CHAPTER VI

THE LAW

The Law is the true embodiment of everything that's excellent.
It has no kind of fault or flaw,
And I, my Lords, embody the Law.

W. S. Gilbert

1. *Scots Law and English Law*

Under the Treaty of Union, as has already been noted, Scotland was guaranteed the preservation of her Law (so far as this concerned Private Right) and the independence of her Courts of Justice. Alterations were to be made in her Laws only for 'the evident utility of the subjects within Scotland'. We have seen how inadequate for this purpose is the legislative machinery of a predominantly English Parliament, whose members can even boast that they know nothing of the Law of Scotland. Although it is perhaps less obvious, the institution of appeals to the House of Lords, besides undermining the independence of the Scottish Courts and imposing heavy expenses on Scottish litigants, worked also as a device for altering the Law of Scotland and adjusting it to English models. With the best will in the world – and this was not always present – English judges, interpreting a law of which they knew nothing, could hardly be expected to do anything other than assimilate the Law of Scotland to that of England, even when the result was inconsistency and confusion. Scots Law, like so many other Scottish institutions, was denied its own natural development in accordance with its own principles. As was said by the late Lord Cooper of Culross, we have confided the last word on a Roman system of law to a court whose members are drawn predominantly from the opposite camp of Anglo-American law. Indeed for a century and a half the situation was much worse,

since during this period the members of the court were drawn, not predominantly, but exclusively, from the opposite camp.

It must again be emphasised, since there is so much ignorance on this subject, that Scots Law, like other European developments of Roman Law, differs from English Law in its fundamental principles; and that to assimilate it to English Law must inevitably produce internal incoherence (sometimes glorified as 'greater flexibility').

Continental lawyers have suggested that if Britain were to enter the European Common Market, Scots Law might be used as a sort of bridge between English and European Law. Such a suggestion awakens no echo in London: when a committee was set up to consider the legal implications of the proposed political change, it was composed entirely of English lawyers. There is a fear in Scotland that closer connexions with Europe might be used to substitute English for Scots Law in Scottish dealings with continental countries. This is presumably one of the reasons why a Scottish judge remarked that if Britain were to enter the Common Market, it might be necessary to have a new declaration of Scottish independence. In any negotiations for such an entry Scottish legal interests should be represented in order to ensure that no agreement should prejudice the system of Law guaranteed by the Treaty of Union. But there seems little hope that these (or any other special Scottish interests) will be represented at all.

2. *Differences in practice*

Apart from differences in their theoretical approach the two systems of law differ fundamentally in their practical working; and Scots lawyers are apt to claim that their system is, not only the more logical, but also the more just and more merciful: it is said, for example, when compared with English Law, to show more concern for the liberties of the individual and less for the rights of property; to be more bound by principles and less tied to precedents; to lay more stress on matters of substance and less on questions of technicality. Indeed in certain respects, few perhaps in number but of fundamental importance, it is

even claimed that until recent years the Law of England was centuries behind the Law of Scotland.

The Crown, for example, has in Scotland always been responsible for breaches of contract and is more strictly bound by statute than it is in England. Landlords have had weightier responsibilities to their tenants and less protection against trespassers. Divorce has been allowed on two grounds since the Reformation, and in this respect women have been given equal treatment with men, whereas in England divorce (except by a Private Act of Parliament) was forbidden till the Nineteenth Century and women have gained equality of treatment only in very recent years. Illegitimate children became legitimate through the subsequent marriage of their parents – a measure introduced in England as late as 1926. Wives and children were protected against being completely disinherited by the arbitrary will of a husband and father – another measure only recently introduced into England in a more limited form. Cheap and speedy justice has long been within the reach of any one through the Sheriff Courts in a way said to be still unknown in England.

Similar differences are to be found in the Criminal Law of the two countries. The strange crime of attempted suicide was never recognised in Scotland; and until recently any one anxious to drown himself in the river Tweed was well advised to try this from the northern bank; for there the most he could ever be charged with is a breach of the peace. In Scottish criminal trials the prosecution has to build up its case gradually from evidence without the initial speech which in England may colour the mind of the jury in a way from which it never recovers; and the defence is allowed the last word after the final speech for the prosecution. Until the recent softening of the public attitude to crime and its punishment, the penalties inflicted on the guilty were less than those imposed in England for the same crimes. It is noteworthy that immediately after the Union one of the first changes made in Scots Law by the new British Parliament was to bring the Law of Treason into line with the harsher law of England.

In Scotland the right to prosecute for crime has long been

almost exclusively in the hands of public prosecuting authorities – England appears to be unique in the civilised world in leaving this right mainly in the hands of private individuals and the police (who themselves were supposed to act as private individuals). In murder cases the Scottish system avoids the premature publicity which arises in England from the preliminary trial before the magistrates, where the case for the prosecution becomes known often without any statement of the case for the defence.

In England the coroner's inquest often adds yet a further complication to a subsequent criminal trial, and even apart from this may cause unnecessary pain to the relatives of the deceased. The fact that there are no coroners in Scotland, though too often unknown to writers of detective fiction, means that painful publicity at a time of tragedy is avoided, and there seem to be no great counterbalancing disadvantages.

These brief allusions to a complicated and controversial subject are not made in order to decry the laws of England, but simply to suggest that the assimilation of Scots Law to English models may not necessarily be for 'the evident utility of the subjects within Scotland'.

3. *The House of Lords*

It was this un-English system of Scots Law that was put, immediately after the Union, under the paramount authority of a purely English House of Lords. Even the counsel who pleaded before it were at first mainly English. The proceedings were carried on in the pure language of the English Law – the only language the Court understood – and the decision had in the end to be translated, whether well or ill, into Scottish terms unless, as sometimes happened, they were set forth in terms which were meaningless in Scotland and consequently incapable of being carried out. In their difficulties the House of Lords sometimes referred questions of law to the English judges, as they did in purely English cases. At other times they sent the decisions under appeal back to the Scottish courts in order to have them restated – a procedure which added to the already oppressive costs of litigation. For a short time Lord

Chancellor Lyndhurst, rightly feeling himself incompetent, delegated his work to two so-called 'Speakers', who also knew nothing of Scots Law. The gentlemen so entitled were not permitted to speak, but at the close of an argument they made a sign and retired in silence. In an adjoining room they expressed their opinions, and having done so returned to the Woolsack to resume their taciturnity. Then a lay figure, who need not even have heard the argument, would rise to his feet and might gravely move that the judgement complained of be reversed. This method was more suited to a comic opera than to a court of law. Fortunately it did not last long, but it lasted long enough to bring discredit on the highest tribunal in the country.

Even if we discount the contention that appeals to the House of Lords were instituted in breach of the letter and spirit of the Treaty of Union, it can hardly be denied that the method of conducting these appeals was indefensible from the start. The situation was aggravated by the fact that the members of this august tribunal were as ignorant of Scottish conditions and traditions as they were of Scots Law. Because English lawyers seemed unable to conceive a Church except as either a department of State or a trust company, the Church of Scotland had to wait until 1921 before it could realise an ideal of liberty which had been pursued continuously since the Reformation.

The system threw a very heavy additional burden on successive Lord Chancellors of England, and the best of them were well aware of their ignorance and sometimes oppressed by their responsibilities. Thus Lord Erskine, although himself a Scotsman, could say: 'I know something of the law, but of Scots Law I am as ignorant as a native of Mexico; and yet I am quite as learned in it as any of your Lordships'. Similar remarks could be quoted from Lord Chancellor Brougham and Lord Chancellor Chelmsford. As to the burden, we need only quote Lord Eldon's observation about Scottish appeals: 'When I became Chancellor the duty of deciding such causes was most extremely painful and requiring infinite labour.'

In spite of these inevitable hardships Lord Chancellor after Lord Chancellor faced his impossible task with true bull-dog courage. Some, like Lord Lyndhurst, and even on occasion

Lord Cranworth, showed a becoming tendency to hesitate about reversing Scots decisions. Others were less modest, and their attitude is revealed in some memorable observations.

In 1830 Lord Wynford made the following statement: 'I protest against what has been said in another place, namely that English lawyers are not competent to advise your Lordships on a question of Scots Law. As well might they say that one who had studied logic in Edinburgh would not be able to reason on any question of morality or policy that arose in England'.

In 1802 Lord Alvanley remarked: 'Here we have no question peculiar to the law of Scotland. The law as to nuisances must be the same in both countries'. In actual fact the case being considered did not purport to be concerned with nuisance, and the laws as to nuisances differ very greatly in Scotland and England.

In 1845 Lord Campbell, in spite of his Scottish origin, expanded this bold generalisation. 'The law', he declared, 'must be the same in all countries where law has been considered as a science'.

But perhaps the gem of the collection is to be found in a statement by Lord Cranworth in 1858. Having first reviewed a series of English cases in accordance with the usual practice, he turned finally to the Scottish authorities and said this: 'But if such be the law of England, on what ground can it be argued not to be the law of Scotland? The law as established in England is founded on principles of universal application, not on any peculiarities of English jurisprudence'.

Attitudes of this kind could not but be adverse to the rational development of law in Scotland. They also illustrate in a limited sphere a more general English failure to recognise Scotland as a partner with traditions and problems of her own.

4. *Legislation by English judges*

One example of the way in which the House of Lords could in effect legislate, and legislate badly, for Scotland may be taken from the case in which Lord Cranworth produced the remarkable statement that has just been quoted. The problem to be considered was whether a master could be held responsible for

damage incurred by one of his employees through the carelessness of another. This was denied in English Law on the rather odd principle that servants must be supposed to have contemplated the risks of their employment before they undertook it. Scots Law took the opposite view and held that the master was responsible in the case of a servant just as he would be where damage had been incurred by any third party. In the case of *Bartonshill Coal Co.* v. *Reid* this principle had been followed by a unanimous Court of Session; but its judgement was reversed by Lord Cranworth on the ground, as we have seen, that the English rule was founded on principles of universal application and so could not but be the law of Scotland. The result was that an irksome rule plagued Scotland for nearly a hundred years until English lawyers woke up to the badness of their own rule and procured its abolition in 1948 to the general satisfaction on both sides of the Border.

There was another case even odder, if less harmful in its effects. The question here was the standard of care owed by an occupier to persons entering his premises – care to secure that they did not come to any injury as a result of the state of the premises or of anything done on them for which the occupier was in law responsible as occupier. English Law distinguished different categories of persons entering an occupier's premises (as 'invitee', 'licensee', or 'trespasser'). These categories were not recognised in Scots Law, but they were imposed on it in 1929 by a decision of the House of Lords reversing a decision of the Court of Session. Here again the English rule was finally recognised to be unsatisfactory and was abolished in England in 1957. The absurdity then arose that while England now enjoyed the former advantages of Scots Law, the Scottish Courts continued to be troubled with the irksome English rule imposed on them arbitrarily by the House of Lords. It was not till two years later that a measure was introduced to restore what had always been the Common Law of Scotland.

These two examples – one of them very recent – are instances of changes in Scots Law made directly by decisions of the House of Lords. Not unnaturally under the circumstances, there were also changes made indirectly by the House of Lords through its

influence on Parliament. One of the best known of these was the introduction into Scotland of juries in civil cases. This was done in 1815 on the English model, mainly, it is alleged, in the hope that the work of the House of Lords would be made easier. This innovation was bitterly regretted by Sir Walter Scott, and it has irked Scottish lawyers right down to the present time; it has to-day the curious result that civil juries are drawn exclusively from the citizens of Edinburgh and the Lothians. As the civil jury has now been almost abandoned in England except for one or two special types of action, there may perhaps be some hope that in the course of time Scotland may be freed from an alien system which should never have been imposed on her. Here too England may ultimately catch up with the old Scottish system, but why should Scotland have so long to suffer?

5. *Reform*

It would be tedious to go on piling up grievances or claiming further advantages for the Scottish legal system. Enough has been said to suggest that Scots Law has been humane and rational and in certain respects pioneering: it reveals the liberal spirit of Scotland and certainly is in no way to be despised; and indeed it does credit, not only to Scots lawyers, but also to the old Scottish Parliament, which is too often dismissed as wholly ineffective. Enough has been said to suggest also that Scots Law has received very ill treatment in the past and even in the present, and that the English attitude to Scotland has not always shown that consideration which is due to a partner in a free union.

Perhaps we may add one brief illustration of the pioneering spirit of Scots Law. From A.D. 1425 onwards the Faculty of Advocates met annually to appoint 'Counsel for the Poor' to defend for love of God any poor creature who 'for fault of knowledge or expenses cannot or may not follow his cause'. This ancient ceremony came to an abrupt end in 1965. After more than five hundred years the English had at last caught up and introduced a Legal Aid Scheme of their own, and the Scots instead of having their own venerable law amended where this

was necessary were obliged to adopt the latest model from London in its place.

There has been no attempt here to make a balanced comparison between the Scottish and English systems, which is obviously a matter only for experts; and in any case it is not necessary to disparage one system in order to praise another.

But what are we to say of the present situation as a whole? Some eminent Scottish lawyers accept it with satisfaction while others do not; but it may be observed that elderly gentlemen who have risen to great eminence in their profession may be a little too ready to defend the excellence of the *status quo*. There is no doubt that Scotland requires some highest court of appeal, though it is hard to see why this should not have been purely Scottish from the beginning. At present there are Scottish judges who, as members of the House of Lords, usually, though not necessarily, sit for Scottish appeals so that the House of Lords is no longer without the indispensable expert advice which was lacking for so long.

The main suggestion for improvement is that for Scottish appeals the House of Lords should sit in Edinburgh. It is difficult to see why it should not then have a majority of Scottish judges, though this possibility seems not to have been considered. A move of this kind would certainly do much to placate Scottish feeling and to reduce the expenses of Scottish litigants. The Faculty of Advocates would be deprived of jaunts to London at the expense of their clients and might be expected to regard the proposal with mixed feelings. Otherwise it would be very welcome in Scotland and would do something to make up for injustices in the past.

Such a reform, however, would still be incomplete. What is required is a Parliament in Edinburgh which would be familiar with Scottish conditions and would be able to develop the Law of Scotland in accordance with its own traditions and with the spirit of the Scottish people.

CHAPTER VII

THE FRAMEWORK OF TAXATION

In this world nothing can be said to be certain,
except death and taxes

Benjamin Franklin

1. *Economic grievances*

For many years before the First World War Scotland was in certain respects one of the richest countries in the world – even richer than England according to some estimates of wealth per head of the population. On the same basis England at that time was thought to be richer than America. Whether these estimates are accepted or not, it seems certain that since then Scottish wealth has steadily declined in comparison with that of England. This is not an agreeable situation when the disparity seems likely to increase. But Scotsmen are inclined to flatter themselves that they are not without a capacity to meet the hardships inevitable in a difficult and changing world. Their fundamental grievance in economic as in other matters is that they are no longer able to control their own progress or regress, as to some extent they could in an age of Free Trade and *laissez-faire*. Now that governments determine more and more the economic progress of a country, it is widely believed that the economic troubles of Scotland spring at least in part from the policies of a London Government whose main concern is always with England, and primarily with the South of England.

A good man may learn to content himself with a modest estate. What he finds intolerable is that his estate should be mismanaged at great expense, and without any proper audit, by a trustee who insists on doling out to him his own money in small packages and on controlling every detail of his expenditure. This is the position of a ward, and not of a grown up. What