

The Union of 1707 and its Impact on Scots Law

DOMINIC SCULLION*

1. Introduction

Prior to the Union, Scotland was an independent political country with a legal system based on Roman Law. The supreme court for matters both criminal and civil sat in Edinburgh. The Treaty and Act of Union preserved the Scottish legal system but, it was subsequently discovered, gave the House of Lords jurisdiction to hear Scottish civil appeals. This article will detail in brief the years immediately before and after the political union. It will also, it is hoped, increase awareness of the direct and long-lasting effects the Union had on Scottish jurisprudence, with attention paid to the *lex mercatoria* and the criminal law; and dispel the belief that the Union weakened Scots law. The author will propose that Scots' lawyers had started looking at English law for legal comparisons prior to the Union and point out those areas in which the Union could be said to have benefited the law in, and of, Scotland.

2. The Treaty and Act of Union

Before the political Union, the Crowns of Scotland and England had been joined in 1603 under James VI of Scotland and I of England.¹ Upon his succession to the English throne, James insisted on a policy the aim of which was to foster closer working relations between the two countries. This policy was to encourage a 'convergence between the two nations in all key areas of the polity'.² These 'key areas' included matters political, religious, commercial, economic and legal. In effect, the Union of the Crowns saw the long journey towards political unity begin, with James as the main supporter of the pro-Union party. However, the king underestimated the political and cultural opposition which met his vision for a union. Whilst there were supporters in both Scotland and England for a political union, few endorsed a union of laws. James over-simplified the predicted outcomes that this legal

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¹ Hereinafter referred to as James.

² A Wijffels, 'A British *ius commune*? A debate on the union of the laws of Scotland and England during the first years of James VI/I's English reign' (2002) 6 Edin LR 315 and TB Smith, 'British Law: a Jacobean Phantasma' (1982) SLT (News) 157.

union would create. He failed to fully consider the practical side of unifying the English common law system with the Scottish civil law system, instead directing his focus on the more ideological vision he had of an united Britain; a 'union of hearts'.³ David Hume only considered the possibility of a legal union in a long-term perspective but qualified this by adding that a union of laws is not a necessary component of a political union.⁴

James, although successful in starting real debate on a unified country, never saw a politically united Scotland and England. The 17th century was yet another of discord between Scotland and England, particularly during the Restoration period of 1660 onward.⁵ The possibility of a commercial union between the two countries in 1668 proved unsuccessful and a string of monarchs (Charles II, James VII(II) and William & Mary) oversaw relations worsen between Scotland and England. Furthermore, the death of William sparked a succession crisis which saw the Scottish Parliament reluctant to accept the Hanoverian succession.⁶ In 1705, however, the Scots reluctantly agreed to treat for a Union with England. The English Parliament had passed an act which allowed Queen Anne to appoint commissioners to treat for a Union. The Scots complied after being informed that they would be regarded as aliens in England and that trade between the countries would cease. The Scottish Parliament, with this 'gun at its head'⁷ conceded the idea of a union with England.

In July 1706 the 25 Articles of Union were presented to Queen Anne. Article XVIII provided for the application in Scotland of the same laws on trade, customs and excise as in England; but:

all other Laws in use within the Kingdom of Scotland doe after the Union and notwithstanding thereof remain in the same force as before...but alterable, by the Parliament of Great Britain.

Article XIX preserved the Courts of Session and Justiciary⁸ but was silent on whether an appeal from the Scottish courts could be heard by the House of Lords. This silence was quickly interrupted, and the House of Lords upheld its own jurisdiction to hear civil appeals from Scotland.⁹

This was to have important consequences for the future of Scots law. The House of Lords, at this time, was English in composition resulting in cases of Scottish origin being decided by English judges trained in English law. Thus, the judicial organ of the British Parliament was to become a mechanism for English law to seep into the law of Scotland and members of

³ *ibid* (Wijffels) at p. 322.

⁴ Hume, *Tractatus II*, cap 10, tit9, f 13r.

⁵ JW Cairns, 'Historical Introduction' in Reid and Zimmermann (eds), *A History of Private Law in Scotland*, vol I (OUP, Oxford 2000) at p. 112.

⁶ This set the scene for the later uprising by the two Stuart pretenders against the Hanoverian Kings.

⁷ See Cairns (n 5) at p. 115.

⁸ However they were subject to 'such regulations for the better administration of Justice' as the British Parliament saw fit (Treaty and Act of Union 1706 Art XIX).

⁹ *Rosebery v Inglis* [1708].

the Scottish Bar would soon be corresponding with English counsel for legal advice.¹⁰

3. A Mixed Legal System

Before the 17th century poor relations between Scotland and England prevented either country looking to their closest neighbour for legal comparisons. Scots lawyers looked to the continental systems, particularly those of the Netherlands and to some extent France. In 1495 Bishop Elphinstone founded King's College, Aberdeen, in order to teach law according to the practices of the universities of Paris and Orleans. The Roman age of Scots law would begin in the 16th century and would last until the 18th century.

Although it is impossible to accurately predict what would have happened to Scots law were it not for the Union, academics have tried. Sir Thomas Broun Smith¹¹ proposed that it is not unlikely that Scots law, or more specifically the civil law, would have been codified.¹² Prior to the Union, Roman law superseded English law as the main source of comparative legal principles. But codification would have become impractical during the 19th century when legal situations common to Scotland and England resulted in a considerable amount of what could be called 'British law'.¹³ This 'Anglicisation' of Scots law was, however, a gradual process even after the Union. Political, social and economic situations in Scotland did not help the people of Britain achieve the 'union of hearts' that James had wanted a century earlier. Scots law 'could more than hold its own in competition against the narrow and formalistic English law of that time'.¹⁴ In the second half of the 18th century relations between the two countries improved and saw a shift towards Scots jurists accepting English influences when appropriate. This shift can be readily seen by examining the *lex mercatoria*.

A. The Law Merchant (Commercial Law)

Smith, although a good source for information about the influences of English law in Scotland, 'was reluctant to concede too important a place for it in the eighteenth century'.¹⁵ Smith was of the view that Roman law was

¹⁰ Below, Section 4.

¹¹ Quondam Professor of Scots Law, University of Aberdeen.

¹² This is a route which countries of a close legal affinity to Scotland took.

¹³ See TB Smith, 'English Influences on the Law of Scotland' (1954) 3 Am J Comp L 522 for further analysis.

¹⁴ *ibid* at p. 524.

¹⁵ ADM Forte, "'Calculated to our meridian"? The *ius commune*, *lex mercatoria* and Scots commercial law in the seventeenth and eighteenth centuries' in DL Carey Miller and E Reid

still the number one authority for judges in the 18th century and that this period was still the 'classical age' of Scots law.¹⁶ But by examining the law reports from the 18th century, one can see that the Court of Session was willing to consider English cases cited before it.¹⁷ In *Stewart v Morrison*¹⁸ the Court held insurance contracts to be a contract *uberrimae fidei*,¹⁹ which was first noted by Lord Mansfield in an English case²⁰ in 1766. In *Stevens & Co. v Douglas*²¹ the Court, in determining the sufficiency of a deviation to avoid a policy, was moved 'chiefly by London practice'.²² *Buchanans v Hunter – Blair*,²³ *David Elliot v John Bell*²⁴ and *Wilson & Co. v Elliott*²⁵ are all 18th century commercial cases in which English authority is referred to. Smith was determined to stress the prevalence of the Civilian tradition in 18th century Scotland. He not only passed over the evidence present in law reports, but seemed to overlook the philosophy of the *lex mercatoria*. Smith was of the view that 'our commercial law was to be seen as an emanation of the *lex mercatoria* or law merchant and as a system of principles which transcended national jurisdictions'.²⁶ This view was not unique to Smith. Writers from the 18th century, like William Forbes (a pre-union writer) and John Millar Jnr,²⁷ also viewed the law merchant as legal principles shared by many countries. The difference is, however, that Forbes and Millar did not shy away from acknowledging the importance of English writers on the subject. In fact, they readily employed works from English academics who viewed the *lex mercatoria* as being based on the *ius gentium* and European mercantile customs. Forte points to John Marius' *Advice Concerning Bills of Exchange* (1651) and John Scarlet's *The Stile of Exchanges* (1682) as works Forbes and Millar referred to who look at bills from the Civilian perspective of exchange contracts.²⁸ This is particularly significant when it is considered that Forbes was writing before the Union.

It is hard to reconcile with Smith's view as it seems to ignore the evidence available to him, almost to the point of being in denial of the facts. Having said that, Sir Thomas was accurate in his assertion that by the 19th century English cases were commonly cited in the Scottish Court. But, his

(eds), *A Mixed Legal System in Transition: TB Smith and the Progress of Scots Law* (Edinburgh University Press, Edinburgh 2005) at pp.120-137.

¹⁶ TB Smith, *Studies Critical and Comparative* (W Green & Son, Edinburgh 1962) at p. 74.

¹⁷ See Forte (n 15) at p. 121.

¹⁸ (1779) Mor. 7080.

¹⁹ Of the utmost good faith.

²⁰ *Carter v Boehm* (1766) 3 Burr. 1905 at 1909.

²¹ (1774) Mor. 7096.

²² ADM Forte, 'Marine Insurance and Risk Distribution in Scotland Before 1800' (1987) 5 *Law & Hist Rev* 393.

²³ (1774) Mor. 7096.

²⁴ (1781) Mor. 1606.

²⁵ (1766) Mor. 7096.

²⁶ *ibid* at p. 121.

²⁷ W Forbes, *A Methodical Treatise Concerning Bills of Exchange* (Edinburgh, 1703) & J Millar *Elements of the Law Relating to Insurances* (Edinburgh, 1787).

²⁸ ADM Forte (n 15) at p. 127.

failure to give credit to the English writers before this time is misleading. During the course of research for this paper, the author did not come across a single piece of scholarly work which suggested that the Union was an immediate success for Scots law. However, having due regard to the work by Forbes it is not far-fetched to suggest that, at least in some legal circles, there was more of a willingness to consider the views of English writers than is perhaps commonly thought. Furthermore, this could lead to another conclusion: that the inclusion of English cases in the Court of Session decisions was not through a sudden decision of Scottish acceptance but, more likely, through a gradual process of inclusion beginning long before the evidence in law reports suggests. If this view is to be taken as accurate, it could also be deduced that, at least as far as the *lex mercatoria* was concerned, there would have been English authority cited regardless of whether a Union had been achieved or not.²⁹ The fact remains that when one considers the many centuries of war and tension between Scotland and England, it took a comparatively short period of time (*circa* seventy years) after the Union for English cases to be considered as authority on matters of commercial law and for their citation to be considered the norm.

The 17th and 18th centuries saw a marked increase in the use of insuring marine risks. This was given momentum by Scottish trade links around the world, itself a product of the Union. During this time Scottish trade was gathering pace and shifting from traditional European trading partners to those of the Americas and West Indies. As Scots law was relatively inexperienced in matters of insurance, Scots advocates and judges were anxious to seek the opinions of English writers.

The Union certainly improved relations between Scotland and England but, although English legal sources begin to be seen in Scottish decisions in the century after the Union, it is inconclusive to suggest that this is only because of the Union. Indeed, it may be interesting to consider whether the citation of English authorities would have been as prevalent if Scottish trade had increased of its accord, without the help of the Union. It may have simply been the natural course of jurisprudence in Scotland.³⁰

B. Scots Criminal Law

Professor Christopher Gane has written one of the few articles on the English influences on Scottish Criminal Law.³¹ Gane, writing in response to

²⁹ For example, see the work of Forbes, a pre-union writer. For examples of English writers being employed post-Union, see G J Bell's, *Commentaries* (4th Edition, Edinburgh 1821) and an analysis of which can be found in Forte (n 15) at pp. 133-135.

³⁰ Indeed, for an example of the opinions of English merchants and banking houses being referenced in a Scottish case prior to the Union see *[Blank] v Maxwell* (1675).

³¹ CHW Gane, 'Civilian and English influences on Scots criminal law' in DL Carey Miller and E Reid (eds), *A Mixed Legal System in Transition: TB Smith and the Progress of Scots Law* (Edinburgh University Press, Edinburgh 2005) at pp.218-238.

T.B. Smith's own research on the subject, analyses the sources of criminal law in Scotland. He concludes that although it was not until after the Union that it became common to find English authorities cited in the High Court, that evidence of English influence on Scots Criminal Law was to be found as far back as the 14th century through the *Regiam Majestatem*. Mackenzie accepted the authority of *Regiam* in criminal matters³² and in *HM Advocate and John Hoom of Eccles v Archibald Douglas of Spott*³³ the court debated and upheld the authority of the work. Delivering a lecture to the Stair Institute, WDH Sellar discussed the influence of English law on Scots law noting that 'the model for the emerging Scottish common law was undoubtedly the common law of England, to such a degree that it is legitimate, I believe, to speak of a Reception.'³⁴ Sellar, speaking of English influences on Scots criminal law between 1500 and 1700 points to an English Act of Parliament of 1572³⁵ which set out the appropriate punishment for vagabonds of over fourteen years old. This legislation was mirrored in Scotland only two years later.³⁶

Gane notes that although it was very rare to find 'explicit' reference to English law in the court reports³⁷ prior to the Union, and that English law was not treated in the same way as Civilian law sources, there were still references to it as illustrations or examples.³⁸ He further acknowledges that in the years immediately after the Union, one is able to find references to English writers and judgments in Scottish court reports³⁹ but it was not until the later decades of the 20th century that the High Court becomes influenced by English decisions.⁴⁰ Therefore, while the Union may have allowed for more 'explicit' comparisons to be made with English criminal law the Union itself could not be credited for judicial importation of foreign rules of law. As the House of Lords had little authority on matters criminal,⁴¹ the supreme court still sat in Edinburgh after 1707. Therefore judicial importations were made by Scottish judges, not by unavoidable consequence of our union with England. This should not necessarily be regarded as a problem. It allows just laws to be developed based on

³² G Mackenzie, *The Laws and Customes of Scotland, in Matters Criminal* (1678).

³³ 9 May 1667; 48 SHS, 200.

³⁴ WDH Sellar, 'Scots Law: Mixed from the Very Beginning? A Tale of Two Receptions' (2000) 4(1) Edin LR 3.

³⁵ 14 Eliz c 5.

³⁶ Acts of the Scottish Parliament, vol 3, 87a.

³⁷ With the exception of the debate aforementioned on the *Regiam Majestatem* and, as an example, the case of *Agnes Finnie*, 18 Dec 1644, Stair Society, *Selected Justiciary Cases, 1624-1650*, vol 3(Stair Society vol 28(1974)).

³⁸ Mackenzie (n 32) at p. 191.

³⁹ For example, *Hay v Hay*, 5 June 1710, Maclaurin No 22, 31 or *HM Advocate v Alexander Livingston*, Dec 1749, Maclaurin No 55, 100.

⁴⁰ See *Meek v HM Advocate* 1983 SLT 280; *Jamieson v HM Advocate* 1994 SLT 537; and *Lord Advocate's Reference (No.1 of 2001)* 2002 SLT 466 for examples.

⁴¹ See Gane (n 32) at p. 231. It should be noted that it was not until 1876 that the House of Lords' jurisdiction on criminal matters was denied. However, its former jurisdiction seemed to have little impact.

comparisons with other legal systems. Gane concludes by opining that these comparisons should not be limited to England and that if Scots law is to develop through the courts 'rather than by a democratically elected...legislature, then at least let us [Scots] borrow on the basis of fitness for purpose, rather than geographical or historical origin'.⁴²

4. *The House of Lords*

As noted above, Article XIX of the Treaty of Union preserved the Court of Session but it was subsequently deemed (through the silence of the text) that Scottish appeals could be heard at the House of Lords at Westminster-hall. This had particular consequences for private law in Scotland. If the loser in a civil action felt that his case was not fairly decided in Edinburgh, he had the right to take the case to London. Before the Appellate Jurisdiction Act 1876, the Lords of Appeal in Ordinary at Westminster were English judges. Therefore when deciding an appeal from Scotland, it was very often English law applied. The cynic could view this as 'unwanted intrusions imposed by a malign House of Lords'⁴³ but if looked at objectively and dispassionately a different opinion could be formed. It is true to assert that there was an unjust make-up in the House of Lords after the Union and that it was not in Scotland's best interests. It is also true that this could be, and was, seen as a problem. However, when studied with the knowledge that Scottish Advocates sought opinions from 'eminent English counsel'⁴⁴ and that this was common at the outset of legal proceedings and not just before an English appeal was mounted, one sees a willingness on the part of the Scottish Bar to put its clients' interests ahead of resentment of England. When seen alongside the fact that a large proportion of these cases were commercial cases, and that England, as already noted, was viewed even in Scotland as an authority on the *lex mercatoria*, one is less sympathetic to cries of 'unwanted intrusions'. The make-up of the House of Lords was certainly pro-English, but this should not be seen as necessarily anti-Scottish.

5. *Conclusion*

It would be impossible to conclude that Scots law did not change after the Union with England. However, it is possible to conclude that the law in, and of, Scotland changed, and generally for the better. Instead of a system of insular laws, we have a system which does not find wrong in drawing legal comparisons. As demonstrated by the work of Forbes and, as discussed by Gane and Sellar, English law was being considered and applied before the

⁴² *ibid* at p. 238.

⁴³ See ADM Forte, 'Opinions by "Eminent English Counsel": Their Use in Insurance Cases Before the Court of Session in the Late Eighteenth and Early Nineteenth Centuries' (1995) *Juridical Review* 345 for further discussion.

⁴⁴ *ibid*.

Union with England. What the Union achieved was for Scots jurists to be able to openly acknowledge the work of their English colleagues in the law, yet maintain a separate and distinct legal identity and for a Chair in Law at Edinburgh to be established, the 'intellectual significance' of which 'cannot be overestimated'.⁴⁵ This in itself ensured the status of Scots law.

However, it is difficult to write on legal history without bias. We are burdened with knowledge and, therefore, while it is interesting and desirable to discuss what Scots lawyers of the 18th century felt and feared about the Union, it is impossible to do so with any degree of accuracy. The effects of the Union are now known to us. The conclusion which is presented here is one taking this into account. Scots law has changed over the last 300 years to a mixed legal system. It is suggested here, however, that much of the changes seen in our law happened through natural discovery as oppose to purely political interventions. The fallacy *post hoc ergo propter hoc* should be considered : just because one event followed another does not necessarily mean it was caused by the other.

⁴⁵ JW Cairns, 'The Origins of the Edinburgh Law School: the Union of 1707 and the Regius Chair' (2007)11 Edin LR 300.