

LAW, LAWYERS AND SNAILS — A SCOTTISH HISTORICAL TOUR

Scottish law is unique as it has survived centuries of conflict and a political Act of Union nearly three centuries ago. What then makes Scots law so special? It has retained a powerful and independent tradition in the face of overwhelming odds. Its influence is worldwide. Go up to the Law Institute of Victoria and visit a pub called the Snail in the Bottle — named after Scotland's most famous case — *Donoghue v Stevenson*. This case promoted the cause of consumer protection and a revised law of negligence not only in Scotland, but in most of the English-speaking world.

Over fifty years ago, Mrs Donoghue and a friend visited a cafe in Paisley on a warm Sunday evening for some light refreshments. Mrs Donoghue purchased some ice-cream and ginger beer, and on pouring some ginger beer from the bottle, observed what appeared to be the remains of a decomposing snail exiting from the bottle. After suffering, Mrs Donoghue raised an action alleging negligence against the manufacturers of the ginger beer. Amongst the obstacles to a successful claim by Mrs Donoghue were the cases of *Mullen v A. G. Barr and Co* and *McGowan v A. G. Barr and Co*. Both pursuers allege a bottle of ginger beer contained dead mice. They both failed even though in each case it was proved that the bottle contained a mouse.

The court of Session did not believe that a manufacturer had any duty to a consumer. These cases were decided a mere twenty days before Mrs Donoghue's action was raised and her lawyers were well aware of these cases — they had acted for the unsuccessful Mr Mullen. Fortunately they were not deterred! Recent commentators on the law have displayed an almost obsessive interest in this case, resulting in the unearthing of some fascinating history relating to the participants in this case, especially with regard to Mrs Donoghue. Her story is a somewhat sad one.

Mrs Donoghue was born on July 4th 1898 in Cambusland and was christened Mary Macalister. Her father was a steelworker and her mother a dyefield worker, a common occupation among working women in that area. In 1915 at the age of seventeen, Mary had a affair with Henry Donoghue who was eight years her elder. She fell pregnant and they decided to marry. They did this by one of the old irregular forms of marriage which existed in Scotland up until 1940 — *per verba de praesentis* — that is they declared their intention to marry before two witnesses and applied to a solicitor for a Warrant from the Sheriff to register the marriage which was done on February 19th 1916. A son, Henry, was born on July 25th and between 1917 and 1920 three more premature children died within days due to malnutrition.

It is accordingly clear that the Donoghue family was not a rich one. The marriage was unhappy and they separated in 1928, the year of the incidents which led to this famous case. After her lack of success in the Court of Session, the case was taken on appeal to the House of Lords. Because of her extreme poverty, the appeal was conducted *in forma pauperis*. This required the appellants to produce a certificate of poverty declaring that she:

was not in all the world worth more than five pounds.

This was issued to her by the Reverend James Dean and two Elders from Milton Parish Church.

The House of Lords granted her appeal on May 26th 1933 and the grand total recovered by the action was £200. All that is known of Mrs Donoghue's life after the action is that she eventually divorced Mr Donoghue and reverted to her maiden name in 1945 and died intestate of a heart attack on Wednesday March 19th 1958 in Gartloch Mental Hospital.

This was a Scottish case, decided on the basis of Scottish law, but decided in London in the House of Lords. Lord Atkin, who gave one of the leading judgements in the case, had floated the neighbourhood principle enshrined in the case in a speech given at King's College, London, six weeks prior to hearing the argument in Mrs Donoghue's appeal, when he stated that:

[A man] is not to injure his neighbour by acts of negligence.

Although *Donoghue v. Stevenson* was eventually decided in the English House of Lords, it was firmly based in Scots Law, a system distinct from English Law. And it depended on an answer to the question: "Who is thy neighbour?"

The Treaty of Union of 1707 in Article Eighteen guaranteed the purity of Scots Law. It drew a distinction between public and private law, declaring that public right policy and Civil government may be made the same throughout the whole of the United Kingdom but that no alteration may be made in laws which concern private right except for the evident utility of the Subjects within Scotland.

Article Nineteen laid down "no court in Westminster Hall" would have jurisdiction in a Scottish case. This article was quickly corrupted through political expediency. In the Scottish case of *Greenshields* appeal was made to the House of Lords who held that they *did* have jurisdiction because they did not sit in Westminster Hall but wherever Parliament chose to sit! This established a right of appeal in *civil* cases to the house of Lords which theoretically had to be based on Scottish Laws with at least one Scottish Law Lord in the appeal court. No such right of appeal, however, exists in criminal cases, which remains a very distinct system.

A Scottish criminal jury consists of fifteen 'men' requiring a majority of 8-7. An English jury is twelve requiring a majority of 10-2. Scottish juries have three possible verdicts — Guilty, Not Guilty and Not Proven. English juries have only the more conventional Guilty and Not Guilty. The definition of many Scottish crimes remains quite separate from the English counterparts.

Private law too remains different. Scottish contract law provides that it is possible to buy property on the exchange of formal letters. English law does not regard that bargain as concluded at this point, leading to the practice of 'gazumping' whereby a seller can apparently agree to sell to one party and then accept another higher offer. These examples constitute only a few of the myriad differences between Scottish and English law. Scots law is a knitting together of many scattered threads as varied in hue as the national tartan.

The legal history of Scotland has been a somewhat neglected field until relatively recently. Even the institutional writers — authors who wrote a definitive statement of the Law of Scotland in their time and who are quoted as binding precedent in the courts today — were not particularly concerned with explanations as to where the common law *came* from. They may be forgiven as there were very few sources for a busy lawyer to research the history of Scotland. Indeed it is difficult enough for the present-day lawyer. Ancient public records and manuscripts have been lost forever through a variety of misfortunes.

When the succession to the Scottish Throne fell into question in the thirteenth century Edward I of England was invited to arbitrate. He took all public records to London to have them examined and although provision was made for their return in the Treaty of Northampton 1328, it is doubtful whether all or any were returned. Moreover when Edinburgh castle where the national archives were kept, surrendered to Cromwell in 1650, it was provided that they be taken to Stirling and when it in turn surrendered, the records were transported to London.

After the Restoration, all that were thought to remain were put on a ship to be returned to Scotland but were lost at sea. Public records suffered from total neglect and indifference until systematic provision was made for their custody and care in the nineteenth century.

It is therefore obvious that the difficulties facing the Scottish legal historian are vast. Enough is known, however, for a reasonably succinct history to be told. Until approximately the seventeenth century, Scotland could properly be described as a remote and relatively poor country. In the earlier centuries, it was remarkably diverse, populated by a variety of peoples and consequently governed by a variety of laws. Scotland was more backward than its European cousins (in particular England) in establishing a strong royal court and legislature and accordingly was slower in having a law common to all.

English law developed much faster than Scottish law. The early, strong development of a native common law furnished by a strong royal court meant that when the civilian tradition became popular with the legal Renaissance in the twelfth century, England resisted it to the end. The law practised by the English royal court became the common law applied throughout the kingdom. The sheer variety of people and tribes populating Scotland, coupled with the various invasions and immigrations, largely prevented one body of law coming to the fore.

Orkney and Shetland were settled by the Norse and so used Norse law. Until 1468 they were part of the kingdom of Norway and still follow a different system of land tenure to the rest of Scotland. The 'Scots' emigrated in droves from Ireland and brought an established system of law with them, based on Indo-European custom. This law had parallels to the Hindu law of Manu. Both comprised canonical texts with a sacred origin interpreted exclusively by a privileged caste. Both had eight forms of marriage and both recognised fasting in front of the defendant's house as a means of securing redress. The rest of Scotland was inhabited by a variety of Britons, Angles, Gael, Picts and Celts, all with their own customs and laws.

By the 1000s, the kingdom of the Scots was largely established along the present borders but still with the wildly cosmopolitan groups living within them. The development of Scots law into a national system of coherent law was not greatly enhanced by the persistence of Norse law in the far North and the law of Clan Macduff which was still being followed in 1548. This said that only the members of the clan would install the King on his throne at his inauguration; lead in the vanguard in every expedition of war; and enjoy the privilege of the law of Macduff for sudden and unforeseen killing. By that law, a duel for the death of a member of the clan might be stopped if a fellow clansman of either combatant could pass between the accuser and his spear.

It is accordingly clear that the odds were heavily stacked against a coherent body of the law! How then, did this eventually arise? The establishment of a strong royal court and the rise of legal science as a subject of study helped dramatically. States began to crystallise, national governments developed, trade revived and populations grew. All of this necessitated administrators, judges, notaries and others with legal training. The Church, one of the most influential bodies of the time, increasingly sent its promising young clerics to the continent to learn the law.

English law remained one of the biggest influences on Scots law. Kings David, Alexander I and Edgar had all spent time in England in their youth as hostages to the court and had watched feudalism (as introduced by the Norman invaders) at work as a method of ensuring the loyalty of noblemen and of maintaining civil order and obedience. They in turn, embraced the idea and brought it North with them. By the end of David I's reign in 1153, lowland Scotland was normanised and feudalised beyond recall. Although the full theory of feudalism was not followed or even worked out, there was a general acceptance of the belief that the King had rights over all the land and could and did make lesser men his tenants.

The proximity of England and the part played by King Edward in the Great Cause (the question of succession to the Scottish Throne) meant a continuing influence on our legal

system. Even the *Regiam Majestatem* popularly believed to be a document commissioned by King David I as a definitive statement of Scots law as it stood in the early 1100s has been shown to be substantially a copy of an English work.

The canon law was in major respects common to both Scotland and England. What then made Scots law markedly different? Initially and obviously the cast variety of peoples living within Scottish borders.

Fordoun, writing in 1389, described the Scots thus:

The manners and customs of the Scots vary with the diversity of their speech. For two languages are spoken amongst them, the Scottish and the Teutonic. The people of the coast are of domestic and civilised habits. The highlanders and people of the islands, are a savage and untamed nation, rude and independent given to rapine, ease-loving, of a docile and warm disposition, comely in person but unsightly in dress, hostile to the English people and language and owing to diversity of speech, even to their own nation and exceedingly cruel.

Obviously, any law had to take account of this wide variety of peoples. Secondly, Scots law more readily accepted canon and civil laws than England as it had a less developed common law and was accordingly less bound by precedent. Scottish law was more open to the reception of new ideas and theories than England when the legal renaissance began in Italy in the twelfth century as it did not yet have a strong and hidebound legal system. Many Scots chose to study at continental universities as there were no formal universities in Scotland until the early fifteenth century Paris and Orleans were especially favoured by Scots followed by Leyden and Utrecht in Holland. Canon law was one of the popular degrees amongst the clergy. There were more clerics with degrees in canon law than in theology and there were a great many famous lawyer-popes. Bishops Kennedy, Turnbull and Elphinstone, the founders of the medieval Scottish universities, were all graduates in canon law.

Clearly the influence of civilian traditions and the civil law played an enormous part in the shaping of Scottish law and contributed a great deal in filling the loopholes discovered by the practitioners of the law. It was by far easier to fill gaps with the already existent Roman law Rashdall (author of *Universities of Europe in the Middle Ages*) noted that:

Law was the leading faculty in by far the greatest number of medieval universities. From a broad political and social point of view one of the most important results of the universities was the creation, or at least the enormously increased power and importance of the lawyer-class. Great as are the evils which society still gives to lawyers, the lawyer-class has always been a civilised agency. Their power represents at least the triumph of reason and education over caprice and brute force. (Vol III p457)

Therefore not only did the study of law have thus calming influence of Scotland and the continent, it also had an enormous influence on Scottish legal institutions — the Court of Session when first formally constituted, was based on a Parisian model.

Civilian ideas and theories were used to fill the numerous gaps in Scots law. These gaps quite simply did not exist in England. Any loopholes were filled by reference to their already strong common law.

Europe continues to have a strong influence on Scots law on a formal footing with the European community, Directives and regulations — the legislative pronouncements from one European community, frequently move to harmonise laws across the member states. For example, a European directive led to the passing of the Consumer Protection Act making the decision of *Donoghue v. Stevenson* largely unnecessary in that particular field, although it retains importance in the field of negligence. However, now as then, I am sure that Scots law will remain true to its principles.

A legal system is, quite naturally, only as good as the lawyers who practise it. Scotland is very fortunate in having the institutional writers but the legal profession developed very slowly in tandem with the emerging legal system. In early law both the Scottish and English courts appear to have been reluctant to deal with representatives and preferred litigants to appear personally. The *Regiam Majestatem* (mentioned earlier) referred to the right of the individual to appoint an attorney but only if constituted by his client being personally present in court. Such a representative did not have to be legally skilled or qualified. The practice of professional advocacy was, in fact, so extraordinary that very few mentions are made of such advocates.

In 1288 Adam Urri, a cleric of Glasgow diocese, practised the civil law for fees — *statutis imperatorum ad stipendis nummorum utebatur* — that is, to practise law for fees — but is stated to have repented before he died. One of Robert I's statutes of 1318 referred to a tenant or his prolocutor, which is probably one of the first statutory mentions of a legal representative and the practise continued to spread during the fourteenth and fifteenth centuries.

Two statutes in the fifteenth century place the profession on a legal footing, as it were. One referred to the right of 'onie pure creature' to use the services of an advocate and his right to be recompensed by the wrongful party. The other went one step further by declaring that only men of honesty and discretion were to be educated to be attorneys.

The judicial bench that we recognise today had an equally tremulous start. By the fourteenth century people were long used to referring disputes to a higher authority for arbitration. During the medieval period, however, judges were largely unqualified and untrained. Some were trained in canon law. The Education Act of 1496 ordained that all barons and freeholders of substance were to put their eldest sons and heirs to school from the ages of eight to none until they had learned perfect Latin a to stay on for a further three years at the schools of art and law so that they might have 'knowledge and understanding of the laws through which justice [could] reign universally.' This was to provide a pool of competent men for judicial office. In default of skilled and more importantly, upright, judges, statute provided that judges should not take bribes and should remain independent. Parliament sought repeated to insist on a high standard of judicial duty and many statutory provisions existed penalising judges who did not enforce particular provisions of the law. The gradual rise of legal science and the renaissance of the continental law schools coupled with the increase in Scottish students studying abroad helped to remedy this state of affairs.

Only the existence of an established judicial structure and the works of the institutional writers such as Viscount Stair (who wrote the civil law institutions) enabled Scots law to survive the Treaty. Viscount Stair was a truly extraordinary man. He lived in turbulent times and his capacity for change and survival as well as his clear legal ability are to be admired. He was educated in Mauchline and then in the University of Glasgow, graduating in 1637. He went to Edinburgh intending to become an Advocate but instead saw military service in the war of the Covenant before returning to Glasgow and the life of a University philosopher until 1647 when he decided to go back to Edinburgh and the Bar. The year after his call to the Bar, he went as Secretary to the Commission appointed by Parliament to treat with Charles II as to the terms in which he was to return to Scotland.

During his absence he had been appointed to a Commission for the revision of the law, a job he was prevented from doing through the troubles of the times. He went to Breda, again to treat with Charles in 1651 and this time a treaty was agreed. Thereafter he had a few relatively peaceful years practising as an Advocate before he was appointed a Judge of the Reformed Court of Session by Cromwell on the instance of General Monk, Cromwell's Scottish adviser. His term of office did not last long as the courts were shut following Cromwell's death, for two years. He advised Monk to call a full and free Parliament, a counsel which resulted in the Restoration after which he was reappointed to the Judicial Bench. However, his judicial career

very nearly came to an abrupt end when he refused to take a declaration at the King's instance, declaring the national covenant an unlawful oath.

The King, after initially demanding his resignation, allowed Stair to take the oath subject to an implied understanding that he did so only 'against whatever was contrary to his Majesty's right and prerogative.' In 1670, Stair was one of the Scottish Commissioners sent to treat as the Union of the two kingdoms, which negotiations subsequently broke down. Towards the close of the year he was appointed President of the Court of Session. When, in 1680, the Covenanters were being persecuted mercilessly, Stair tried to lessen the severity of the Test Act by the inclusion of a clause declaring that the Protestant religion should be defined in it as

The religion contained in the confession of faith recorded in the first Parliament of James I, which is founded on and agreeable to the word of God.

However, the form in which the Act was passed meant that no honest man could sign it. Stair found that he himself was subject to persecution through his refusal to sign. He was not included in a new commission of Judges and he took the opportunity of his enforced leisure to write his *Institutions*. After being advised by the King's Advocate that he was likely to be arrested and condemned for treason because of his actions with regard to the Test Act, he fled to Holland. He found that

I was in continual suspicion, my tenants were thrown into prison and forced to give bonds on pretence of conventicles for more than they were worth, and my rents were arrested.

Escape was accordingly the wisest choice. His persecutors tried and failed to have him expelled from Holland and he was found guilty of treason in his absence. He refused his subsequent remission, not returning to Scotland until he accompanied William of Orange in 1688. His final days are marred by the actions of his son, the master of Stair, who neglected to tell the King that Glencoe had taken the oath of allegiance, although after the date fixed, thus leading to the Massacre of Glencoe.

Lawyers have fulfilled other roles in history. Boswell wrote the biography of Dr Samuel "Dictionary" Johnstone. Sir Walter Scott wrote some of the greatest Scottish literature, as did Robert Louis Stevenson, all of whom practised at the Scottish Bar,

Scotland has a fiercely independent legal system. It has resisted attempts to unify the law across the United Kingdom and it will doubtless remain individual within the wider European context. Our private law remains distinct. It has quite different historical influences and sources than English law. It is a fluid system with the capacity to adapt to changing morals and society. The highest criminal court is perhaps unique, with its declaratory power which allows it to declare new crimes — a power which it uses sparingly.

The Scottish people themselves are noted for their pride and independence, perhaps encapsulated in the popular toast:

Here's tae us and wha's like us;
Damn few and they're a' deid.

Despite the 'threat' of the Treaty of Union and the political shenanigans which accompanied it, moving Robert Burns to note:

We're bought and sole for English gold, sic a pariel of rogues in a nation

Scotland has retained its own culture, identity and above all its own legal system, which, given its staying power and its capacity to live in relative amity with the English system yet retaining its individuality, will in a European context survive and strengthen.

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