 1984, and the latest as recently as 2010. Their publication therefore covers much of my academic career, and indicates both continuities as well as developments. I completed my doctorate under the supervision of Professor Alan Watson (to whom I owe so much I cannot possibly express it here) and Dr (as he then was) Sandy McCall Smith in December 1980; in October of that year I had had the good fortune to have been appointed a lecturer in the Queen's University of Belfast in the Department of Jurisprudence. The Department was headed by Professor (now Sir) Colin Campbell, and there I had as good an introduction to an academic career as I believe to have been possible. This was my situation in 1984. By 2010, I had held a personal Chair of Legal History in the University of Edinburgh for over ten years. In the intervening period, as well as benefiting from the continuing support, friendship and enthusiasm of Alan Watson, I had, as a young scholar, received

significant encouragement from the late Professor Peter Birks, particularly when he held the Chair of Civil Law in Edinburgh.

Hector MacQueen has recently published a paper on "Friendships in the Law". The choice of this topic is far from surprising to those who know him. I have benefited from Hector's friendship in the law for nearly four decades. His energy is enviable; his support and generosity as a colleague and scholar seemingly without limit. Dr Paul du Plessis is a more recent friend and colleague; but he has become similarly important to my scholarly life in Edinburgh. Even if one prefers to work on projects on one's own, the support and friendly criticism of colleagues remains central to scholarly life. In this I have been blessed in both Belfast and Edinburgh.

All researchers in Scotland benefit from two excellent research institutions: the National Library of Scotland and the National Records of Scotland (formerly the National Archives of Scotland, and, before that, the Scottish Record Office). Assiduous readers of the footnotes and acknowledgements in both volumes will also note the help received, through access to their archives, manuscripts and rare books, from: the Advocates Library, Edinburgh; the University Libraries of Edinburgh, Glasgow and Aberdeen; the Mitchell Library, Glasgow; the British Library, London; the City of Edinburgh; the University of Glasgow; the Society of Advocates in Aberdeen; and various private individuals.

When approached about producing a collection of one's past papers, it is tempting, in darker moments, to see the suggestion as reflecting a judgement that one has nothing more of value to say; but, like all optimistic scholars, I remain convinced that my best work is still to come.

John W Cairns, Old College, August 2013

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Introduction

This selection of essays deals with some linked aspects of the history of Scots law in the early modern period, with a particular focus on the role of the Roman or Civil Law. The volume thus initially deals with the reformation of the legal system in the Renaissance period under the impact of the continuing Reception of Roman law, while also following further transformations in the era of the Enlightenment and beyond; it proceeds to consider the impact of late Dutch Humanism on Scots lawyers, and the dominant place of Roman law in their education, while finally using evidence from Scotland and other Civil-Law legal systems to help explain and understand aspects of English law in the eighteenth century. While not a continuous narrative, the selection gives a strong sense of my views on the development of law in Scotland, and of the continuing importance of the Civil Law in its formation – an importance almost impossible to exaggerate, though it has been at times unduly denigrated.[1]

The elements and influences that came together to create Scots law were similar to those that created the legal systems of most of early modern western Europe in the high and later Middle Ages: local customs, learned feudal law, Canon Law, and Civil Law.[2] In each jurisdiction, of course, the mix was to be unique. Moreover, travel and foreign study along with the circulation of books and ideas meant that there were mutual influences among the legal systems of Europe. One ends up with complex histories, not always easy to disentangle.

The essays in the present volume are by one who is an early modern scholar, who has focused mainly on the eighteenth century, and whose primary interests have been in the legal profession and legal education. This means there is little in the way of discussion of, for example, medieval Scots law. I have considered the medieval law in the relevant part of my short, but monograph-length, contribution to Ken Reid and Reinhard

1 J W Cairns and P J du Plessis, "Ten years of Roman law in Scottish courts" 2008 SLT (News) 191.
2 R van Caenegem, *An Historical Introduction to Private Law*, trans by D E L Johnston (1992) 30–114; R Lesaffer, *European Legal History* (2009) 192–415.

Zimmermann's *History of Private Law in Scotland*;[3] but this was primarily a work of synthesis, and the only originality lies in that synthesis. Readers can much more usefully be referred to the work of Hector MacQueen, David Sellar, and a number of others on medieval Scots law.[4]

The volume begins with a section entitled "Foundation and Continuity", which focuses on the intellectual background to the modernisation of Scots law in the sixteenth century under the influence of the *ius commune*. Central to this was the erection of the College of Justice under papal and parliamentary authority in 1532. Of course, the creation of the College of Justice was in some ways a reform and formalisation of the activities of the Lords of Council and Session in the earlier period; but in an essay (not included here), I argued that, contrary to a view developed out of the earlier work of R K Hannay, we can see that 1532 represented something new.[5] The essay involved a close exploration of the institutional history of the foundation of the College, involving a careful reading of the texts of the Papal Bulls, of the legislation, and of other material in a comparative context. I demonstrated that the College was the result of a deliberate policy to create a new court along the lines of other similar courts familiar in contemporary Europe, a policy to ensure establishment of a court manned by judges, some of whom at least had a university training in law.[6] The authoritative study of the foundation of the College is now that by Mark Godfrey, in which he demonstrates that it marked what almost amounted to a revolution in the administration of civil justice in Scotland, marking the end of medieval practices, symbolised by the reinforcement of use of Romano-Canonical procedure.[7]

The first chapter of the volume is one which explores the change of rituals and symbols – and rituals and symbols are very important in law – that marked the transition from the medieval to the early modern law in Scotland. It shows how a focus on the older rituals involving the "keys of the court", dempsters, serjeants, clerks, and suitors along with rituals such as fencing (defining the space of the court), calling of suits and swearing of

3 J W Cairns, "Historical Introduction", in K G C Reid and R Zimmermann (eds), *A History of Private Law in Scotland: Volume 1: Introduction and Property* (2000) 14 (henceforth Cairns, "Historical Introduction") at 15–48.

4 See, e.g., W D H Sellar, "Celtic law: survival and integration" (1989) 29 *Scottish Studies* 1; H L MacQueen, *Common Law and Feudal Society in Medieval Scotland* (1993); H L MacQueen, "Tears of a legal historian: Scottish feudalism and the *ius commune*" (2003) *Juridical Review* 1.

5 R K Hannay, *College of Justice: Essays*, ed by H L MacQueen (1990).

6 J W Cairns, "Revisiting the Foundation of the College of Justice", in H L MacQueen (ed), *Miscellany V*, Stair Society vol 52 (2006) 27.

7 A M Godfrey, *Civil Justice in Renaissance Scotland: The Origins of a Central Court* (2009).

assizers, with an intense focus on locality, gave way to ceremonies organised around the public display of learning by men trained in a university in the learned laws – in the *ius commune* consisting of the *ius canonicum* and *ius civile*. Here was a new ritual, a ritual focused on university learning in law rather than on the gathering of a local community to do justice, perhaps in its own way signifying the centralising ambitions of the Stuart monarchy.

The significance of the *ius commune* in Scotland is discussed further in the second chapter through the curious episode of the looting of law books from Edinburgh in 1544 by an English knight. The account in the chapter agrees with earlier scholars that the books looted were connected to the Abbey of Cambuskenneth, as a number of the volumes can be linked with, first, Patrick Paniter, Abbot of Cambuskenneth 1513–1519, and, secondly, his successor Alexander Mylne, Abbot 1519–1548. What is interesting about the books is that, along with a magnificent Bible, they constitute a significant part of the main sources of the *ius commune*, both Canon Law and Civil Law, together with some of the standard commentaries on them. Mylne had been Official, that is ecclesiastical judge, of Dunkeld; but in 1532, he was appointed as the first President of the College of Justice. Were these books from the Cambuskenneth library in Edinburgh in connection with his work on the Session? Supporting this speculation is the fact that the books are comparable to the library possessed by Bishop William Elphinstone as ecclesiastical judge and Lord of Council,[8] and also include works which we know, from study of Sinclair's unpublished *Practicks*, were consulted by judges in the College of Justice in the 1540s.[9] There were many volumes of printed works of the *ius commune* in Scotland at this time.[10] There were also significant collections of Scottish manuscripts of materials of the *ius commune*, of which the Stair Society has recently published an invaluable survey.[11] John Finlay has provided us with excellent insights into the men who used such material.[12]

8 L J Macfarlane, "William Elphinstone's Library" (1958) *Aberdeen University Review* 253 at 256–263; L J Macfarlane, "William Elphinstone's Library Revisited", in A A MacDonald, M Lynch and I B Cowan (eds), *The Renaissance in Scotland: Studies in Literature, Religion, History and Culture Offered to John Durkan* (1994) 66 at 68–69, 72–80.

9 G Dolezalek, "The Court of Session as a Ius Commune Court – Witnessed by Sinclair's Practicks", in H L MacQueen (ed), *Miscellany IV*, Stair Society vol 49 (2002) 51 (henceforth Dolezalek, "The Court of Session as a Ius Commune Court") at 72–75; A L Murray, "Sinclair's Practicks", in A Harding (ed), *Law Making and Law Makers in British History* (1980) 90.

10 See, e.g., J Durkan and A Ross, *Early Scottish Libraries* (1961) passim.

11 G Dolezalek, *Scotland Under Ius Commune: Census of Manuscripts of Ius Commune in Scotland, Mainly Between 1500 and 1660*, 3 vols (2010) (henceforth Dolezalek, *Scotland Under Ius Commune*).

12 J Finlay, *Men of Law in Pre-Reformation Scotland* (2000).

Gero Dolezalek has described the Court of Session as "a *ius commune* Court".[13] The College of Justice copied the procedure of the courts of the Church and also shared personnel with the Church. Though a civil court, eight of its fifteen judges, including the President, had to be "ecclesiastics". We have already noted that the first President, Mylne, was Abbot of Cambuskenneth; the second President was Robert Reid, another ecclesiastical lawyer, who was Bishop of Orkney.[14] The extensive role played by the ecclesiastical courts in Scotland enabled and reinforced the application of the *ius commune* in the College of Justice.[15] Indeed their significance is underscored by Tom Green's study of the Commissary Court.[16]

In the third chapter, there is an attempt to analyse the changing nature of the references to sources in Scotland in the 100 years or so after the founding of the College of Justice. From Sinclair's *Practicks*, it is possible to deduce the type of material used by and before the court in the 1540s. It included a range of Canon Law source material, commentaries, and decisions of ecclesiastical courts, as well as sources of the Civil Law, with commentaries such as those of Bartolus and Baldus. Indeed a rare surviving written pleading from 1503 also shows considerable reliance on Canon Law in litigation over the barony of Kingedward before the Lords of Council. The chapter traces a decline of overt reliance on Canon Law through examination of the sources cited in the *Jus feudale* of Thomas Craig, written around 1600, and the *Practicks* of Sir Robert Spottiswoode, collected from the 1620s to the 1640s. What this shows is the continued significance of Canon Law, but a failure to cite it by Spottiswoode, other than in his reliance on it for procedural issues. While Sinclair's *Practicks* demonstrate that Scotland had a typical mix of *ius commune* (Canon and Civil Laws) and *ius proprium* (Scots customs and statutes), Craig and Spottiswoode's works suggest that in the intervening period there had been a subtle change, probably due to the politics, intellectual developments and religious upheavals of the sixteenth century, out of which was emerging a competing understanding of the nature of Scots law,

13 Dolezalek, "The Court of Session as a Ius Commune Court" (n 9).

14 J Kirk, "Reid, Robert (d 1558)", in L Goldman (ed), *Oxford Dictionary of National Biography* (2004), available at *http://www.oxforddnb.com/view/article/23338*, last accessed 23 July 2013.

15 S Ollivant, *The Court of the Official in Pre-Reformation Scotland* (1982).

16 T Green, "The Court of the Commissaries of Edinburgh: Consistorial Law and Litigation, 1559–1575. Based on the Surviving Records of the Commissaries of Edinburgh", unpublished PhD thesis, University of Edinburgh (2010) 37–55, available at *http://hdl.handle.net/1842/5456*, last accessed 23 July 2013.

located within the structure of the law of nature and nations in a Europe of developing nation states with imperial ambitions.[17]

I have discussed elsewhere the importance of Craig, his politics, and his work as a scholar.[18] As yet, there has been no detailed work on the textual tradition of his *Jus feudale*, of which there have been three printed editions, the earliest appearing almost half a century after his death.[19] That said, Craig is almost certainly best read within the context of the influence of French Humanism (however that may be defined or more exactly understood) in Scotland.[20] There has been some tentative exploration of the influence of Legal Humanism on Scots law during the period;[21] but the concept of Legal Humanism of course remains to some extent contested and certainly contestable.[22] As Chapter 3 demonstrates, Spottiswoode's collection of *Practicks* exhibits the use of more modern Humanist authors.

Such law teaching as existed was also probably subject to growing Humanist influence. Thus, when the Regent Mary of Guise founded the Royal Lectureships in 1553, she appointed Alexander Sym as "her lectoure and reidar in the lawis or ony utheris sciences". In June of the same year, Edward Henryson, Doctor of Laws, was appointed to read a lesson in the laws and one on Greek thrice weekly.[23] Henryson had been educated at Bourges, noted as a centre for modern, Humanistic study of the laws.[24] William Skene, Professor of Law at St Andrews from 1558 to 1582, may also have been

17 For a rewarding further discussion of Spotiswoode, see J D Ford, *Law and Opinion in Seventeenth Century Scotland* (2007) 181–215 (henceforth Ford, *Law and Opinion*).

18 J W Cairns, "The *Breve Testatum* and Craig's *Ius Feudale*" (1988) 56 *Tijdschrift voor Rechtsgeschiedenis* 307; J W Cairns, "Craig, Cujas, and the Definition of *feudum*; Is a Feu a Usufruct?", in P Birks (ed), *New Perspectives in the Roman Law of Property: Essays for Barry Nicholas* (1989) 75; J W Cairns and G McLeod, "Thomas Craig, Sir Martin Wright and Sir William Blackstone: the English discovery of feudalism" (2000) 21, 3 JLH 54 (henceforth Cairns and McLeod, "The English discovery of feudalism").

19 See Dolezalek, *Scotland Under Ius Commune* (n 11) vol i, 184; vol ii, 296–297; vol iii, 195.

20 A point well made as long ago as 1957 in J G A Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century: A Reissue with a Retrospect* (1987) (henceforth Pocock, *The Ancient Constitution and the Feudal Law*) 70–90. On Craig's career at the Bar, hitherto neglected, see now J Finlay, "The early career of Thomas Craig, Advocate" (2004) 8 EdinLR 298.

21 J W Cairns, T D Fergus and H L MacQueen, "Legal Humanism and the History of Scots Law: John Skene and Thomas Craig", in J MacQueen (ed), *Humanism in Renaissance Scotland* (1990) 48.

22 See D J Osler, "Images of Legal Humanism" (2001) 9 *Surfaces: revue électronique* 101.6, available at *http://www.pum.umontreal.ca/revues/surfaces/vol9/osler.htm*, last accessed 22 July 2013.

23 J Durkan, "The Royal Lectureships under Mary of Lorraine" (1983) 62 *Scottish Historical Review* 73 at 73–74.

24 M-C Tucker, *Maîtres et étudiants écossais à la Faculté de Droit de l'Université de Bourges (1480–1703)* (2001) 220–221, 277–278.

educated there.[25] This is the background to the fourth chapter. In 1589, the Lords of Council and Session proposed the foundation of a chair in Law in the recently founded University of Edinburgh. The advocates opposed the innovation. Their motivations were no doubt complex; but it is important to note that among the reasons they gave for opposing the foundation was the claim that there already were functioning chairs in Law in the Universities of Aberdeen and St Andrews. They added that as graduates of these universities they were pledged to support them. They further claimed that, in any event, little benefit had come from these chairs, and just as little was likely to flow from the proposed new foundation in Edinburgh. The advocates' analysis was probably fair. In Aberdeen, law teaching was unsettled. In St Andrews, Skene did have an interesting law library, including standard works of the *ius commune* and Humanist texts, but his teaching appears to have been elementary. Nonetheless, the evidence does show the advocates' determination that intrants to the Bar should have a sophisticated university education in law, at this time only obtainable abroad. A few years later, legal education in St Andrews collapsed completely, as the then professor, William Welwood, became embroiled in political and religious feuds in the town.[26] Such residual activity as there was in Aberdeen remains shadowy.[27]

More detailed study of the period is required; but the focus on the *ius commune* in Scots legal practice completed a transformation of the earlier medieval legal system.[28] Thus, when James VI of Scotland inherited the English throne in 1603, Scots law and English law could readily be understood as opposed to one another. A document prepared to explain Scots law for an English lawyer commented: "There is noe common lawe in Scotland, but the Judge eyther proceedeth accordinge to warrant of the municypall lawe, which is the statutes of Parliament, and that faylinge they have recourse to the ymperiall civill lawe."[29] James was keen to unite his kingdoms further, and quickly adopted the style "King of Great Britain".[30] Whatever may have

25 J Durkan, "The French Connection in the Sixteenth and Early Seventeenth Centuries", in T C Smout (ed), *Scotland and Europe, 1200–1850* (1986) 19 at 25–26.

26 J W Cairns, "Academic feud, bloodfeud and William Welwood: legal education in St Andrews, 1560–1611" (1998) 2 EdinLR 158 (Part I) and 255 (Part II).

27 J W Cairns, "Lawyers, law professors, and localities: the Universities of Aberdeen, 1680–1750" (1985) 46 NILQ 304 at 306–310.

28 Ford talks in terms of a *translatio studii* from "the continental law schools to the College of Justice": Ford, *Law and Opinion* (n 17) 50–51.

29 See, e.g., J D Mackie and W C Dickinson, "Relation of the manner of judicatores in Scotland" (1922) 19 *Scottish Historical Review* 254 at 268.

30 B P Levack, *The Formation of the British State: England, Scotland, and the Union 1603–1707* (1987) 4; B Galloway, *The Union of England and Scotland, 1603–1608* (1986) 60–61.

been his pragmatic aims, his ambitions were also inspired by ideas for an imperial and universal monarchy;[31] but the difficulties were formidable. An English commentator claimed that the laws of the two countries were "*toto genere* in all things different".[32] Perhaps this was an extreme view, but those who claimed the laws were fundamentally the same also overstated their case. Thomas Craig concluded that, to bring the laws into harmony, it would be necessary either to go back to Norman law, or the *jus Feudale*; or, if common ground could not be found there, to the Civil Law, which, because it had so much natural equity (*naturalis aequitas*), shone forth among all peoples and was everywhere a common law (*ius commune*).[33] This was not a view likely to appeal to English lawyers.

A successful union of Scotland and England did come. But before that achievement, one had already been imposed in the 1650s by the armies of Oliver Cromwell. This led to an attempted major reconstruction of Scottish legal institutions combined with an aspiration to abolish Scots law, a stated ambition that was not realised.[34] But one can suspect, as indeed is argued in part of the sixth chapter included here, that the experience of the disruption of the Cromwellian period that made the Scottish political classes determined to ensure that, when Union with England did come in 1707, Scots law and its institutions were to be protected. Thus, while *ius publicum* could be altered by Westminster and made the same throughout the United Kingdom, *ius privatum* – the laws concerning "private Right" – could only be revised when it was for the "evident utility of the Subjects within Scotland". As I have shown elsewhere, this reflected both the Scottish Commissioners' knowledge of Roman legal texts, and the necessary requirement of preservation of existing legal rights.[35] The Scottish political classes were not revolutionaries. They were not setting out to be potentially expropriated by

31 J Robertson, "Empire and Union: Two Concepts of the Early Modern European Political Order", in J Robertson (ed), *A Union for Empire: Political Thought and the British Union of 1707* (1995) 3 (henceforth Robertson, *Union for Empire*).

32 Found quoted in B P Levack, "The proposed union of English law and Scots law in the seventeenth century" (1975) 20 *Juridical Review* 97 at 99.

33 T Craig, *De unione regnorum Britanniae tractatus*, ed by C S Terry (1909) 89 at 328. See further, B P Levack, "Law, Sovereignty and the Union", in R Mason (ed), *Scots and Britons: Scottish Political Thought and the Union of 1603* (1994) 213.

34 Cairns, "Historical Introduction" (n 3) at 101–105. For a recent study of aspects of the sources of the law in this period, see A Wilson, "Practicks in Scotland's Interregnum" (2012) *Juridical Review* 319.

35 J W Cairns, "The origins of the Edinburgh Law School: the Union of 1707 and the Regius Chair" (2007) 11 EdinLR 300 (henceforth Cairns, "Origins of the Edinburgh Law School") at 315–316. For an excellent recent discussion of the Union provisions, see J D Ford, "The legal provisions in the Acts of Union" (2007) 66 CLJ 66.

an alteration of the Scots private law that protected their estates and indeed determined their rights, such as those to hold courts and to vote.

Of course, the Union with England took place against a complex background of debate over unions, monarchies, confederations, and Empires that, until very recently, Scottish historiography has tended to ignore. A set of pioneering essays on Union and Empire edited by John Robertson pointed in a new direction that subsequent scholars have had to follow;[36] some excellent works on the Union have resulted.[37]

It must always be recalled that multiple monarchies and composite and conglomerate states with diverse, overlapping and distinct jurisdictions, and different laws and legal systems, were common in the European monarchies and republics of the *ancien régime*.[38] Unified political structures and unified national laws were to be the products of the Napoleonic era. Thus, both the Stuart multiple monarchy and the new Kingdom of Great Britain conformed to contemporary European patterns in both their political structures and varied legal systems. The English monarchy had extended English common law to Wales and Ireland; but the strength of the Scottish legal system and the specific political circumstances of the Union meant that substituting English for Scots law north of the border was simply impossible.

The fifth chapter of this collection further explores the broader significance of the Union for Scots law, showing how the preservation of the existing law provided by the Union did not stifle the dynamism of Scots law, nor prevent its being open to outside influences, even from English law. Whereas once the law had been seen as *ius proprium* in opposition to the *ius commune*, now it was largely viewed within a structure of *ius naturale* and *ius gentium*. The education and culture of Scots lawyers supported such an understanding.

The sixth chapter attempts to outline some of the changes in the legal system wrought by the Union. It shows that, prior to 1707, the Scots Parliament had been very active as a legislature, introducing many and significant reforms into Scots law. After the Union, this energetic legislative

36 J Robertson, "Preface", in Robertson (ed), *Union for Empire* (n 31) xiii.

37 C A Whatley with D J Patrick, *The Scots and The Union* (2006); A I Macinnes, *Union and Empire: The Making of the United Kingdom in 1707* (2007); C Jackson, "Conceptions of Nationhood in the Anglo-Scottish Union Debates of 1707", in S J Brown and C A Whatley (eds), *Union of 1707: New Dimensions* (2008) 61. The tercentenary of the Union, unlike the anniversary of the Union of the Crowns, produced some excellent research.

38 H G Koeningsberger, "Composite states, representative institutions and the American Revolution" (1989) 62 *Historical Research* 135; J H Elliott, "A Europe of composite monarchies" (1992) 137 *Past and Present* 48.

reforming activity fell away. Indeed, Westminster kept out of Scottish affairs as much as possible, legislating on Scottish affairs, other than revenue, only in response to Scottish lobbying or political crises, such as the Jacobite Rebellions.

Chapter 6 locates these developments against the intellectual history of Scots law, paying particular attention to the now rather obscure figure of Sir Francis Grant of Cullen.[39] What is important about Cullen is the way he reveals the typical mentalities of elite and thoughtful Scots lawyers of the period. He illustrates how, in seventeenth-century Scotland, as elsewhere in Europe, there had already been to some extent a re-orientation of the law, as the Roman or Civil Law and the municipal law blended in practice, so that the *ius commune* and the *ius proprium* were together creating something akin to what German scholars call the *usus modernus pandectarum*. Of course, this was founded on the earlier legal culture and traditions of the country.

The era saw the production of institutional works of law; and in this Scotland again conformed to a general European pattern.[40] The most significant of these types of works in Scotland was that produced by James Dalrymple, Viscount Stair, first printed in 1681, with a second edition of 1693, now readily available in a modern edition, based on the second, of 1981.[41] Stair's work had been circulating in manuscript, sometimes described as his Practicks, since the early 1660s, probably having first been drafted around 1659–1660.[42] Adelyn Wilson's careful study of the development of the text demonstrates Stair's reliance on a limited number of sources to write his work, blending the Civil and the municipal laws, and adding in

39 On Grant, see C Jackson, "Revolution Principles, *Ius Naturae*, and *Ius Gentium* in Early-Enlightenment Scotland: The Contribution of Sir Francis Grant, Lord Cullen (*c* 1660–1726)", in T J Hochstrasser and P Schröder (eds), *Early Modern Natural Law Theories: Context and Strategies in the Early Enlightenment* (2003) 107.

40 K Luig, "The institutes of national law in the seventeenth and eighteenth centuries" (1972) 17 *Juridical Review* 73; J W Cairns, "Institutional writings in Scotland reconsidered" (1983) 4 JLH 76 (repr in A Kiralfy and H L MacQueen (eds), *New Perspectives in Scottish Legal History* (1984) 76) (henceforth Cairns, "Institutional writings in Scotland reconsidered").

41 J Dalrymple, Viscount Stair, *Institutions of the Law of Scotland: Deduced from its Originals, and Collated with the Civil, Canon and Feudal Laws, and with the Customs of Neighbouring Nations*, ed D M Walker (1981). Various internet resources now make the first, second and subsequent editions all readily accessible.

42 See Ford, *Law and Opinion* (n 17) at 59–63; A L M Wilson "Sources and Method of the *Institutions of the Law of Scotland* by Sir James Dalrymple, 1st Viscount Stair, With Specific Reference to the Law of Obligations", unpublished PhD thesis, University of Edinburgh, 2011, available at *http://hdl.handle.net/1842/6205*, last accessed 23 July 2013 (henceforth Wilson, "Sources and Method").