4. Natural Law, National Laws, Parliaments and Multiple Monarchies: 1707 and Beyond

John W. Cairns[187*]

Ditlev Tamm has pointed out that the gateway of the town of Rendsburg in Schleswig contained a stone marking the northern limit of the Holy Roman Empire.[188] Among the many implications of this, one may be singled out. Whatever may have been the importance or effectiveness of the Empire, the territory beyond the river Eider could not even in theory be subject to the jurisdiction of the Reichskammergericht in Speyer (or later Wezlar) and hence subject, barring local statutes and customs, to the authority of the *gemeines Recht* applied by that court. South of the Eider, Holstein, however, also under the King of Denmark, was a Duchy of the Empire. This is just one indicator of the potential legal complexity of the territories of the Danish composite monarchy, which included through the eighteenth century, as well as these German territories, Norway, Iceland, Greenland, and some Caribbean islands. Scotland had no need of such a boundary stone to indicate it was not part of the Empire, although in 1469, shortly after James III's marriage to Princess Margaret of Denmark, Parliament, declaring that the king possessed "ful Jurisdictioune and fre Impire within his Realme", deprived the work of imperial notaries of any authority in civil cases in Scotland.[189] Ten years later, a clergyman was accused before Parliament of "tresonable usurpacioune" for his pretended legitimation of a child "in the name and Autorite of the Emperoure, contrare to our souverain lordis croune and maieste Riale".[190] So even in Scotland the universal claims of the Emperors had an impact.

Both Scotland and Denmark have an identity and national consciousness which may be traced to the middle ages.[191] In both, the law has commonly come to be seen as one of many badges of that national identity. Without endorsing this (essentially nineteenth-century) view, comparison of the circumstances of the two countries brings differences rather than similarities to the front in assessing their laws. Thus, Scots law became a minority system in the British composite state; Danish law, on the other hand, was dominant in the Danish composite state. Despite the explicit rejection of the authority of the Roman

Emperor in 1469, by 1700 Scots law had become strongly marked by a reception of the *ius commune* of Roman and Canon law. The culture of the elite Scots lawyers based in Edinburgh practising before the Court of Session was cosmopolitan. For nearly two centuries past, they and the judges before whom they pleaded had commonly been educated to a high standard in a continental university in Civil, that is Roman, and often Canon law.[192] It is this "civilian" aspect of Scots law that has traditionally been used to emphasise its difference from English law. In contrast, as a mark of identity, Danish law emphasised its "Nordic" roots in opposition to the Romanistic *gemeines Recht* of Germany, to which the Scots law of around 1700 could in fact be much more easily compared.[193] As a badge of particular national identity, the cosmopolitan nature of Scots law only worked in opposition to English law.

Composite states, conglomerate states, and multiple monarchies were normal in early modern Europe.[194] Crucial to any further comparison of the Scottish and Danish positions is an understanding of contrasting systems of government and legislation in the eighteenth century in this context. In the 1660s, Denmark had become an absolute monarchy, the terms of which were embodied in the Royal Law of 1665.[195] Symbolic of, and deriving from, the monarch's new absolutist powers was Christian V's promulgation of a new Danish Code, unifying the laws within Denmark, in 1683 (a version for Norway was promulgated in 1687).[196] Indeed, this marked an historical development whereby the Danish kings came no longer to be seen as judges, but rather as legislators, in line with absolutist natural-law theory of the type currently being developed by, among others, Samuel von Pufendorf.[197]

In 1603, James VI of Scotland had inherited the English throne. Despite inconclusive negotiations and discussions of various forms of closer union, the two countries remained united only by the Stuart dynasty. If not in the formal position of subjection to England that was the lot of the kingdom of Ireland, Scotland was no longer generally able to act independently, foreign policy, for example, typically being determined in England. Assessment of the Stuart (and Willemite) multiple monarchy and of the consequent political tensions within the British Isles would be superfluous: suffice it to say that during the seventeenth century both English and Scots in the long run found the regnal union problematic, even disastrous.[198] Though a closer Union was far from the necessary result of all this, a mixture of politics and ideology contributed to bringing about a more incorporating union of England and

23
19 July 1681

EDINBURGH, the nineteenth day of *July*, 1681.

FOrasmuch as it hath pleased the Kings most Excellent Majesty, to call a Parliament of this Kingdom to meet at *Edinburgh*, upon *Thursday* the twenty eighth of *July* instant; His *Royal Highness*, His *Majesties* high Commissioner, and Lords of Privy Council, Do hereby Command and Require, the Lyon King at Arms, and his Brethren Heralds, Macers, and Pursevants, to pass to the Mercat Cross of *Edinburgh*, and there, by open Proclamation, to Warn all the Lords Spiritual and Temporal, Officers of State, Commissioners of Shires and Burrows, to conveen at *Holyroodhouse*, the said twenty eighth of *July*, by nine of the Clock in the forenoon; the Lords furnished with their Gowns, Robes, Horses, and Footmantles; and the Commissioners of Shires and Burrows, with their Horses and Footmantles, to attend His *Royal Highness*, His *Majesties* high Commissioner, on Horse-back, in his going to the Parliament-House, and in his return. And to the end, it may be known who are to be Admitted as Commissioners for Shires and Burrows, that all Persons having Commission from any Shire or Burgh, deliver in their Commissions to the Clerk of Register, upon the twenty fifth instant, in the forenoon, in the Parliament-House, that accordingly they may be Admitted as Commissioners to this Parliament.

WIL. PATERSON, Cl. Sti. Concilii.

Printed by the Heirs of *Andrew Anderson*, Printers to His most Sacred *Majesty*, Anno DOM. 1681.

Proclamation of Parliament
This image depicts a surviving example of the official printed proclamation ordering the Riding of Parliament in 1681. The High Commissioner represented the monarch, and here it was James, Duke of Albany.
The image is topped by the royal coat of arms in its Scottish quartering.

Scotland in 1707; an event about which nothing was inevitable – not even the event itself – and the negotiations serious and difficult.[199]

The most important and obvious effect of this Union was disappearance of the Scottish Parliament. If in theory the English Parliament was also abolished, in practice for England there was continuity, but with forty-five Scottish members added to the House of Commons and sixteen elected Scottish peers to the House of Lords.[200] For Scotland it was different; there was no longer a Scottish Parliament and soon no Privy Council. Nevertheless, Scotland continued in many ways as a polity on

its own, with its own rich civic culture and complex structures in which there was considerable participation. It is important to note that the Honours of Scotland, the arched imperial crown, sword of state, and sceptre, which symbolised independence and sovereignty, were to be kept in Scotland along with the parliamentary and other records and warrants, and "so [to] remain in all time coming notwithstanding of the Union".[201] These structures and provisions demonstrate the extent to which the Union was only partly incorporating.

Structures of Government before the Union

Before 1707, the main institutions of central government in Scotland were the Parliament and the Privy Council. The former was unicameral, consisting of the monarch, the estates of the realm (the nature of which had varied, though once having classically been the three estates of clergy, nobility and burgesses), and the various officers of state, such as the Chancellor, Secretary, Justice-Clerk, Lord Advocate, and so on. After 1603, the king attended Parliament in person only exceptionally, but he was represented both by his Commissioner and symbolically by the presence of the Honours of Scotland – Crown, Sceptre, and Sword of State. Royal assent to acts was signified by touching them with the sceptre.[202] While the royalist lawyer and political and constitutional theorist Sir George Mackenzie (1636-91) had argued that legislation was the prerogative of the king, the Estates only consenting, by 1707 it was clear that legislation was enacted by both monarch and estates.[203] The Privy Council was dominated by the officers of state and guided the administration of the country, developing and implementing royal policy and enforcing the laws.[204]

The most important local officer was the sheriff, a royal appointment, dating from the middle ages. By 1707 around two-thirds of sheriffs held office heritably, that is by hereditary right as property.[205] They were responsible in their sheriffdoms for the execution of royal writs, including those for court summonses, summoning of jurors, elections to Parliament and so on. They presided over assizes that determined the cost of bread. They summoned meetings of the freeholders of the sheriffdom and were returning officers for elections.[206] Commissioners of Supply had been established in 1667 to enable collection of a land tax known as the cess.[207] They progressively acquired responsibility to collect other taxes for other miscellaneous duties, such as ensuring repair of highways and bridges. They were named annually in the Act of

Supply from lists of landowners and met frequently as the sheriff had to call them to ensure collection of taxes.[208] Justices of the peace had been introduced in 1609, though their role remained that of minor local administration.[209] County freeholders, basically feudal superiors who owned land of a certain value, assembled before the sheriff for various head and other courts, where business could be transacted. Such assemblies also gave them the opportunity to act collectively, to petition Parliament or the Crown on matters that concerned them. The justices of the peace and the commissioners of supply were inevitably chosen from the freeholders. It was the freeholders who elected members to Parliament.

By 1707, there was an extensive system of royal burghs and burghs of regality or barony in (mainly) lowland Scotland. All had privileges founded on a charter, but royal burghs in theory had a monopoly on overseas trade, returned members to Parliament as the estate of burgesses, and were largely self-governing with what were essentially self-electing oligarchic councils. Royal burghs also had a significant institution in the Convention of Royal Burghs, which met regularly and lobbied on their behalf.[210]

After 1690, the established national church was Presbyterian. If this – and the doctrine of the "two kingdoms" – meant it was no longer directly represented in Parliament, the Kirk had an influential body in its annual General Assembly, which contained prominent lay members. It could – and did – lobby politicians, petition Parliament and monarch, and thereby was a body that statesmen could not ignore. The Kirk's synods, presbyteries, and sessions (in the parish) exercised discipline over clergy and laity. In each parish there was a group of heritors, landowners with a duty to maintain the kirk and manse, ensure there was a schoolmaster, and pay the minister his stipend from the teinds of the parish.[211]

The Legal System before the Union

The most important civil court was the [Court of] Session, a central court developed out of the King's Council in the fifteenth century and reformed as the College of Justice in 1532.[212] With jurisdiction in all matters of civil or private law, it had its own *stylus curiae*, elaborated on the foundation of Romano-Canonical procedure. It was possible to take a "protestation for remeid of law" from the Session to the Parliament.[213] The central criminal court was the Justice or Justiciary Court,

which had been reformed in 1671. It could travel on circuit round Scotland, but this remained irregular until after the Union. An accused was tried by jury in a procedure similar to but far from identical with an English trial.[214]

The sheriff exercised the most significant local jurisdiction.[215] Sheriffs generally appointed a legally-trained depute to do the work, who might also appoint a local substitute. Sheriffs possessed a wide civil and criminal jurisdiction. Scotland was also covered by a system of Commissary Courts, secular successors to the former ecclesiastical courts, with that of Edinburgh having a supervisory and wider jurisdiction, particularly over divorce and marriage.[216] Competing in significance with the sheriff were those landowners who had rights of regality, that is who possessed a jurisdiction almost as great as that of the Crown, though in civil matters subject to the Session's powers of adjudication and suspension. Many landowners had lesser, but still important, rights of jurisdiction as barons. It is often suggested that lords of regality and barony were not very active in exercising their jurisdictions around 1700, but where evidence survives this seems often to have been far from the case.[217] Remembering that many sheriffs held office heritably, it has been calculated that Scotland probably had over 200 heritable jurisdictions in 1707.[218] The importance of the sheriff court and franchise jurisdictions meant that the justices of the peace never developed the vital significance they possessed in England and had been allowed to lapse in 1641. Revived after the Restoration, some justices were active around the time of the Union, though their effectiveness may be questioned.[219] Burghs also held courts, only those of Edinburgh excluding the jurisdiction of the sheriff.[220]

Putting aside consideration of the Gaelic culture of the Highlands, Scotland had long had a unified law. This consisted of the "municipal law", identified with statutes and customs, and the "common law", understood as the Roman law received in Europe, along with the feudal, Canon, and mercantile laws. Reliance on the Roman law was thought to secure liberty, property, honour and life, by providing certainty and avoiding arbitrariness.[221]

Provisions of the Union

The eighteenth article of the Act of Union provided that the same laws on trade, customs and excise as in England would be applied in Scotland, adding that "all other Laws, in use within the Kingdom of

Scotland do after the Union, and notwithstanding thereof, remain in the same force as before ... but alterable by the Parliament of Great Britain". A distinction was drawn, however, so that laws "concerning publick Right, Policy and Civil Government" could be made the same throughout the United Kingdom, while "no alteration [might] be made in Laws which concern private Right, except for the evident utility of the subjects within Scotland". The nineteenth article preserved the Court of Session and Court of Justiciary "in all time coming within Scotland", though subject to such "Regulations for the better Administration of Justice" as the Parliament of Great Britain might make. The existing Admiralty Jurisdiction was preserved, though now under the Lord High Admiral or Commissioners of Admiralty of Great Britain; the Parliament of Great Britain was empowered to alter this court, though an admiralty court was always to be preserved in Scotland to deal with "Maritime Cases, relating to private Rights". Heritable rights of admiralty were preserved as rights of property to their proprietors. All inferior courts were preserved, though alterable by Parliament, while "no Causes in Scotland [were to] be cognoscible, by the Courts of Chancery, Queens-Bench, Common-Pleas or any other Court in Westminster Hall"; moreover, these courts were not after the Union to have "power to Cognosce, Review, or Alter the Acts, or Sentences of the Judicatures within Scotland, or stop the Execution of the same". A new Court of Exchequer was to be erected in Scotland, "for deciding Questions concerning the Revenues of Customs and Excises ... having the same power and authority in such cases, as the Court of Exchequer has in England". The new court was to continue to exercise the Scottish Exchequer's traditional jurisdiction, having the "power of passing Signatures, Gifts Tutories, and in other things", so that it was not to have the type of extensive jurisdiction at common law potentially possessed by the English court. The Privy Council was retained "for preserving of publick Peace and Order" until the Parliament thought fit to alter it (which it did in 1708 by abolishing it, largely due to the machinations of a group of Scottish politicians). The twentieth article preserved the Scottish heritable jurisdictions "as Rights of Property, in the same manner as they are now enjoyed by the Laws of Scotland". The twenty-first article preserved the privileges of the royal burghs.[222]

The Commissioners for Union had been forbidden to consider the ecclesiastical polity of both countries, and each country's legislature passed an act to secure its own church. The Scottish act securing the church also secured the universities, and required that their professors

conform to the tenets of the Kirk.[223] These acts were integral to the union settlement and though not part of the articles of Union were included in the Acts passed.[224]

Preservation of the legal system and law entailed upholding the existing structures of jurisdiction that provided local government, which remained distinct and quite different in constitution from that of England. Any other solution for the legal system would have been completely impractical. Legal rights defined property rights; property rights defined political rights. Burghs both royal and of regality and barony had their trading privileges which they could enforce in their courts and in the Court of Session. Many landowners had profitable rights of jurisdiction. To have replaced the substantive law and legal institutions with anything else would have been a task of quite extraordinary difficulty. For example, simply to have introduced English law would have completely reshaped the Scottish polity and expropriated the property rights of the landed classes – and it was after all the landed classes who were agreeing Union. To have sorted all of this out to create a more unified state was politically impossible. Vested interests required preservation of the law and legal system.

It is very likely, however, that the experience and memory of the enforced Union with the English Commonwealth under Cromwell in the 1650s coloured attitudes to the union of 1707. The Commonwealth regime attempted to restructure the Scottish legal system. The results were not inspiring. Cromwell removed the Scottish records to London. Not only are national records potent symbols of national identity, this action greatly hampered the operation of the legal system.[225] There can be no surprise that the provisions of the Union of 1707 prohibited the removal of the records from Scotland.[226] In January 1652, all jurisdictions not deriving authority from the English Parliament were abolished.[227] In theory all courts, including sheriff, commissary, baron, regality, and burgh courts ceased to operate. Commissioners for the Administration of Justice, of whom four were English and three Scots, were appointed in May 1652, replacing the Session (which had not sat since February 1650) and the Justiciary Court.[228] These could deal with both civil and criminal business, though it is clear the regime preferred to use the English judges for criminal work.[229] Their commissions required them to administer justice according to "the laws of Scotland, equity and good conscience".[230] Two men were appointed to each shire, one English one Scots, as sheriffs and commissaries. An admiralty court was also created.[231] In 1654, an ordinance abolished all heritable ju-

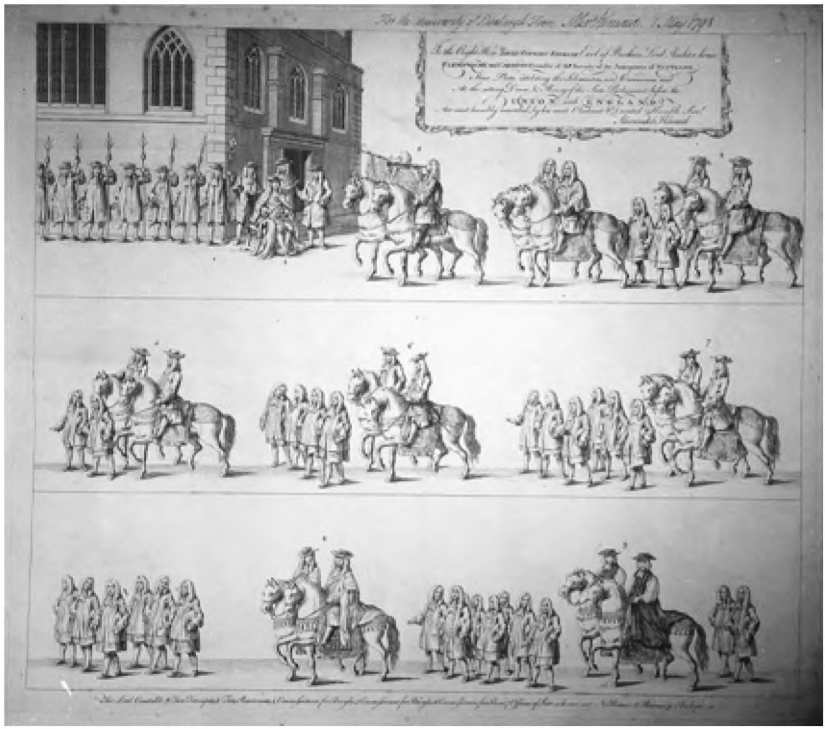
risdictions, feudal casualties, and military jurisdictions, while another created "Courts Baron" for land considered a "manor".[232] A system of justices of the peace was established in 1655.[233] Though no effective steps were taken, the new government clearly also wanted to assimilate Scots law to that of England.[234]

These reforms have acquired a broadly favourable reputation as popular and successful, promoting speedy and impartial justice.[235] This was an assessment developed in the later eighteenth-century, largely by accepting the claims of the Cromwellian regime at face value and identifying the reforms as abolishing "feudalism" and "subjection" in a manner comparable to the legislation abolishing heritable jurisdictions and military tenure in 1747.[236] There is very little evidence to support it, and much against it. For example, the "feudal" jurisdictions carried on operating through the Commonwealth period, presumably to satisfy local needs. The new Commissioners were found slow and unsatisfactory in dealing with civil business. Like most occupying regimes, the Commonwealth government in Scotland was most concerned with maintaining order.[237]

In 1670, when Union had been mooted between Scotland and England, the Scots commissioners had proposed that Scots law should in all time coming remain as it was before the Union, and that all processes concerning the Scots and their property should be dealt with only in Scotland. There could be no cases heard in England or taken there on appeal. In fact no provision was suggested for how reforms would be made.[238] This is explained by Sir George Mackenzie's reflection that it was unlikely "the proposal of an Union [could] have been less acceptable to the people at any time, than at this, in which the remembrance of their oppres[s]ion from the Usurper was yet fresh with them".[239]

This experience will have reinforced the determination of the Scots commissioners for Union that Scottish court structures and Scots law as far as possible should be preserved. Cromwell had expropriated the property of the Scottish landowners without compensation by abolishing barony and regality courts – and the reform had not even worked. In the 1680s, the Restoration regime had also been seen as attacking heritable jurisdictions, and hence property rights, which led to a specific "Article of Greivance" in the Scottish settlement of 1689.[240]

When Parliament enacted the Union, it further reinforced the position of Scots law by regulating appointments to the bench of the Court of Session. Only those who had served in the College of Justice for five years as an advocate or as Principal Clerk of Session or for ten years as



Riding of Parliament
This image depicts part of the procession known as the "Riding of Parliament". This was a cavalcade from the Palace of Holyroodhouse to the Parliament House in a strict order. It gave an important representation of the political community. © The Scotsman Publications Ltd. Licensor wwwscran.ac.uk.

a Writer to the Signet were eligible for appointment. Further, a Writer to the Signet could only be admitted as a Senator two years after he had undergone "a private and publick Tryal on the Civil Law before the Faculty of Advocats and be found by them qualified for the said Office".[241] The Court was not to have members who did not have an academic education in law of the type favoured by Scots; the Crown was not going to have the authority to appoint the common lawyers of England to the Scottish bench.

The new Court of Exchequer came into existence on 1 May 1708. It consisted of the Lord High Treasurer, the Chief Baron, and four other Barons. In practice it was the Chief Baron and Barons who sat. Advocates of the Scots bar and barristers or serjeants of the English bar

of five years standing were eligible for appointment. As well as Scots advocates, English barristers qualified to appear before the English Exchequer also had rights of audience.[242] The new Court essentially followed English law and procedure in Exchequer matters, and in practice, through the eighteenth century, one judge was always an English barrister.[243] While this court could have been a medium for infiltrating English law into Scots law, in fact this did not happen, though it did encourage Scots to learn English law.[244]

That the Scottish political class contained many lawyers would have reinforced the aim of ensuring protection of law, legal system, and property under the Union. It was common for landowners (who did not possess noble titles) to be admitted as advocates before the Court of Session after an education in law at (by this time) typically a Dutch university: sometimes they practised; sometimes they found the training useful in exercising their local rights of heritable jurisdiction.[245] Some noblemen also acquired a legal education, though it was not thought proper for a peer to plead as a lawyer.[246] Notable in this respect were the third Duke of Argyll and his nephew the Earl of Bute, both educated in law in the Netherlands.[247] That Scots appeals after 1707 went to the House of Lords made desirable the presence in the Lords of Scots peers with this type of education.[248]

Legislation After the Union

In the years before 1707, both before and after 1689, the Scottish Parliament had been very active as a legislature, producing important and lasting reforms in Scots law. These included acts protecting the liberty of the subject, easing credit by protecting creditors and producing more refined systems of diligence, reforming prescription, protecting minors, making for greater certainty in real rights, and improving registration and the formalities of deeds. Acts also encouraged development of lands through division of commonties and the encouragement of enclosures.[249] Union brought all this energetic activity to an end. Joanna Innes has demonstrated just how dramatic was the decline of legislation affecting Scots law, though the rate of legislation increased again after the mid-century.[250]

Innes's quantitative and qualitative analysis of actual and failed legislation shows that this was not a simple effect of the Union. In the first years of the Union "English" domestic legislation also declined, though not so dramatically (50% as against 85%). Evidence suggests that Scots

in fact followed a policy of keeping matters away from Westminster. She plausibly points out that Scots wanted material benefits from the Union, while the English wanted a secure succession and political stability – not to interfere in Scottish domestic affairs.[251]

This means that major legislative reforms in the law generally arose either from lobbying and pressure from Scotland or from metropolitan anxiety over security. Bob Harris has shown that Scots in fact were not only adept at lobbying, but also managed to act as a "national interest" at Westminster through the eighteenth century. Much of this activity focused around economic concerns, such as development of the linen trade, or opposition to the malt tax. The Convention of Royal Burghs, heritors and barons of shires, and other groups regularly presented petitions to Parliament. The Convention commonly employed a London agent to look after its interests at Parliament. That ministers typically allowed patronage over Scottish appointments to be exercised through Scottish grandees, most notably Lord Ilay (later third Duke of Argyll), provided good channels of communication from Scotland to Parliament and the ministers, whereby Scottish concerns received a hearing. Harris has shown that the achievements were considerable.[252]

On the other hand, the sheer weight of numbers of English members was telling, especially when Jacobitism was seen to threaten the political settlement. Thus, the Jacobite scare of 1708 led to the "Act for Improving the Union between the Two Kingdoms", which replaced the Scots law on treason with that of England.[253] This legislation was bitterly opposed by the Scottish members; but they could not successfully resist it.[254] The Rebellion of 1715 led to the Clan Act, which abolished certain personal military services considered "arbitrary and oppressive … contrary to the nature of good government, destructive of the liberties of free people, inconsistent with the obedience and allegiance due to his Majesty and government, as well as the greatest obstruction to the improvement of trade, husbandry, and manufactories".[255]

The most important statutory reforms of this nature were those enacted, largely on the initiative of Lord Hardwicke, after the 1745 Rebellion. Much of this legislation was not directed at the legal system in any fundamental kind of way, though in itself of tremendous importance, but was of an administrative and regulatory nature, concerned with disarming the Highlanders, forbidding their traditional dress and the like.[256] Of greater significance for Scots law was the abolition of ward holding, a military tenure, and heritable jurisdictions. Hardwicke undoubtedly hoped that these reforms were means towards "Anglicisa-

tion" of the Scots law and legal system. Jewell's study of the progress of the legislation shows how party and personality affected the drafting, amendment, and progress in Parliament of the statutes.[257] Of the two reforms, that of tenures proved the easier to get through parliament, though the proposals provoked an extensive pamphlet literature. The Tenures Abolition Act converted ward holdings into blench tenure if held of the Crown or feu ferme if held of a subject superior. It also regulated or abolished certain feudal casualties, and tidied up or reformed other aspects or incidents of the feudal tenures.[258] The scheme to abolish heritable jurisdictions was much more keenly disputed in Parliament, with considerable resistance in Scotland, because of the proposed abolition of useful local courts and anxieties over whether it breached the articles of Union. Different individuals and groups fed material into the bill that emerged, so that, as well as abolishing the heritable jurisdictions, the act provided a useful overhaul of criminal procedure before the Court of Justiciary. Its main effect was, of course, to abolish all heritable sheriffships, stewartries, baillieries, constabularies, and regalities, vesting their jurisdictions in the Session, Justiciary Court, circuits, and sheriff and stewartry courts that would otherwise have possessed them. Barons lost their franchise jurisdiction to try serious crimes, but could deal with their tenants, minor crimes, and civil suits to the value of forty shillings. Considerable compensation was paid, because the private property of individuals – most of whom had been entirely loyal to the House of Hanover – was essentially expropriated by the act. The long title of the act described one of its purposes as "rendering the Union of the Two Kingdoms more complete". This could only be so in the sense that now Scotland, like England, lacked significant heritable jurisdictions. In fact, the act did nothing to assimilate the Scots and English laws and legal systems, and the basic architecture of the Scottish legal system was preserved. One of the act's most obvious effects was greatly to increase crown patronage over the Scottish legal system.[259] It would be wrong to see these reforms as "imposed" on the Scots by an essentially "English" Parliament. Many Scots were in favour of them. Their passage through Westminster gave opportunities for debate, amendment, and lobbying.[260]

Two acts early in the Union, however, clearly conformed to the model of imposition of legislation on a largely unwilling Scotland. Both concerned the Church. Many members of the Kirk had originally opposed the Union because its incorporating form meant that Anglican bishops in the House of Lords would have authority over the Church of

Scotland both in legislation and appeals from the Scottish courts. During the brief period of high Tory administration under Anne, such anxieties about the religious settlement seemed correct. In 1709 the Presbytery and Provost and Magistrates of Edinburgh took action against an Episcopalian minister, James Greenshields, for using the Anglican prayer book and liturgy. It is a reasonable inference that Greenshields was deliberately trying to provoke the Edinburgh Presbytery to move against him, to bring the issue before a sympathetic House of Lords. His defiance of the jurisdiction of the Presbytery led to an order of the magistrates of Edinburgh requiring him not to conduct services; his subsequent disobedience led to his imprisonment. This order of the magistrates was ultimately reversed by the House of Lords.[261] In London, Greenshields associated with the Anglican hierarchy, and lobbied for the Toleration Act of 1712, "to prevent the disturbing those of the Episcopal Communion in … Scotland in the Exercise of their Religious Worship and in the Use of the Liturgy of the Church of England".[262] This was an attack on the Kirk as established, reducing the authority of its courts. It made plain the authority of Westminster, with Anglican bishops in the Lords, and Parliament now duly passed the Patronage Act, restoring to lay patrons the right to appoint ministers that had been given to the elders and heritors in 1690.[263] These acts were viewed as attacks on the Union settlement, and were among the grievances that led the Earl of Findlater to move dissolution of the Union in 1713.[264] The Patronage Act created many tensions in the Kirk through the century. But such interference with the Kirk, contrary to the spirit of the Union, was never again attempted.[265] No doubt the Scottish episcoplians' associations with Jacobitism long prevented any further moves in their favour, while the national church proved staunchly loyal to the House of Hanover.[266]

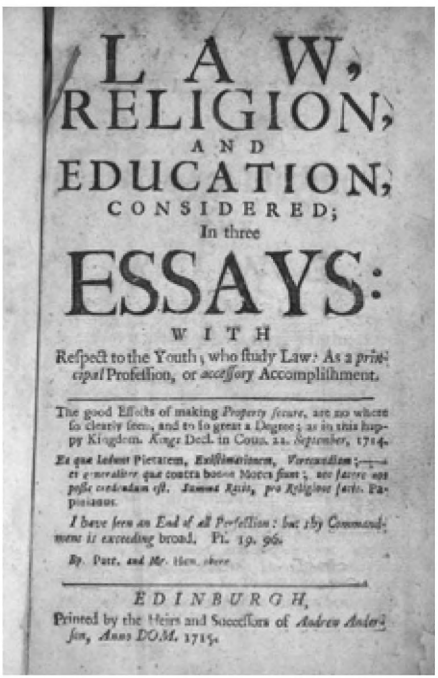
With some exceptions, the existing active civic culture and institutions in Scotland allowed Scots largely to control or influence legislation affecting their interests by lobbying and petitioning. Indeed, despite the Union, many new specifically Scottish institutions were created by legislation. These were generally designed to develop Scotland economically along sound mercantilist principles. Fishing, agriculture, the linen industry, and banking were all further promoted this way. Important reforms, such as the Election Act of 1743, the Entail Act of 1770, and the Bankruptcy Act of 1772, were drafted in Scotland by the law officers, approved by the judges, corporations of lawyers, and freeholders, before being sent to Westminster for enactment.[267] Thus, as

Harris has demonstrated, within the new Kingdom of Great Britain, a Scottish political community remained that saw itself as having distinct national interests, which was able to utilise the system of patronage to achieve its ends and communicate its concerns.[268]

The Nature of Scots Law

The dramatic decrease in legislation relating to Scotland after the Union was nonetheless significant. Reforms in the law may be necessary or desirable, but of neither political interest nor direct economic importance. To explore the implications of this, it is necessary to consider further how Scots viewed their law and legal system. Two main strands of thinking can be identified. The first focused very much on Scots law as *ius proprium* departing from a universal *ius commune* identified with the received Roman and Canon laws. The second emphasised the place of Scots law as a municipal law validated within a framework of essentially Protestant natural law.

The approach of Francis Grant (c.1660-1726) to law exemplifies the first of these. Educated in law in Leiden between 1684 and 1687,



LAW,
RELIGION,
AND
EDUCATION,
CONSIDERED;
In three
ESSAYS:
WITH
Respect to the Youth, who study Law: As a principal Profession, or accessory Accomplishment.

The good Effects of making *Property secure*, are no where so clearly seen, and to so great a Degree; as in this happy Kingdom. *Kings* Decl. in Couns. 22. *September*, 1704.

Ea quæ Iuberet Pietatem, Existimationem, Verecundiam;——et generaliter quæ contra bonos Mores sunt; nec facere nos posse credendum est. Samuel Rutherf. pro Religione scrib. Vindiciarum.

I have seen an End of all Perfection: but thy Commandment is exceeding broad. Ps. 119. 96.

By Pers. and Mr. Hen. Above.

EDINBURGH,
Printed by the Heirs and Successors of *Andrew Anderson*, *Anno DOM.* 1715.

Law Religion and Education (Edinburgh 1715). This work, probably by Francis Grant, Lord Cullen (1658x63–1726), is important in its clear depiction of how Scots lawyers were expected to argue in a manner typical of the modern usage of Roman law. Reproduced by permission of the Trustees of the National Library of Scotland.

and writing just after the Union, he stated that young lawyers in Scotland needed to know "our municipal and common *Laws*". "Municipal" law meant what was peculiarly Scottish "in Statutes, Custom, and old Maxims of Justice and Government; *different* from the *Roman Law*". By "common" law was to be understood "the *Roman Law*: Yet, not *simply*, as it obtained, precisely, under that Empire; but *qualified, as commonly* retained or received; after the Dissolution thereof: Whether by *Explanation*, or *Adaptation* to the Feudal, Canon, or Mercantile Subjects; which superveen'd."[269] Scots law, the *ius proprium*, existed only in so far as it was different from the *ius commune* of Roman law, which was otherwise applicable as a universal law.[270] Grant argued that because "Our peculiar Statutes, and consuetudinary Maxims, were *very few*", the common law was cultivated and adopted.[271] Scots law was a "*compound Law*", that is, a kind of Roman-Scots law typical of the *usus modernus Pandectarum*.[272] This identification of Scots municipal law with statutes, custom and maxims (what others called "practick") different from Roman law and of "our" common law with Roman law was not only traditional from at least 1500, but also paralleled in many contemporary European legal systems.[273]

Grant considered Roman law to possess both divine authority and, in many respects, divine origin. He stated that it had been adopted by "the several Soveraigns, with Acquiesence of the People, in *Europe*" after its rediscovery subsequent to the fall of the Roman Empire. Scotland, "tho' … never intirley subject to the *Roman* Empire; yet, with other Nations, *imbraced* their *Law*".[274] Grant asserted that likewise in Scotland "our Kings and States" had adopted "the *common Law* in Supplement of our *own*". Several pages were devoted to demonstration of this.[275] For Grant, it was this use of the adapted Roman law in Scotland that ensured liberty, property, honour and life by providing certainty, because it ensured that decisions were made on the basis of authority, rather than individual judicial reason.[276] Along with Scotland's (and then Great Britain's) "Gothish" constitution, it prevented the Scots being subjected to the arbitrary will of the magistrate or monarch – "the Governour's vagrant *Reason*".[277] This was because, though Grant emphasised the divine origin of Roman law, its excellence as natural law, and its role as a law of nations, he argued that "Civil-common Law" was in force "*now*, of *Necessity*, or as binding". It was not utilised "of meer Discretion, or as a *variable Directory* to Reason".[278]

Sir George Mackenzie, the leading intellectual advocate of the Restoration period had political views very different from those of Grant.[279]

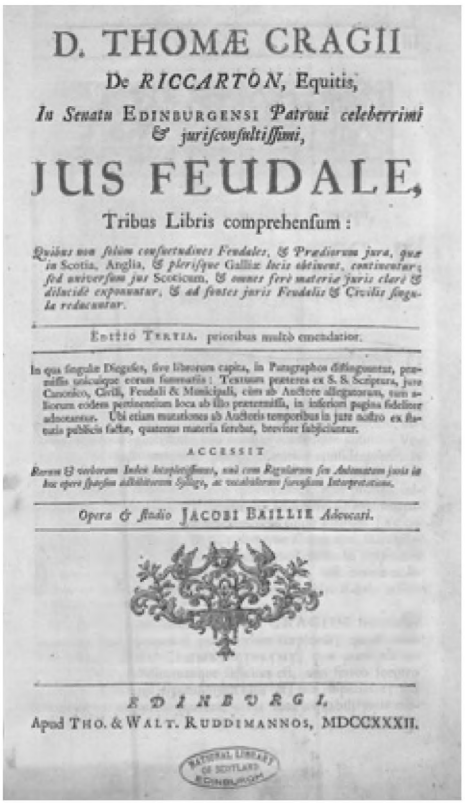
But he also argued that it was statute and custom that gave authority to the *ius commune* in Scotland, and indeed presented a view of Scots law and valid legal argument very similar to that of Grant.[280]

The second type of approach to Scots law was rooted in the reworking of late scholastic natural law. In Scotland it can initially be linked to the writings of Thomas Craig (1538-1608). Reacting to the development of ideas of sovereignty in the sixteenth century, Craig started from the premise that law could clearly be divided into *ius* and *leges*. He stated that the latter were made by magistrates without a superior. *Ius*, on the other hand had a broader meaning, originating in nature: "so is called *ius naturale*, *ius Gentium*, so *ius commune* that is common to almost all peoples, as a certain innate equitable reason ruling in the souls of men."[281] Ruling with an imperial crown, the Scots monarchs could issue *leges*.

Craig explained that there were three types of *ius*: *ius naturale*, *ius gentium*, and *ius civile*. The first had two meanings: that which nature had taught to all living creatures, and that which nature had taught to all men, and which was observed by Jews, Turks, and even pagans. In this second sense, *ius naturale* was allotted the first place in judging, acting or contracting. It was considered to be good and just (*bonum et aequum*), derived from the *ratio iuris* or equity inborn in humans; against it, neither statutes of the kingdom, nor prescription of the longest time, nor custom had argumentative place. *Ius gentium* had next position of authority, as what all nations observed ought to prevail, notwithstanding the provisions of the *ius civile* or *municipale*. The third type of *ius* was the *ius proprium* or *civile* of each people. So, in Scotland, after the *ius naturale* and that law which was common to all nations, Craig stated that first recourse should be made to "our written law", should there be any, to resolve difficulties and serious controversies. Scots written law consisted of the constitutions and statutes enacted by the Three Estates, this was the proper law of the kingdom. Thus, acts of Parliament had to be investigated first. Craig pointed out that Scots acts could fall into desuetude.[282] After, such statutes, judicial custom or practick was relied on in Scotland to resolve controversies. Failing written law or custom, Craig argued that recourse should be made to *ius feudale*, which he saw as a universal common law, because it was the historical source of Scots law, and, failing it, to the Civil (Roman) law, though, if Canon law had innovated on the Civil it was to be preferred.[283]

In many ways Craig's account of what was to be done in practice in Scotland was perfectly compatible with what Grant stated. The fun-

damental distinction between them lay in the justification for reliance on the universal "common" law. For Craig, the authority of Roman law did not derive from Scottish statute and custom, but rather from its embodiment of natural law. He stated that in Scotland "we were bound by the laws of the Romans only in so far as they were congruent with the laws of nature and right reason". But he further commented that there was "surely no broader seedbed of natural equity, no more fertile field of articulated reasoning and arguments from those principles of nature than the books of the Roman jurists". This meant that "what is equitable and what inequitable by nature and what most agrees and what disagrees with right reason" ought to be drawn from them "as if from the very fountain". In further contrast to Grant, Craig identified the "common" law or *ius commune* with the *ius gentium* and the *ius naturale*. The Civil law was *ius commune* only because it was used by everyone as embodying equity.[284]



D. THOMÆ CRAGII

De *RICCARTON*, Equitis,

In Senatu EDINBURGENSI *Patroni celeberrimi & jurisconsultissimi,*

JUS FEUDALE,

Tribus Libris comprehensum:

Quibus non solùm consuetudines Feudales, & Prædiorum jura, quæ in Scotia, Anglia, & plerisque Galliæ locis obtinent, contexuntur; sed universum jus Scoticum, & omnes ferè materiæ juris clarè & dilucidè exponuntur, & ad fontes juris Feudalis & Civilis singula reducuntur.

EDITIO TERTIA. prioribus multò emendatior.

In qua singulæ Dispositiones, sive librorum capita, in Paragraphos distinguuntur, præmissis titulisque eorum summariis: Textuum præterea ex S. S. Scriptura, jure Canonico, Civili, Feudali & Municipali, cùm ab Auctore allegatorum, tum aliorum eidem pertinentium loca ab illo prætermissa, in inferiori pagina fidelitèr adnotantur. Ubi etiam mutationes ab Auctoris temporibus in jure nostro ex statutis publicis factæ, quatenus materia ferebat, breviter subjiciuntur.

ACCESSIT

Rerum & verborum Index locupletissimus, una cum Regularum seu Axiomatum juris in hoc opere passim adhibitorum Synopsi, ac vocabulorum forensium Interpretatione.

Opera & studio JACOBI BAILLIE *Advocati.*

EDINBURGI,

Apud THO. & WALT. RUDDIMANNOS, MDCCXXXII.

Thomas Craig *Jus feudale* (Edinburgh 1732). One of the most important works on Scots law, and widely circulated from when it was written (around 1600) by Thomas Craig (1538?–1608), the Jus feudale was first printed in 1655. The editor of the 1732 edition, James Baillie, turned a late humanistic work into one of the usus modernus pandectarum through his elaborate apparatus of learned citations. Reproduced by permission of the Trustees of the National Library of Scotland.

Later in the seventeenth century, James Dalrymple, Viscount Stair (1619-95), developed this type of thinking in a more coherent fashion in his *Institutions of the Law of Scotland*, first published in 1681, though written some twenty years earlier. Stair drew heavily on Craig in his account of Roman law and his view of it as embodying equity.[285] Stair was also strongly influenced by Grotius' theory of natural law, which he by no means uncritically followed; in particular, a strict Calvinist, he always viewed reason as subsidiary to the will of God.[286] Stair stated that "Where our ancient law, statutes, and our recent customs and practiques are defective, recourse is had to equity, as the first and universal law".[287] He stressed that Roman law, "though ... not acknowledged as a law binding for its authority", it was nonetheless "followed for its equity".[288]

Around the time of the Union the approach of Grant and Mackenzie to the Civil law was probably much more typical of Scots lawyers than that of Stair. Proponents of either generally stressed that it was the scarcity of native law that led the Scots to rely so much on the Civil law as a common law of universal validity.[289] While both emphasised the links between sovereignty and law, neither required that, for laws to be binding, the sovereign should have specifically enacted them. There were universal common laws that could be applied in Scotland alongside the limited municipal *ius proprium*.

Stair, however, was unique in one respect: the emphasis he placed on "custom" as a source of law, and indeed as the *best* source of law. In the dedication of his first edition to Charles II, he wrote that "[o]ur law is most part consuetudinary, whereby what is found inconvenient is obliterated and forgot", so that "[w]e are not involved in the labyrinth of many and large statutes". The superiority of custom to statute lay in the fact that "it was wrung out from ... debates upon particular cases, until it come to the consistence of a fixed and known custom". While he admitted that initially in customary law "the people run some hazard ... of their judges' arbitrement", this was better than the risk of legislation, where the lawgiver had immediately to "balance the conveniences and inconveniences"; in so doing, he could and often did make mistakes, so that there were left "*casus incogitati*".[290] This was in direct contrast to the more typical opinions of Mackenzie and Grant, who thought that reliance on the writers of the *ius commune* was superior to reliance on the decisions of judges in resolving problems of interpretation or *casus omissi* in litigation: indeed, both very strongly distrusted judicial law-making. Grant emphasised that "common" law was relied on "to

prevent the *Arbitrariness of Judges*" and that most nations preferred the "*common Opinions*, even of *Doctors*" to judges making law.[291] Mackenzie set out an elaborate system for evaluating the decisions of judges, but pointed out that it was necessary to be aware that judges could be corrupt, ignorant, or indeed both. He too preferred the abstract opinions of learned lawyers to those of judges.[292]

The Triumph of Judicial Law-Making

That the Scottish political and legal community was ultimately able to negotiate the less glamorous and dramatic aspects of law reform after the Union was largely due to thinking compatible with Stair's view of law. If the views of Grant and Mackenzie were more typical in 1707, those of Stair had one great advantage.[293] His location of Scots law within a framework provided by the laws of nature and nations, and his emphasis on development of the law by the courts potentially provided an understanding of law that was much more dynamic than the rather more traditional view that answers could be found in the writings of the *ius commune* and, if there were no law or opinion directly in point, through extension by analogy.

Two inter-linked developments by the middle years of the eighteenth century helped unleash the dynamic potential of this thinking. First, Scots lawyers departed from their traditional attitude that Roman law was part of Scots law as a living universal law. Secondly, natural law no longer seemed to provide convincing arguments for a rational, universal, and abstract justice (whether or not exemplified by Roman law).

For the first decades of the eighteenth century, most Scots lawyers continued to consider the law they practised as involving a necessary blend of the municipal and common laws.[294] Thus, when James Baillie produced his authoritative edition of Craig's *Jus feudale* in 1732, he found it necessary and appropriate to locate it within the common law by providing an extensive explanatory and interpretative apparatus of citations to the Civil and Canon laws. Patrick Turnbull, admitted as a Scots advocate and English barrister, wrote in 1745 that 'in *Scotland*, *Holland*, and [some other polite States], [the Civil law] is the common Law by Adoption, and of Authority in every Thing where their own Municipal Laws have not made some Alterations'.[295] This approach was emphasised in legal argument in court and in university teaching. A work such as the *Institute* (1751-3) of Lord Bankton (1685-1760) could

only be properly understood within a framework of Civilian learning.[296]

From around 1750, however, Scots lawyers ended their practice of studying law abroad (almost exclusively in the Netherlands in the previous seventy years or so), and their direct participation in and familiarity with Dutch humanist scholarly and intellectual traditions ceased.[297] If this was not a particularly Scottish story, as indeed it was not, it nonetheless had a powerful effect in cutting Scots law loose from other, similar European systems.[298] By 1780, it was claimed that the Civil law was neither much studied nor cited.[299] By the end of the eighteenth century, writers and scholars were arguing that the role of Civil law in Scotland was now much diminished.[300] In part this was because certain key Scottish thinkers, notably Lord Kames (1696-1782) and Adam Smith (1723-90), developed the insight of Charles de Secondat, Baron de Montesquieu (1689-1755) that the laws of a people were linked to its manner of subsistence into a theory that societies potentially went through four stages – hunting and fishing, pastoral, agricultural, and commercial – the different modes of subsistence of which required different institutions and laws.[301] This approach inevitably challenged the appropriateness of reliance on the old universal common law in legal argument.

In itself, progressive decline of reliance on Civil law would not necessarily have led to dynamic judicial activism but for the change in Scottish attitudes to the universal natural law that Roman law had hitherto been seen to embody. This was because in eighteenth-century Scotland natural law came to be viewed as a theory of justice, which in turn was seen as "primarily a personal *virtue*". Justice was unique as a virtue because it was enforceable through courts and legislation as law.[302] Of course, there was considerable variation among Scottish thinkers on the nature of moral judgements and action, in particular whether they concerned the senses or reason. Further, there were disputes as to whether justice was natural or "artificial".[303] The work of Haakonssen above all has made this intellectual history well known and there is no need to rehearse it here.[304]

Despite differences among thinkers, the general focus on justice as an individual virtue and concern with institutional structures for justice led to certain similar attitudes. In particular, there was a focus on the development of appropriate institutions to inscribe justice into law. For example, Lord Kames argued that courts had what he described as an "equitable" jurisdiction whereby judges developed the law on the basis of justice and utility. They knew when to do so through exercise of their

moral sense, which let them appreciate when reform was required.[305] Though starting from a different approach to how moral judgment was possible, Adam Smith's view that rules of justice were developed from the moral sentiments as he understood them also led him in principle to favour transformation of justice into law, not through legislation, but through operation of precedent. This was because direct confrontation of concrete and actual problems allowed judges and jurors, acting as informed impartial spectators, to recognise the requirements of justice and decide accordingly. Practice and experience allowed better adaptation of rules to individual cases than abstract theorisation.[306] Such considerations led both Kames and Smith to be concerned with the structure of courts, and how they best could be adapted to further development of the law.[307]

Smith's pupil John Millar (1735-1801) was for over forty years, from his Chair of Civil Law in Glasgow, the most influential law-teacher in Scotland. He popularised among the legal profession this dynamic view of law, developing a science of legislation based on reform through judicial activity. His classes on jurisprudence in Glasgow were designed to develop understanding of this, and to equip Scots lawyers with the requisite knowledge and analytical tools for the task.[308] In Edinburgh, Allan Maconochie (1748-1816), Professor of Public Law and the Law of Nature and Nations from 1779 to 1796, also taught Smithian legislative science, presumably with similar aims.[309] Law reform did not always require litigation: enlightened lawyers in an energetic court could develop the law within what turned out to be fairly broad parameters. Reform of the law could be kept within Scotland, and need not trouble an uninterested Parliament that might intervene further in ways the Scottish legal community did not want. In so far as they could, Scots lawyers set out to create a modern commercial law in this way, though recognising that statute was sometimes necessary.[310] That Scotland no longer had its own legislature did not matter as much as might have initially been thought, while the existence of a joint legislature with England did not inevitably lead towards swift assimilation to English law, though influence was inevitable and is undeniable.

National Laws within United States

The merger of the Scots legislature into that of Great Britain dominated by English members did not have a major immediate impact on Scots law. The Westminster Parliament had no interest in major re-

forms of Scots law for their own sake. When there were proposals for reform or reform was thought to be needed, Scots proved successful lobbyists, who could often materially affect proposals and initiate other reforms. Of course, in the face of a concerted and determined attempt to impose toleration of Episcopalians or introduce the English laws on treason, little could be done; but lobbying and influence were able to affect the legislation proposed by Hardwicke after the Jacobite rebellion of 1745.

Crucial in this was Scotland's possession of institutions and bodies and the creation of new institutions and bodies that preserved considerable autonomy and self-direction through the eighteenth century. A comparison with Ireland, which retained its own parliament, is instructive. Through the eighteenth century, over half of the Irish Bishoprics were awarded to men from outwith Ireland, as were nearly half the judicial posts between 1702 an 1760. The Irish peerage, revenue service, church, pensions, and judiciary were all used to provide patronage for Englishmen for English political purposes.[311] Robert Clive (1725–1774), for example, with no link with Ireland, was awarded an Irish peerage as Baron Clive of Plassey.[312] Scottish patronage was not exploited in a similar systematic way to reward Englishmen. In 1682, Richard Lawrence wrote that Ireland was "governed by English laws, enacted by English Parliaments, administered by English judges, [and] guarded by an English army".[313] The same could have been written in 1750. Only under the Commonwealth had this been true for Scotland. It is worth noting that livings within the established Presbyterian Church in Scotland were simply not open to men who were ordained in the Church of England, and, other than appointment to the new Exchequer Court, which used English procedure, the Scottish bench was not open to lawyers trained in England. In this sense, the separate church and legal system did help maintain Scottish national difference. While Scots qualified to take Anglican orders and trained for the English bar, sometimes achieving high office like Lords Mansfield and Loughborough, Englishmen in the eighteenth century generally did not choose to pursue legal or clerical careers north of the border. They were to be found in Scotland in numbers only in the army, which, like the navy, had very quickly become a truly British institution.

After 1707, appeals went from the Court of Session to the House of Lords.[314] The exact impact of this on Scots law in the eighteenth century is uncertain, other than in individual cases, especially since no reports of Scottish appeals were published until the nineteenth century. Along

with the new procedures in Exchequer matters, it encouraged Scots to undertake the "*new Terror*" of "the Study of the *English-Law*", which was now "very requisite to a *compleat Lawyer* in our *united* State".[315] Works were proposed and occasionally achieved that promised an account of the relevant English law along with the Scots.[316] Again, this does not appear to have had a significant impact on Scots law, although Scots were willing to understand English law as a declaration of *ius gentium* that could have value in developing Scots law.[317]

Grant and his contemporaries presented a view of Scots law that did not link it intimately to national identity. They did not view Scots law as particularly unique. The historical development of Scots law involved a cultivation of the municipal law that took into account the experience of Germany, France and Italy, leading to replenishment "with the best of the *Gothish* and Canon Principles; and thereafter, the *Roman-Law Reformation*; that obtained there"; also "Intercourse, either in War or Peace" with England led to the adoption of "any *Flowers* planted by the *several* Nations who reigned there, that were fit to be transplanted to our Soil". Grant considered that, though the Scots were originally German, "[*a*]*fterward*, the *great Bulk* of the Nation; not inhabiting the Mountains; both as *Country* and *Language*, were *Belgick*". Subsequent history, notably the reception of Roman law, meant there could be no surprise that there should be similarity of laws, so that perusal of the works of "the principal more *modern practical Writers*" – he singled out Benedikt Carpzov (1595-1666), Johan Brunnemann (1608-72), Johann Voet (1647-1714), Ulrik Huber (1636-94), Hugo Grotius (1583-1645), Antonio Pérez (1583-1673), and Georg Adam Struve (1619-92) – who accommodated "the *Learning and Experience* of *all* others to the *Roman-Gothick* Constitution, *as* it obtains among themselves" showed that "the *Bulk* thereof; is the *very same* with *ours*".[318] Use of the "common law", its interpreters, both doctors and courts, made law an international science.

Despite the mention of Grotius, the list of authors demonstrates the extent to which Grant still worked very much within the confines of the *usus modernus*. He might have relied on natural law to give a certain moral content to law, but it was not central to his account. For Stair, law was also an international science, but because of the *ius naturale* and *ius gentium*, rather than the "common law" as understood by Grant. The development of thinking on Scots law from the mid-eighteenth century onwards was able to draw on this to move from a universal natural law to a theory of justice emphasising decisions by courts, which were able

to draw on a substantive historical natural jurisprudence to develop the law, perhaps even on the basis of English law.

In Denmark, the Roman law was never considered the *ius commune*. In this the Eider proved a greater barrier than the North Sea. Even if Roman law was taught at Copenhagen, it was always considered foreign law by the courts, only of actual value as natural law. The highest judges in the early modern period remained the king and his council; the latter were noblemen, not trained in law, who opposed the introduction of foreign law. In contrast, though Scotland's highest court may also have developed from the royal council, it was dominated by jurists trained in the *utrumque ius* of the Roman and Canon laws. The law was thus able to make a greater claim to be an important part of Danish identity, than Scots law could for Scottish identity. No Scot would have made the claim made by Peder Kofod Ancher (1710-88) in the second half of the eighteenth century that Danish law was "our own, the fruits of the land without any admixture of foreign products".[319]

Yet, Scots law was preserved after the Union and in the age of Enlightenment modernised and reformed, without being destroyed. This was not only because of the particular culture of the Scots lawyers, but also because the institutional structure within Scotland could be mobilised to protect or to develop Scots law through activity in the Westminster Parliament. This was important, because while it was relatively common for eighteenth-century states to incorporate different legal systems and laws, this was not to be so in the nineteenth century, when pressures of nationalism and centralisation, and the vogue for codification tended to produce unified laws and legal systems within states. The British state, however, never achieved that level of assumed, specific national identity. Just as those symbols of ancient Scottish sovereignty, the Honours of Scotland with their imperial crown, remained locked in Edinburgh Castle, so England and Scotland were never completely merged administratively. This meant that Scots law survived without a Parliament within the British conglomerate state, and later could be developed into a badge of national identity.