

COMMENTARIES

ON

THE LAWS OF SCOTLAND.



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COMMENTARIES
ON THE
LAWS OF SCOTLAND,
AND ON
THE PRINCIPLES
OF
MERCANTILE JURISPRUDENCE.

BY
GEORGE JOSEPH BELL, ESQ. ADVOCATE,
PROFESSOR OF THE LAW OF SCOTLAND IN THE UNIVERSITY OF EDINBURGH.

THE FIFTH EDITION.

VOL. I.

WILLIAM BLACKWOOD, EDINBURGH: AND
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MDCCCXXVI.



TO THE HONOURABLE

THE DEAN AND THE FACULTY

OF

ADVOCATES.

GENTLEMEN,

I INSCRIBE this Work to you with the most sincere affection and respect.

I have lived long among you, in the enjoyment of that friendly and liberal intercourse which so happily distinguishes our Society ; and, instead of any abatement of the feelings I experienced on entering a profession to which you had given so high a character, I have witnessed, with gratification and pride, the increasing dignity and independence of the Scottish Bar.

While your high attainments in literature and in science have entitled you to a distinguished rank among the learned in Europe, it is in your professional character that I now

address you, in presenting a Commentary on the Practical Jurisprudence of Scotland. The Work is already known to you, and you have honoured it with a reception much more favourable than I had ever ventured to expect. In thus inscribing it with your name, I hope I may be permitted to flatter myself, that as you have too high a sense of your public duties to countenance what ought not to be received, your approbation is not entirely to be ascribed to your good will towards the Author.

I have the honour to be,

GENTLEMEN,

Your most faithful and obedient Servant,

GEORGE JOS. BELL.

EDINBURGH, *25th May* 1816.

THE multiplication of Law Books is an evil of which there are continual complaints; and to some it appears still a greater evil, that new editions should be published of books in daily use, so enlarged and altered that the old editions are almost superseded. But this is a necessary accompaniment of the benefit to be derived from a commentary on practical jurisprudence; which, to be useful, must exhibit every change that takes place in the law, whether accomplished by the hand of the Legislature, or the result of that sifting and examination which is produced by the unceasing vigilance and keenness of private interest. This change proceeds from year to year, almost from day to day, requiring perpetual attention on the part of the profession, that they may take note of the useful distinctions and exceptions which are established by the judgments or pointed out in the opinions of Courts of Justice, or which grow out of the suggestions of experience. In Scotland alone, during the short period that has elapsed since the publication of the former edition of this Work, upwards of three thousand adjudged cases have appeared in the Books: In England, the number applicable to mercantile law alone is very great. The Legislature have passed at least five hundred public statutes, of which many, touching the most important branches of practical and commercial jurisprudence, are truly in themselves codes of whole departments: Such are the Navigation and Ship Registry Laws; the Warehousing System; the Bankrupt Laws.

I have been led on gradually from edition to edition to extend this Work, by adding Commentaries on subjects or questions not formerly discussed. But in thus following up my original design, I have been guided invariably

by what, in a practice at the Bar of five-and-thirty years, I have experienced to be chiefly useful in application to the existing state and transactions of the country, as occurring in consultation or in judicial discussion.

In order, as far as possible, to reconcile my duty to the law and to the profession, with the wishes of those who may desire to have the benefit of a new edition without purchasing what they are already possessed of, I mean to print a Supplement to the Fourth Edition ; comprehending, not only the additions which I have made of new matter by the introduction of subjects not treated of in the former edition ; but all the alterations which by new laws have been made in various departments, as in the Navigation and Warehousing system ; and, as far as possible, the result of the more important cases and discussions, with the variations produced on the text in consequence. But this last it is manifestly impossible to present fully, and with justice to the law, to the reader, or to myself, in the way of a Supplement ; and in this respect, therefore, the Supplement must be very imperfect.

It is now more than three years since the Fourth Edition of this Work has been entirely out of the hands of the Booksellers : And I resisted every call for a new edition till the proposed Statute should be passed for regulating Bankruptcy. But it having been thought expedient to delay that important measure, partly with the view it is believed that some useful suggestions might be derived from the new Act relative to Bankruptcy in England, I cannot presume longer to withhold this Work from publication. I have therefore proceeded to publish it in Parts, trusting that before I shall arrive at the proper subject of the Bankrupt Laws, the new Statute may have been passed.

The necessity of thus publishing the Work in Parts, will prevent me from printing the Supplement until the whole Work is completed.

PREFACE.

A LITTLE after the middle of the seventeenth century, the Law of Scotland was reduced to a regular system in the admirable Institutions of Lord Stair ; a work so well digested in all its parts, so liberal in principle, so good in arrangement, so distinguished for sound judgment and excellent adaptation to the business and concerns of men, that it would seem almost beyond the age in which it was written, were it not in truth a digest of the judgments of the Court of Session reduced to order, according to the spirit and arrangement of the Roman jurisprudence.

A new Institute was published nearly a century afterwards ; a posthumous work, prepared from the lectures of Mr Erskine, who filled the Chair of Scottish law in the University of Edinburgh. In this work the actual state of the law at that time is exhibited, with a conciseness and perspicuity surpassed only by Mr Erskine's previous work on the Principles of the Law of Scotland.

A very remarkable change has since taken place in our national jurisprudence. In particular, the trade of Scotland has been extended, and with it the principles of mercantile law have grown up, and very rapidly advanced towards maturity. The Roman law, indeed, has furnished the great principles on which mercantile jurisprudence has in modern Europe been grounded ; and in that learning the older Scottish lawyers were eminently skilled. But although the habits and the education of our lawyers prepared them for cultivating with advantage the principles of mercantile jurisprudence, it has happened, from particular circumstances, that, as a branch of law, this, till about half a century ago, has been comparatively neglected in Scotland.

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Towards the end of the century before the last, there was some appearance of a growing attention to this department of law, proceeding partly from the influence of foreign example ; chiefly, perhaps, from the circumstances of the country. In that part of their professional studies which depended on the Roman jurisprudence, our lawyers received or finished their education on the Continent. In France, particularly, they were accustomed to pass some part of their youth ; and to attend the sittings of the Parliament of Paris, after the model of which the Court of Session was formed. The French ‘ Plaidoyez ’ were their models in forensic eloquence ; and Sir George M’Kenzie, in his inaugural oration on opening the Library of the Faculty of Advocates, seems to speak the fashionable language of his day, when he glories in the ‘ Roman ‘ eloquence ’ of France and Scotland, compared with the dry and abstract arguments of the lawyers of other countries. About the middle of the seventeenth century, the attention of the lawyers of France was strongly called to the doctrines of mercantile jurisprudence ; and, first, the Ordonnance of 1667 ; afterwards, that which was proposed and accomplished by Colbert in 1673 ; and, finally, the still more celebrated Ordonnance de la Marine of 1681, gave a splendour to commercial law, which could not fail to make an impression upon the lawyers of Scotland. With this example, the advancing state of Scottish commerce co-operated in preparing the way for a growing attention to the subject. The spirit infused into the country by that bold speculator who projected the Bank of England, and who, after having first meditated the establishment of an Indian trade in Scotland, proposed afterwards the magnificent scheme of a settlement on the Isthmus of Darien, excited to an excessive height the commercial enterprise of his countrymen. The laws of commerce necessarily rose into notice ; and we find, accordingly, that some attention was paid to commercial law in Lord Stair’s time.

But this dawning of mercantile jurisprudence was soon overcast. The failure of the Darien expedition, and of all the splendid and premature schemes which had been formed for the advancement of Scotland, effectually checked mercantile enterprise ; and the Union with England gave to the spirit of the country a direction entirely new.

The Union was soon followed by two rebellions ; which not only disturbed the tranquillity, and interrupted the natural advancement of industry, wealth, and commerce, but produced a similar effect on the progress of the law. The numerous forfeitures which followed the rebellions of 1715 and 1745, gave rise to a multitude of difficult questions, of high interest, relative to the connexion

of superior and vassal ; the nature and efficacy of destinations in deeds of entail ; and the force of real securities over land. All the learning of the feudal law came more immediately to be called into use ; and the professional success, as well as the character of a lawyer, was estimated chiefly according to his skill in the law of heritable property. The jurisprudence of mercantile dealings, fitted for times of a different complexion, was almost entirely abandoned. In the work of Mr Erskine, published after this era, there is very little to be found concerning commercial law ; and the valuable learning concerning contracts, and the principles of mercantile jurisprudence in general, to be found in the Institutions of Lord Stair, shrinks in the Institute of Mr Erskine into a very narrow compass.

After the agitation of the rebellions had ceased, and the confidence of the country in the continuance of public tranquillity began to be restored, there appeared something like a revival of the spirit of trade. The improvement of land, and the encouragement of manufactures, were promoted, by the institution of a Board of Commissioners for the management of the forfeited estates which had been annexed to the Crown. Instructions were given, that, in the administration of this trust, those Commissioners should be careful to hold out liberal encouragement to industry ; and to the sound discretion with which this duty was exercised, may, in a great measure, be ascribed the commencement of that agricultural improvement which soon sprung up in Scotland. A Bank was instituted, the professed object of which was to aid the proprietors of land in their exertions : But the slow returns from such an employment of capital, with some other failures in the management, or, rather, in the conception of the true nature and uses of a bank, led to the ruin of the establishment.

The country had been essentially benefited by the exertions which had been made ; and not only agricultural improvement, but commercial enterprise were greatly promoted : But still there was little of the spirit of mercantile jurisprudence. The merchants were left to struggle with all the evils of our old law, little suited to the occasions of commercial intercourse ; and a proposal, made by merchants, to introduce a system of Bankrupt Law similar to that of England, met with the most determined opposition from our lawyers. The wide-spread ruin which followed on the fall of the Douglas Bank tended to allay this opposition, and to satisfy even lawyers, that the old maxims and rules, and the forms of diligence of our ancient law, were, in many respects, ill adapted to commercial intercourse in the shock of extensive

bankruptcies ; and gradually the nation was reconciled to the passing of the first Bankrupt Law in the year 1772.

It is from that time only that the rise of the mercantile law of Scotland is to be dated, and that the attention of our lawyers and Judges began to be directed judicially to commercial dealings.

It may naturally be imagined, that the most obvious and best course would have been to adopt at once the mercantile law of England, which had already made great progress towards perfection. But there is some soul of good in things evil ; national jealousy, and the repugnance which still prevailed to an acknowledgment of superiority on the part of England, prevented any premature attempt to assimilate the jurisprudence of the two countries, even in relation to those transactions in which there was a perpetual intercourse of trade between them.

When in these circumstances the present Work was begun, now nearly thirty years ago, it was with hesitation and difficulty, and with much cautious disquisition, that I could venture to approach some of the doctrines of mercantile law ; and it has been only in the course of five successive editions of the book that I have been able, on the one hand, to dismiss much reasoning that, by the authoritative recognition of the principle, had become unnecessary ; and on the other, gradually to extend my Commentaries to other questions as they rose into importance, or as room was left for their discussion by the abridgment of what had become familiar and established.

From what has been said concerning the history of Scottish jurisprudence, it may be inferred, that, in searching for materials by which to illustrate the principles of mercantile law, much aid could not be derived from our own books. A considerable share of the attention of persons educated for the Bar in Scotland, has necessarily, at all times, been directed, in the course of studying the civil law, to the great principles which regulate contracts ; and there never has been occasion to discuss questions of this sort, on which the Judges and lawyers of Scotland have been found deficient in the learning, or unskilled in the principles, which ought to rule such determinations. But, unfortunately, those learned and able arguments, so often delivered by the Judge on questions of general jurisprudence and of mercantile law, had for a long time been known only to those who heard them delivered, or to others by a obscure tradition ; and what might have enlightened the law, and done honour to the

judicial establishment of Scotland, had been lost in the imperfect reports made of adjudged cases. In those reports, not only the decisions were not preserved in the language of the Judges who pronounced them, but the very grounds on which they were made were kept out of view, and nothing preserved but a mere skeleton of the case, and of the arguments of counsel, accompanied with a transcript of the formal words of judgment.

In this dearth of materials afforded by the books of the Scottish law, it was natural, or necessary, to look abroad for aid—to the writings of foreign lawyers, and the decisions of foreign courts: And the occasion was such as to justify the use of such authorities.

The Law-merchant is universal: It is a part of the law of nations, grounded upon the principles of natural equity, as regulating the transactions of men who reside in different countries, and carry on the intercourse of nations, independently of the local customs and municipal laws of particular states. For the illustration of this law, the decisions of courts, and the writings of lawyers in different countries, are as the recorded evidence of the application of the general principle; not making the law, but handing it down; not to be quoted as precedents, or as authorities to be implicitly followed, but to be taken as guides towards the establishment of the pure principles of general jurisprudence.

This general Law-merchant is, in England, said to form part of the common law: and it is so much a part of that law, that it requires not to be proved by witnesses, like matter of foreign regulation, but is noticed judicially by the Court. The same precision, in the laying down of this doctrine, is not to be found in Scotland; because, in our books, little attention has been given to the subject, and the dicta of our Judges have perished. But the same principle operates as in England; and our Courts are daily in the habit of proceeding on this Law-merchant as fully authoritative in Scotland, and of allowing the decisions of courts, and the writings of lawyers, to be cited in illustration of it.

But in mentioning foreign authorities and decisions, as coming in aid of our own imperfect materials, it is necessary to distinguish, in a particular manner, those of England. Not only from the extent and variety of her commerce, but from the fortunate circumstances which marked the progress of this part of her jurisprudence, the English books afford valuable aid in cultivating the subject of mercantile law.

During the troubles which agitated and depressed this country, England was triumphantly proceeding in her great career of commercial prosperity; and the progress of her jurisprudence, which might naturally be expected to accompany that of her trade, was happily directed by the successive wisdom and learning of many great men. It has been objected to the judicial decisions of some of those Judges, that they did not sufficiently study to form precedents for future cases. But there had gradually been accumulated a rich collection of materials, when Lord Mansfield, in the middle of the last century, was appointed Lord Chief-Justice of the King's Bench. This eminent man, who has been called the father of the commercial law of England, devoted his splendid talents, during an uninterrupted period of thirty years, to the great duty of constructing, in a series of judicial determinations, a system of mercantile jurisprudence. The spirit with which he proceeded has thus been stated by one who enjoyed much of his confidence, the late Mr Justice Buller:—
' Within thirty years, the commercial law of this country has taken a very different turn from what it did before. Before that period, we find, that, in Courts of Law, all the evidence in mercantile cases was thrown together: they were left, generally, to a Jury, and they produced no established principle. From that time, we all know, the great study has been, to find some certain general principles which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future. Most of us have heard these principles stated, reasoned upon, enlarged, and explained, till we have been lost in admiration at the strength and stretch of the human understanding.'

This design, so far most happily accomplished by Lord Mansfield, has been steadily kept in view by the Judges who have succeeded him in the courts of England,—Lord Kenyon, Lord Ellenborough, Lord Eldon, while he sat in a Court of Law, and during the long period of his presiding in the House of Lords. The arguments which have been delivered from the Bench, for nearly a century, by so many eminent men, are reported to us so faithfully, that we have before us, as materials of study, the whole of what has been laid down by the Judges of England upon mercantile jurisprudence.

But, in the use of those materials a task of great delicacy remained to be performed. England and Scotland were, by the Articles of Union, placed so entirely on the same footing in all the regulations respecting trade, that the system of mercantile jurisprudence in the two countries is truly to be considered as the same; and, of late years, the judgments of West-

minster-Hall and those of the Court of Session, have, in both countries, been allowed to be quoted as the decisions of British Courts upon the mercantile law of Great Britain. Still much caution is to be observed in the adopting of English judgments as authorities in Scotland; and I state this the rather, that I think there has appeared of late some danger lest the purity of this part of jurisprudence, and the integrity of our own system of law, should be impaired by too indiscriminate a use of English authorities. In a large proportion of cases which come into courts of justice, the relation, and consequent rights of parties, stand on such a footing, that the law-merchant, and the municipal law or local custom, are in a manner blended together; and it is difficult to discriminate on what precise ground the decision has proceeded amidst these elements of judgment. Even the peculiar forms of trial, and science of pleading, as embodied in a decision, may often lead to mistake; and a judgment may appear to be given on a general principle of jurisprudence, which turns entirely on a point of form. There is evidently, therefore, great hazard in transferring the decisions pronounced upon cases of this description, in one country, to the practice of another system; and unless the separation be carefully made, rules of foreign municipal law may be incautiously imported, and an adulterate precedent adapted as authority in mercantile law, for the illustration of which we look into those cases. Of those dangers, arising from the peculiarities of municipal law, the lawyers of England have been more fully aware than we are accustomed to be in this country. To avoid them was one great aim of Lord Mansfield in his determinations of mercantile cases; and every one who has conversed much with lawyers of the higher class in England, must have seen the same wise caution distinguishing all their inquiries into the nature and foundations of legal doctrines, and the weight of authorities and decisions.

In observing this caution, and in attempting to extract from various, and sometimes discordant materials, the pure doctrines of the law-merchant, while the task I had undertaken appeared to promise usefulness, it was also a task of great difficulty. Many of the English cases have, by Lord Mansfield, and upon the model which he began, been decided with so much care in the determination of the principle, that they are as lights in this obscure path. Others contain so strong an infusion of common law, intimately blended in the judgment, that without a careful comparison of them with the great principles of jurisprudence delivered in the Roman law, and recognized in the Scottish authorities, or commented on by foreign writers of credit, there was much hazard of impairing what it was my design to clear, and

of substituting, in the place of mere obscurity, corrupted doctrine and mistaken principles. But I trusted, that, amidst the delicacies of the undertaking, and the chance of failure, some benefit might arise. While I did not profess to embrace the whole details, or deliver a digest of the mercantile law, but merely to investigate questions of this description which presented themselves, I was satisfied that what appeared to me so embarrassing, after so much study, must to those whose researches were only occasional, and undertaken with a view to the discussion or decision of a particular question, present difficulties no less formidable; and that a free examination of the principles of mercantile law, as illustrated by the decisions and legal authorities of England as well as of Scotland, might contribute in some degree to the improvement of this great system in both countries. I ventured to expect, that if the design were properly executed, it might enable the lawyers of England to become better acquainted with our jurisprudence than hitherto they had found to be practicable. Some of that learned body I have been mortified to find ignorant on this subject, and in no degree aware of the admirable principles and comprehensive views by which the law of Scotland is distinguished. Others, again, whose opinions will finally prevail, have a very different sense of this matter. Lord Bacon long ago said, ‘I have read, and read with delight, the Scottish statutes, and some other collections of their laws;—with delight, I say, partly to see the brevity and propriety of speech, and partly to see them come so near our own laws.’—And, in the present day, men of the first eminence in the law of England have expressed their high admiration and respect for the law of Scotland; and make no scruple to profess the care with which they are accustomed to examine into its doctrines, in preparing to determine questions of general jurisprudence, or in deliberating on suggestions fit to be made to the Legislature for the improvement of the English law.

The hope of producing a Work which might be of some use, in opening a fuller communication between the laws of the two countries; in promoting a free examination of the difference between them; or in shewing how completely they coincide in some points of importance to both, carried me through many difficulties. I am happy to say, that I have succeeded in this great object beyond my most sanguine expectations; and that with whatever imperfections this Work may be chargeable, I have at least the comfort to think, that it has been instrumental in introducing the Lawyers of England and of Scotland to a more intimate knowledge of the contrasted excellencies of their respective systems of jurisprudence.

But this book was not meant to be a commentary on mercantile law alone. In every branch of the law there has been a very remarkable progress since Mr Erskine's time. The necessity even for a new Institute has been strongly felt; and one of the schemes for improving the jurisprudence of Scotland, which the Bar have often contemplated, was, that there should be drawn up, by the co-operation of men of talent and high authority, a modern digest or code of the law. At other times, we have cherished the hope as less visionary, that a very eminent person, peculiarly qualified for so great an undertaking, and in possession of invaluable materials for the purpose, might be induced to think that he should best discharge that debt which every man is said to owe to his profession, by the publication of an Institute. Had a Work of such surpassing usefulness as the Bar were prepared to expect from that quarter made its appearance, the field of these Commentaries would have been much narrowed. And although there might still have been some questions of heritable right and competition, on which a Commentary might have been useful, as requiring an examination more in detail, a discussion somewhat less abstract, than it is fit or possible to deliver in an Institutionary Work; I should have abstained from much of that discussion which, in the want of any modern Institute, I have thought necessary for completing my view of the laws which regulate the connexion of debtor and creditor.

In the whole course of these extensive labours I have accustomed myself to examine all the cases and authorities with the greatest freedom, but I hope with that respect and deference which become an individual. In questions of mercantile law, I have been actuated by a sincere desire to find the governing principle of universal jurisprudence, or to discriminate the peculiarities that may justify a determination in one part of the empire, which may not, perhaps, be entitled to prevail in another. I have been encouraged, in my labours, by the greatest authorities of my own time in both parts of the Island; and I am proud to acknowledge the highest gratification that the author of such a performance can have bestowed upon him, in the recorded approbation of the Scottish Bar, and in the public notice with which both Scottish and English Judges have, from the Bench, been pleased to distinguish this Work.



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In Binding up the FIRST VOLUME, pages xxiii. xxiv. of the Contents of PART I.
must be cancelled.

