OLD STUDIES IN SCOTS LAW

VOLUME 1

Principles of the Law of Scotland

Fourth Edition

GEORGE JOSEPH BELL

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INTRODUCTION

Bell's later career

On Saturday 2 March 1822 it was reported in the *Caledonian Mercury* that:

> On Wednesday last, the Magistrates and Town Council elected George Joseph Bell, Esq. advocate, to be Professor of the Law of Scotland in the room of the Hon. Mr Baron Hume. By the constitution of this professorship, the election is made from a leet of two, transmitted to the Council from the Faculty of Advocates, one of whom is always a person whose official rank is understood to exclude him from the situation of an actual candidate. In the present instance, Mr. Bell has been called to this important and arduous station by the unanimous voice of his brethren; a distinction which he is felt to have merited, not only by his well known professional talents and learning, but by his eminent services as an institutional writer on some of the most important and difficult branches of our municipal law.[1]

By the time of his appointment to the Chair of Scots Law at Edinburgh University in 1822, Bell was already in his early 50s[2] and, as the newspaper notice implies, the author of a celebrated work, the *Commentaries on the Law of Scotland and on the Principles of Mercantile Jurisprudence*, which had first appeared some twenty years earlier and was now in its third edition.[3] The Chair was a part-time position and at first Bell continued to practise at the bar. No doubt he hoped for further preferment, and indeed on 28 November 1827 *The Times* reported that Bell was likely to "be appointed one of the Lords of Session on the resignation of Lord Eldin, which is confidently expected". Matters were thought so advanced that "a very active canvass" had

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[1] As might be expected, Bell had solicited his election. A letter survives dated 9 Jan 1822 to an unknown recipient (perhaps the Dean of the Faculty of Advocates) which begins as follows: "On coming to town this afternoon, I learn that the Chair of the Professor of Scottish Law is likely to become vacant by the appointment of Mr Hume to the Court of Exchequer. And some of my friends, thinking of me I fear more favourably than I deserve, have urged me to put myself in nomination as a Candidate." I am grateful to Dan Carr for discovering and transcribing this letter, which is held in the Library of the University of St Andrews.

[2] Bell was born on 26 March 1770.

[3] The two volumes of the first edition were published, respectively, in 1800 and 1804. In 1800 the work was known as *Treatise on the Laws of Bankruptcy in Scotland*, but by 1804 (when the first volume was reissued) the title was *Commentaries on the Municipal and Mercantile Law of Scotland considered in relation to the Subject of Bankruptcy*.

begun for Bell's successor in the Chair, with J S More,[4] Robert Jameson and Mungo Brown as the leading contenders. In the event, only the first part of the story turned out to be true: Lord Eldin resigned, but the appointment went elsewhere. Nor was Bell appointed to the vacancy created by the death of Lord Alloway a few months later.[5]

One reason for the failure of Bell's candidacy may have been his support for the separate Jury Court, which was unpopular in parts of the legal profession. Bell had been a member of the law reform commission on court proceedings which sat in 1823–24 and he produced a first and controversial draft of what was to become the Court of Session Act 1825.[6] His practice, already diminished following his appointment to the Chair of Scots Law,[7] came close to collapse as a result.[8] As Lord President Hope explained to Viscount Melville in a letter dated 13 March 1826:[9]

> The poor Devil has almost entirely lost his business, which was once very respectable; but the Body of Writers were so angry with him for his conduct in drawing up the Judicature Bill, in principles so different from what he had himself professed, & from what the Report of the Commission authorised, that they have withheld their business from him to a very serious degree. On which account, as he has a large family, & suffered severe loss by his Eccentric & vagabond brother John, the Surgeon, I would wish that he had a permanent situation in addition to his professorship.

In the event, no "permanent position" was found for another five years. But when the Whigs came to power following the election of 1830, the new Lord Advocate, Francis Jeffrey – an old friend as well as a near contemporary[10] – appointed Bell as one of the principal clerks of session, a position which had

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[4] More was to succeed to the Chair on Bell's death in 1843.

[5] On 17 Feb 1829 John Fullerton replaced Lord Eldin, and on 24 June 1829 Sir James Wellwood Moncreiff replaced Lord Alloway. See G Brunton, *An Historical Account of the Senators of the College of Justice of Scotland from its institution in 1532* (1849) xxx. Like Bell, both men were Whigs.

[6] See N Phillipson, *The Scottish Whigs and the Reform of the Court of Session 1785–1830* (Stair Society vol 37, 1990) 152 ff.

[7] G W Wilton, *George Joseph Bell* (1929) 14. Wilton (9 n 4) estimates Bell's best year to have been 1821, immediately prior to his appointment to the Chair. See also Lord Moncreiff, "Letters and discoveries of Sir Charles Bell", *Edinburgh Review*, April 1872, 394 at 398: "His professional career as regards practice was for many years very successful. … But Themis is a fickle goddess, and in the jostling of the distinguished crowd to which he belonged, in the end he was distanced by younger men."

[8] In addition, his health was precarious in early 1824, due apparently to overwork. See *Letters of Sir Charles Bell selected from his correspondence with his brother George Joseph Bell* (1870) 281–82 (20 Feb 1824, to George Joseph Bell): "I have vexed myself constantly of late with the idea of your continual labour. Now, the fact is, it will not do; and you may as well give out at once that you have been over-tasked, and broken down in harness."

[9] Quoted in Phillipson, *Scottish Whigs* (n 6) 157.

[10] Jeffrey was three years younger having been born on 23 Oct 1773.

also been held by David Hume during the latter years of his tenure of the Scots Law Chair.[11] This added £1000 to the income of approximately £750 which Bell already received from the Chair. Bell's appointment was announced in December 1831 and he first took his seat in court on 17 January 1832.[12] From 1833 to 1839 Bell also served as chairman of a particularly active royal commission for law reform.[13]

According to Lord Cockburn, Jeffrey "thought himself almost sufficiently rewarded for having taken office" as Lord Advocate by being able to appoint Bell as a principal clerk of session, adding that Jeffrey "would have made him a judge if there had been a vacancy".[14] When, however, a vacancy did eventually materialise the position was taken by the Lord Advocate for himself, and on the occasion of Jeffrey's formal installation as a judge, at 11 am on Wednesday 7 June 1834, it fell to Bell as principal clerk to read aloud the letter of appointment from the King.[15] Perhaps by then Bell had given up hope of a position on the bench. Perhaps he had even come to accept that he could have more influence as a professor than as a judge. That certainly had been the view of *The Scotsman* in noting Bell's appointment as a principal clerk on 28 December 1831:

> The Clerkship of Session, vacant by the death of Mr Hamilton, has been bestowed upon Mr George Joseph Bell. He at the same time retains the chair of Scots Law, and as the two places will be nearly equal in emolument to a seat on the bench, we trust Mr Bell's promotion will stop here, and that he will long retain the academical situation which he is so well qualified to fill.

As things turned out, Bell was to continue to hold both positions until his death, at the age of 73, on 23 September 1843. Bell's last years, however, were difficult,[16] and Cockburn's tribute, written from a position of worldly success, strikes a melancholy note:[17]

> His death was not to be regretted, – old, blind, poor, and getting poorer, and never forgetting the disgraceful treatment which excluded him from the Bench

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[11] It is sometimes said that Bell replaced Sir Walter Scott (who in 1822 had seconded Bell's nomination to the Chair): see eg D M Walker, *The Scottish Jurists* (1985) 338; but Scott had resigned his position as a principal clerk of session more than a year earlier, on 12 Nov 1830, and the vacancy filled by Bell was caused by the death of Robert Hamilton.

[12] *Caledonian Mercury* 19 Jan 1832.

[13] On the workings of this commission, see W M Gordon, *Roman Law, Scots Law and Legal History* (Edinburgh Studies in Law vol 4, 2007) 215–30.

[14] Lord Cockburn, *Life of Lord Jeffrey* (2nd edn, 1852) vol 1, 327. See also Lord Cooper, *Selected Papers* (1957) 49: "One can only wonder whether his contemporaries at the Bar and on the Bench during these years appreciated the grim humour of the fate which relegated Bell at the summit of his powers to the position of a spectator in the Inner House."

[15] *Aberdeen Journal* 11 June 1834. See also Cockburn, *Life of Jeffrey* vol 1, 365. Cockburn himself was elevated to the bench at the next vacancy, on 15 Nov 1834.

[16] Wilton, *Bell* (n 7) 16–18.

[17] H Cockburn, *Circuit Journeys* (1888) 203.

> because he would not be dishonest, life for him had lost most of its attractions. There could not possibly be a better man, and he is the greatest legal writer in Scotland next to Stair.

Professor Bell's design

In his inaugural lecture, which took place on 12 November 1822, Bell gave some indication of how he intended to go about teaching the class of Scots law. While "practical details would be rendered illustrative of principles" and "the students would be taught to know what the law actually was, they would also be furnished with the means of forming an opinion of what it ought to be".[18] To make time for the more discursive approach which this statement implied, it was necessary to provide some other means of transmitting basic information. Bell's first idea was to produce a synopsis of his lectures in note form but with full references – in effect an extended lecture handout – and this was published in 1827, without Bell's name on the title page, as an *Outline of Lectures on the Law of Scotland; for the use of students in the University of Edinburgh.* This was a substantial work, running to some 252 printed pages.[19] "It will be found to save much time", Bell noted in the introduction, "which may be applied to the purpose of useful illustration."[20] Whether Bell intended all along that the *Outline* should only be a stop-gap measure until a full text could be prepared is unclear. But at all events a full text was duly published in 1829 as *Principles of the Law of Scotland for the use of students in the University of Edinburgh*.[21] A second edition followed almost immediately, in 1830, and a third in 1833. There was then a gap, but on 30 October 1839 a notice in *The Scotsman* announced the publication, the following day, of a fourth edition, "greatly enlarged". This is the edition reproduced in the present volume. As it was the last to be prepared by Bell, it can fairly be treated as containing his final thoughts on the innumerable topics covered in the *Principles*. An additional merit is that it is much shorter than the later editions,[22] which make valiant efforts to keep the text up to date, and where the editor's additions are so interwoven with Bell's original text that, to the incautious eye at least, they can easily be mistaken for the work of Bell himself.

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[18] *The Scotsman* 16 Nov 1822.

[19] Professor Gordon suggests that publication may have been stimulated by the questions which Bell was asked in 1826 by members of the Royal Commission on the Universities of Scotland: see W M Gordon, "Introduction", in G J Bell, *Principles of the Law of Scotland* (10th edn by W Guthrie, 1899, reprinted 1989).

[20] G J Bell, *Outline of Lectures on the Law of Scotland; for the use of students in the University of Edinburgh* (1827) iii.

[21] A facsimile reprint was published by Gaunt Inc in 2001.

[22] For example the 9th edition (1889) is, at 1592 pages, almost twice the length of the 4th.

As the title makes plain, Bell's *Principles* was, in its origins, intended for students.[23] The only previous work entitled *Principles of the Law of Scotland* was the student book by John Erskine of Carnock, one of Bell's predecessors in the Edinburgh Chair, a work acknowledged by Bell as being "the standard book" for students,[24] and one which the new book was plainly intended to supplant.[25] Further, the title of Bell's first edition contained the additional words "for the use of students in the University of Edinburgh". The preface to that edition, addressed "to the students of the law of Scotland in the University of Edinburgh", is quite explicit:

> This Introductory View of the Principles of the Law of Scotland has been prepared for your use. I hope it will render your study of a very difficult science more easy, by supplying you with a brief statement of the leading rules and exceptions, and a correct list of the authorities relied on in support of the several propositions, or useful in illustrating them.

Bell continues with an admonition which deserves to be repeated by all teachers of law:

> This book is intended not to be read merely, but to be studied. And, in doing so, I should recommend it to you carefully to consult the Authorities to which I have referred; to verify the propositions which they accompany; and to take note of the practical observations, or difficulties, which arise to you in the perusal of the cases. For you may be assured, that no man can become a lawyer by hearing the prelections or lessons of another, without severe study; and that none ever yet became eminent in the Law, who was not his own teacher.

To facilitate such study Bell purchased "at great cost" a private law library which was made available to students in the mornings and again in the

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[23] In its attack on the recommendations of the 1831 Royal Commission, the Edinburgh Law Faculty, while questioning the value of any "innovations … of a purely speculative description", boasted of the "new means of study" provided for the Scots Law class in the form of a "Text-book, containing minute citation of cases and authorities": see *Evidence Oral and Documentary taken and received by The Commissioners appointed by His Majesty George IV July 23d, 1826; and re-appointed by His Majesty William IV, October 12th, 1830; for visiting the Universities of Scotland. Volume I: University of Edinburgh* (PP 1837 vol XXXV) (henceforth *Royal Commission Evidence*) App 257.

[24] J Erskine, *The Principles of the Law of Scotland in the order of Sir George Mackenzie's Institutions of that Law* (1754): see Bell, *Outline* (n 20) iv. In 1760 George Wallace had published the first volume of a work entitled *A System of the Principles of the Law of Scotland*. According to Walker, *Scottish Jurists* (n 11) 305, it "seems to have been a disastrous failure. It is said that only 40 copies were sold and that the author bought up the rest of the edition himself, either to avoid having it remaindered, or to conceal his own defective presentation". In any event, no further volumes were ever published.

[25] *Letters of Sir Charles Bell* (n 8) 311 (3 April 1830, to George Joseph Bell): "I am delighted with your substitute for little Erskine, but I am a little jealous in favour of the great book [ie the *Commentaries*]."

evenings.[26] And he embarked on the arduous task of preparing summaries of every case, English as well as Scottish, which was cited in the *Principles*. The result was the *Illustrations from Adjudged Cases of the Principles of the Law of Scotland*, published in three volumes between 1836 and 1838. Once again, there is an address "to the students of the law of Scotland in the University of Edinburgh":[27]

> In preparing these Illustrations, I have, from a deep sense of duty to you, for whose improvement and means of study I am bound and anxious to provide, submitted to much irksome and unpleasant labour. But I trust that I have placed within your reach the means of fully understanding the rules and principles of the Law of Scotland, as best illustrated and enforced in a series of judicial determinations.

The summaries are brief, typically five or six to the page. They follow the order of the *Principles* and contain a cross-reference to the relevant paragraph of the text.[28] The fourth edition of the *Principles*, which was published shortly afterwards, makes sporadic reference back to the *Illustrations*. As well as cases, the text of certain key statutes is also reproduced. With the publication of both a textbook and what amounts to a book of cases and materials, Bell had, as he noted in the "Advertisement" to the fourth edition of the *Principles*, "completed my original design". His students were now fully equipped for the "severe study" which law requires and demands.

If, however, Bell's original and continuing purpose was to assist his students, he became increasingly aware of the value of the *Principles* for the legal profession and even for the courts. The result was a series of presentational changes. The reference in the title to the students at Edinburgh University did not survive the first edition. From the second edition onwards there was an elaborate dedication to Francis Jeffrey – Dean of the Faculty of Advocates at the time of the second edition ("the eminent station to which you have been raised"), Lord Advocate by the third ("Amidst your arduous and successful exertions for the amendment of the Representation of the People, and the establishment of a free Constitution in our Burghs, you have not allowed yourself to neglect the less ostentatious but not less important duty of watching over and advancing the improvements of the Laws"), and Senator of the College of Justice at the time of the fourth ("in testimony of his acknowledged excellence as a judge"). Finally, it was made clear in successive prefaces that it was not only students who would find the work of assistance. In the second and third editions, practitioners are mentioned before students ("I was induced to undertake this Work in the hope that it might prove useful to the profession at large, but more especially to those whose studies it is

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[26] *Royal Commission Evidence* (n 23) App 257.

[27] This appears in vol 2.

[28] This, of course, is to the paragraphs of the 3rd edition, but the paragraph numbers of the 4th edition are the same except for the final part, Part V.

my peculiar duty to promote"), while the fourth edition refers to the work's usefulness "for the sudden occasions of practice". Nonetheless, it would no doubt have surprised Bell that the later reputation of the *Principles* owed little or nothing to its usefulness for students. This is a point to which we must return.

Relationship to Bell's lectures

The class of Scots law met daily throughout the winter months between the hours of 3 and 4 pm – a time designed to accommodate the professional lives both of the professor and of those of his students who were in practice.[29] The course started at the end of October or beginning of November and lasted until early April, with around 100 lectures being given altogether.[30] Students ranged in age from 16 to 25.[31] In Bell's first year, 1822–23, there were 257 students but numbers fell off thereafter so that in 1829–30 – the last year for which published figures are available – only 128 students were in attendance.[32]

In oral evidence given to the Royal Commission on the Universities of Scotland in 1826, Bell described his students in this way:[33]

> The class which I teach is a very peculiar one; it consists not only of young men, properly academical students, who are intended for the learned professions here in Edinburgh, but of men who, without intending to submit to academical discipline, come up from the country (some of them even considerably advanced in practice), and who attend for the information which they may expect to obtain from the lectures. They therefore do not consider themselves under academical control in the same way as, in the initiatory classes, the young men are; but they attend for their own advantage when they can, or when they find advantage in it; or neglect to attend when they find it inconvenient, or useless.

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[29] *Royal Commission Evidence* (n 23) App 257. The venue was room 12, Old College, which, according to a report by Playfair, had a capacity of 318: see App 164. The location of this room is uncertain. When the northern side of Old College was built in the early 1820s, the plan was for Scots Law and Moral Philosophy to share the room directly above modern-day room 175: see A G Fraser, *The Building of Old College: Adam, Playfair and the University of Edinburgh* (1989) 230–31, 374–75. But by the time Playfair reported to the Commissioners, in 1827, Scots Law was sharing accommodation with Practice of Physic, and Moral Philosophy with Conveyancing and Clinical Surgery.

[30] *Royal Commission Evidence* (n 23) 188, App 123.

[31] *Royal Commission Evidence* (n 23) 186.

[32] *Royal Commission Evidence* (n 23) App 131. This anticipated a general decline in student numbers at Edinburgh University in the 1830s and 1840s: see eg *Journal of Henry Cockburn being a continuation of the Memorials of his Time 1831–1854* vol II (1874) 51–53. John Cairns has suggested to me that the class of Conveyancing, which was started in 1825–26, may have offered sufficient (and more relevant) legal instruction for some who would previously have attended lectures in Scots Law.

[33] *Royal Commission Evidence* (n 23) 187.

Some – typically around 35 – would have taken the class of Civil law in the previous year,[34] but Bell considered that at least "[w]ith regard to those who are destined for practising in the country, I think their time would be much thrown away in such attendance".[35]

Although he did not read his lectures, Bell spoke from "full notes"[36] – a source of anxiety in the near-blindness of his final years.[37] No manuscript, however, seems to have survived – as survived, and has been published, in respect of his immediate predecessor in the Edinburgh Chair (David Hume) and also of his immediate successor (John Schank More).[38] Further, whereas numerous sets of student notes are available in the case of Hume's lectures, including two volumes of notes taken by Bell himself in 1788–89,[39] notes by Bell's students are a great deal rarer.[40] Although doubtless there are others, I have been able to trace only two sets: one from 1825–26 by Thomas Lees and a second from 1836–37 by John Yule of Broughton Hall.[41] They are quite different in character. Lees' notes, taken very early in Bell's tenure of the Chair and before the publication even of the *Outline of Lectures*, run to 433 pages plus an index and give an extensive and detailed account of the law. Yule, by contrast, manages only 111 pages for 100 lectures[42] and is sometimes extremely terse. For example, for lecture 66, on servitudes, he records only that "Servitudes are constituted either by grant or prescription; and they may be extinguished in several ways as confusione, or express renunciation and discharge" – a poor return for an hour's listening.[43]

Whether Yule was a typical student is of course hard to say. Nonetheless, by examining his notes it is possible to gain some idea of Bell's lecturing style and of the relationship between the lectures and the *Principles*. In his

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[34] *Royal Commission Evidence* (n 23) App 131.

[35] *Royal Commission Evidence* (n 23) 190.

[36] *Royal Commission Evidence* (n 23) 188. This is from the oral evidence by Bell himself, given to the Commissioners on 18 Oct 1826. Bell added: "I am induced to do that from the great extent of the subject, and from the peculiar views which I entertain of the way in which that class ought to be taught."

[37] *Letters of Sir Charles Bell* (n 8) 395 (18 Sept 1841, to John Richardson).

[38] G C H Paton (ed), *Baron David Hume's Lectures 1786–1822* (Stair Society vols 5, 13, 15, 17–19, 1939–58); J McLaren (ed), *Lectures on the Law of Scotland by John Schank More LLD* (2 vols, 1864).

[39] These are held in Edinburgh University Library (shelfmark Dc.5.37–38) and are marked as volumes 2 and 4; the other volumes are missing. Edinburgh University Library holds eight further sets of students' notes, ranging from 1790–91 to 1820–21.

[40] One reason for this is probably that, with the publication of the *Principles*, the lectures themselves became of less value.

[41] T Lees, *Notes on the Law of Scotland from Lectures delivered in the University of Edinburgh, by George Joseph Bell Esquire Advocate*; J Yule, *Notes of Professor Bell's Lectures on Scotch Law*. The former is held by the writer, the latter is in Edinburgh University Library (shelf mark Dk.2.4).

[42] Though he missed two of these, including the very first.

[43] Yule, *Notes* (n 41) 83–84.

evidence to the Royal Commission, Bell had complained that "one course is a great deal too long both for the spirit and strength of the Professor, and for the attention of his pupils", and advocated the introduction of a second course on Scots law[44] – a suggestion ultimately recommended by the Royal Commission[45] but then emphatically rejected by Bell's own colleagues.[46] As it was, in seeking to cover all of private law in just 100 lectures, Bell could give no more than a "hasty view"[47] even of those topics selected for inclusion. Yule divides his material by lecture rather than by subject matter, making it possible to see how much time Bell devoted to each topic. In 1836–37 Bell gave a relatively full treatment of the law of contract, with which he began his lectures, but by later on in the course the coverage was more rushed or even cursory. Marriage was disposed of in four lectures, leases in one, and some topics which feature in the *Principles* were omitted altogether, for instance prescription or common interest. Yule's notes on a single lecture rarely extend beyond three pages and are often much shorter, and whereas Lees a decade earlier had given extensive lists of authority, Yule cites virtually none. Here the effect of the *Principles* is obvious: if the law had already been set out and vouched for in the lecturer's own book, there was little point in repeating the information in the form of notes.

For Bell, the book was an opportunity to give lectures in a more discursive manner. Predictably, the result met with opposition. One student, Thomas Fraser, who attended the class in 1831–32,[48] later recorded in his diary that:[49]

> [T]he lectures of Mr Bell notwithstanding his high legal reputation were generally considered profitless, and his class were most inattentive. … The subject of Mr Bell's lectures was a very wide one embracing the whole law of Scotland, with the exception of conveyancing which he left to Napier,[50] and criminal law, which he rarely touched on, and his mode of treating it was extremely desultory

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[44] *Royal Commission Evidence* (n 23) 188. Baron Hume held the same view: see App 284–85.

[45] *Report made to His Majesty by a Royal Commission of Inquiry into the state of the Universities of Scotland* (1831 PP XII) 53–54: "In the progress of society, the subject of the Municipal Law of Scotland has now become so extensive, that after due investigation, we are satisfied that, even with the important aid of the Class of Conveyancing, the whole branches of it cannot be effectually comprehended in one Course of Lectures during a Session of six months." See also 140.

[46] *Royal Commission Evidence* (n 23) App 258.

[47] Yule, *Notes* (n 41) 70.

[48] This was a year or two before the lectures were attended by the future Lord President Inglis: see J Crabb Watt, *John Inglis, Lord Justice-General of Scotland: A Memoir* (1893) 42.

[49] Quoted in T St J N Bates, "Mr McConnachie's Notes and Mr Fraser's Confessional" 1980 JR 166 at 176.

[50] Macvey Napier (1776–1847), although much better known as editor of the *Edinburgh Review* and the *Encyclopaedia Britannica*, was also the first Professor of Conveyancing at Edinburgh University, holding the chair from 1825 until his death in 1847. Unlike the lectures of Professor Bell, Thomas Fraser held Napier's lectures in high regard.

> consisting almost entirely of verbal commentaries with little attempt at system or arrangement upon his own very excellent text book.

Some at least of these "verbal commentaries" were included by Yule in his notes. At times their purpose may have been to capture the attention of a youthful audience by means of a striking illustration. For instance, Bell explains in the context of force and fear that: "Once in ancient times an abbot was put into an iron cage and roasted at a fire till he signed a charter, which of course was found to be null."[51] More characteristic are the illustrations used in the lecture on error in contract law to expand on the brief (but, as it turned out, highly influential) treatment found in the *Principles*.[52] These resemble, but are different from, the illustrations which appear in the *Commentaries*.[53] Error as to quality, for example, is explained in this way:[54]

> [S]uppose I order from a Brewer some ale telling him that it was wanted for exportation to the West Indies; it spoils on the way out, and the brewer is liable, because he did not give the proper quality for exportation. There is a French case which bears upon this point. A gentleman made a bargain with a Jeweller for a "watch for a lady"; the Jeweller sent a silver watch which the gentleman refused, alleging that a lady's watch evidently means a gold one; and the court found the gentleman entitled to have a gold watch.

Elsewhere in his lectures, Bell's account of the distinction between real and personal rights is carefully set in a commercial context:[55]

> Another division has been made of the rights relative to things into two classes; first jus in re (ie which signifies a real right in a thing itself, whereby a person actively possesses the things as his own); and second jus ad rem which is a right depending upon the obligation of a person to give a thing, but in which thing itself the creditor has no real right, but only a right to compel the debtor to fulfil his obligation as far as possible; as for instance suppose A bought 100 quarters of wheat from B and paid for them, on the agreement that said wheat was to be delivered within a certain time. But before the expiry of this time B fails. Upon this A demands the wheat, but does not obtain it; he merely ranks with the other creditors, and gets his proportional dividend. But you will say, A paid for his wheat, and therefore it is his property; true, but the other creditors of B are exactly in the same situation, for B owes them all either wheat or money or some other commodity; they have all as good a right as A and therefore A only gets a dividend along with the rest. In this case A has a right ad rem, but not in re. If he had got the wheat at the time he paid for it, then he would have a right in re; it would have been his own real and actual property.

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[51] Yule, *Notes* (n 41) 6.
[52] *Principles* § 11.
[53] *Commentaries* (7th edn, by J McLaren, 1870) I, 313–14.
[54] Yule, *Notes* (n 41) 4.
[55] Yule, *Notes* (n 41) 2–3.

In bankruptcy, Bell implies, there is misery all round, and no one creditor should be favoured over any other.[56] And far from being resistant to this result, as has sometimes been the modern approach,[57] Bell sees the principle of *paritas creditorum* as a simple and obvious question of fairness.

A final passage from Yule's notes shows Bell venturing, uncharacteristically, into matters philosophical. Once again his treatment is both clear and, for a student audience, illuminating:[58]

> There is also a difference between legal and moral obligation. Let us suppose that a man has through misfortune become bankrupt, and is lying in jail, and that some person hearing of his destitute circumstances, sends him a banknote sufficient to pay his creditors, and procure his release. After a while this person in turn becomes bankrupt and is thrown into prison. Now is the time for the former bankrupt, whom we shall suppose in the meantime to have acquired wealth, to step forward and release his benefactor. But is he bound in Law to do this? By no means; – there is here a strong moral obligation but no legal one. On the other hand, if at the time the former was relieved from his difficulties, he granted a written promise to repeat the sum, then of course there is a legal obligation.

Structure

In devising a structure for his lectures, and hence for his *Principles*, Bell was working within a tradition, influential in a number of countries, by which law was expounded systematically on the pattern of Justinian's *Institutes*.[59] Stair's *Institutions* and the *Institute* of Bankton and of Erskine were the most significant Scottish examples of this "institutional" model.[60] But whereas the earlier writers tended to copy the Justinianic structure closely or, in the case of Erskine, very closely,[61] Bell in his *Principles* followed a plan which was partly of his own devising. "The object of Jurisprudence", Bell states at the very outset, "is the protection and enforcement of Civil Rights". Civil rights

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[56] For a modern statement of this fundamental principle, see N R Whitty, "*Sharp v Thomson*: identifying the mischief" 1995 SLT (News) 79.

[57] *Burnett's Tr v Grainger* 2004 SC (HL) 19 at para 67 per Lord Rodger of Earlsferry: "The decision of the Extra Division is correct. But it shocks." Bell was less tender-hearted.

[58] Yule, *Notes* (n 41) 3–4.

[59] K Luig, "The institutes of national law in the seventeenth and eighteenth centuries" 1972 JR 193. For a discussion and further references, see N R Whitty, "The *Stair Memorial Encyclopaedia* and the institutional tradition", in S Hetherington (ed), *Halsbury's Laws of England Centenary Essays 2007* (2007) 203 at 204–06.

[60] Viscount Stair, *The Institutions of the Law of Scotland Deduced from its Originals and Collated with the Civil, Canon and Feudal Laws, and with the Customs of Neighbouring Nations* (1681; 2nd and last personal edn 1693); A McDouall, Lord Bankton, *An Institute of the Laws of Scotland in Civil Rights: with Observations upon the Agreement or Diversity between them and the Laws of England* (1751–53); J Erskine, *An Institute of the Law of Scotland* (1773).

[61] P Birks and G McLeod (eds), *Justinian's Institutes* (1987) 19.

are divided into those which relate to property and those which relate to the person; and property rights are themselves divided into real rights and personal rights.[62] The result is a fourfold division which corresponds to the first four parts[63] of the *Principles*:[64]

> Rights personal; arising from contract express or implied.[65]
> Rights real; of property heritable and moveable.
> Rights arising from marriage, and the constitution of a family; with the laws of succession.
> Rights relative to the person.

To these four parts of the book Bell adds a fifth which was originally on actions, in the traditional way, but which by the fourth edition had become a treatment of evidence, diligence and bankruptcy.

Alan Watson comments that Bell's order of treatment is "much altered" from Justinian and that, with the publication of the *Principles*, the "Romanisation of the systematics of Scots law suffered a setback".[66] If criticism is intended, it is not wholly deserved. Bell's structure was not notably less orthodox than that of his successor in the Edinburgh Chair, More, who nonetheless claimed adherence to the trichotomy of persons, things and actions.[67] Averse by nature to justification, Bell has nothing to say on the subject, but his structure is plainly influenced by the Justinianic scheme.

More serious is the charge that the *Principles* is badly organised or, as Goudy put it, is "unsystematic in arrangement".[68] It is certainly true that topics sometimes jostle together without apparent order, and that the relationship between different sections of the text is not always explained. But if, as Walker suggests, order "does not seem to have been very important to him",[69] Bell usually provides a sufficient framework for the exceptionally wide range of material which he seeks to cover. Often indeed he does much better than this, and Part I of the *Principles* in particular (on contractual and other personal rights) sets out the law in what is a generally logical and well-ordered manner.

Quite properly, decisions as to structure were influenced by the exigencies of teaching. Thus Bell reverses Erskine (and Justinian) by covering

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[62] *Principles* §§ 1–3.

[63] By the 5th edition (1860), prepared by Patrick Shaw, "parts" had become "books", and the books were subdivided into parts and chapters.

[64] The list quoted is as given in § 4. However, the wording is slightly different in the table of contents, and different again in the actual headings to individual parts.

[65] This includes obligations more generally. The title of Part I is "Obligations and Contracts, and their Extinction".

[66] A Watson, *Legal Transplants: An Approach to Comparative Law* (1974) 38–39.

[67] McLaren (ed), *More's Lectures* (n 38) vol 1, 14–15.

[68] H Goudy, Review of the 9th edn of the *Principles* (1889) 1 JR 410.

[69] Walker, *Scottish Jurists* (n 11) 345.

obligations before property because, while the order "signifies little", "some conveniences in explanation seem to recommend an arrangement by which the Rights arising from Contract or Convention shall first be considered".[70] Again, while Bell accepts that the exposition of land law in the first section of Part II "should naturally be followed by a view of the doctrine and rules of succession", he concludes that "it is better to defer the consideration of those subjects, till a general idea shall be obtained of the nature of property in moveables".[71] Succession is thus left over until Part III, and indeed in the lectures themselves Bell seems to have covered moveable property before heritable.[72]

Style

If Bell's style seems laconic and unvarnished, it must be recalled that, at least as originally conceived, the *Principles* was designed to convey basic information to students, thus freeing up time in lectures for more wide-ranging discussion and commentary. In reading the *Principles* we should remember that this commentary is missing.

In later editions Bell sometimes added to the end of a paragraph a brief discursive passage. These are easily found because they are in a smaller font and are introduced, in the fourth edition at least, by the word "Note". Quite often they engage with comparative material. For example, at the end of § 86, which had explained that property in the sale of goods passes on delivery and not by contract, Bell writes:[73]

> A distinction is to be observed between the language of the English law and that of the Scottish in this respect; for much confusion has arisen from this source, in running the analogy between the laws of the two countries. The English lawyers say, that, the contract of sale being completed, the property is passed: They do not, however, mean by this that the absolute property, the proprietary right or dominium, is thenceforward with the buyer; but only that a special property, jus ad rem specificam, has passed. There is still with the seller a right to retain the thing sold for the price. The English law in this respect is law in America; and by the Code Civil of France, the rule which formerly prevailed there, according to the principle of the civil law, has been abandoned, and the property held to pass with the completion of the contract. In Holland the property is not passed till delivery on credit, or payment of the price.

Relatively speaking, however, such notes are unusual and it is possible to read large numbers of pages, especially later on in the work, without coming across one.

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[70] *Principles* § 4. This explanation was dropped from the 4th edition.

[71] *Principles* § 307. This passage appears only in the 1st edition.

[72] That is the position as disclosed in both sets of student notes mentioned in n 41.

[73] References omitted. This note is already present in the 2nd edition but is confined to the law of England. The discussion of other countries is new in the 4th edition.

Today the very conciseness of Bell's work seems an advantage. By discarding the detail and laying bare the underlying principles, Bell facilitates the understanding of complex ideas and promotes the orderly development of the law. At times, the combination of terse statement of principle and brief numbered paragraphs reminds the reader of a civil code. Bell indeed cites the French *Code civil* (1804) from time to time and was doubtless influenced by what must have seemed a daringly innovative approach to law and law-making. The point was not lost on those who, in the second half of the nineteenth century, thought that Scotland too should have a civil code:[74]

> Let us suppose, for example, that the late Professor Bell had been invited to convert his *Principles of the Law of Scotland* into a Code. While he could have added nothing to the clearness and precision of the leading rules which he had laid down, and of the minor rules and exceptional rules by which they are carried out or modified, he would have been able to sweep away all matter of mere doubt and conflict, and to adopt positively those half-established rules which in his opinion were the most correct. He would also, at the same time, have been able to give a little more breadth to his leading principles, and more sharpness and distinctness to the details. The result would have been a manual of the Law of Scotland in which scarcely an ambiguity could be found, containing all that was necessary to guide men through the ordinary concerns of life; containing further, all the principles by which the most abstruse questions arising out of the most complicated transactions could be decided by the lawyer. And yet this Code would have occupied no more space than that of an octavo volume of extremely moderate thickness.

This, however, is to overstate the codal nature of Bell's *Principles*. Aeneas Mackay was closer to the mark when he suggested that the *Principles* might "hold the relation to the future Scottish Code, which the writings of Pothier did to the French Code".[75]

The first four editions

The editions of the *Principles* for which Bell himself was responsible were published in 1829, 1830, 1833 and 1839. The main changes occur between the first and the second. Not only is the second edition considerably longer than the first – 714 closely-printed pages compared to the 622 pages in generous spacing and type size of the first edition – but two completely new sections have been added, on trusts in Part III (§§ 1991–2001) and on "Rights of persons in their public relations" in Part IV (§§ 2129–2213),[76] the

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[74] J B Kinnear, *Principles of Reform: Political and Legal* (1865) 231–32.

[75] H Goudy, A J G Mackay and R V Campbell, *Addresses on Codification of Law* (1893) 51–52.

[76] In the 3rd and 4th editions this is §§ 2129–2204. The paragraph numbering in those editions is usually identical except where changes in the organisation of the text make this impossible. The 1st edition has fewer and much longer paragraphs, 896 in all.

latter covering a rather miscellaneous group of topics including citizenship, peerages, elections, poor relief, and bodies corporate. Elsewhere, new topics are sometimes introduced, for example the construction of contracts (§ 524). Beyond this, the main changes are an expansion of the existing text and an increase in the number of authorities cited. The third and fourth editions, by contrast, are largely updates of the second, taking account of new case law[77] and adding further references to secondary literature. Some cases are also omitted as being "superfluous, or not sufficiently striking".[78] A major change in the fourth edition is the omission from Part V of the section on actions[79] on the ground that the subject has become too complicated to be dealt with in short compass.[80] In his successive revisions Bell often makes small adjustments to wording, for example by turning a sentence round or by substituting one word for another, but these acts of restless draftsmanship are rarely accompanied by a change in meaning.

An example, selected more or less at random, illustrates Bell's methods of working. In his *Outline of Lectures on the Law of Scotland* of 1827 Bell gives, in note form, the basic rules of formation of contract:[81]

> Constitution of mutual contract. Offer. Distinction between offer and order for goods. Acceptance of offer. Implied acceptance. Consensus in idem placitum. Limitation of time, &c. How offer withdrawn.

A list of authorities, mainly cases, follows. In the first edition of the *Principles*, the notes are replaced by two pages of text.[82] The next edition gives much more attention to acceptance: whereas the first edition had been content to explain that an acceptance is either express or tacit, and then pass on to another topic, the second edition proceeds to treat each type of acceptance in turn and to give examples.[83] The third edition follows the second,[84] but in the fourth the treatment of orders in trade is separated from that of tacit acceptance,[85] a new paragraph is added on the form of offers,[86] and there is a

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[77] Compare, for example, § 534, on restitution. In the 2nd edition Bell offers the confident view that "if the payment have been made in error, restitution may be demanded, whether that error be in matter of fact, or even in law". In the 3rd (and 4th) edition, however, Bell acknowledged that the view that there is recovery for error of law "is much shaken" by *Wilson v McLellan* (1830) 4 W & S 398. It was to remain in that state until *Morgan Guaranty Co of New York v Lothian Regional Council* 1995 SC 151 returned the law to what Bell originally said it was.

[78] Preface to the 3rd edition.

[79] §§ 2205–2275 and 2330–2352 of the 3rd edition.

[80] See the introductory note to Part V in the 4th edition.

[81] Bell, *Outline* (n 20) § 39.

[82] § 39.

[83] §§ 74–81.

[84] §§ 72–83.

[85] §§ 80–82.

[86] § 74.

notable increase in the number of authorities cited. In each of the first three editions, the following passage appears:[87]

> Acceptance must precisely meet the offer. If it differ from the offer, the new condition is equivalent to a new offer, which requires acceptance.

In the fourth edition this becomes:[88]

> Express acceptance must precisely meet the offer. If it substantially differ from the offer, the alteration is equivalent to a new offer, which requires acceptance.

The differences are interesting. In the first sentence Bell adds the word "express" as a signal that he has now moved on from discussing tacit acceptance (which was the subject of the previous paragraph). In the second, as well as making a characteristic change in the wording ("alteration" for "new condition"), he now says that an acceptance is a counter-offer only if it differs "substantially" from the original offer. Most interesting of all is the use of authorities. In the earlier editions no authorities were cited at all, but in the fourth edition Bell refers to Justinian's *Institutes*, Toullier's *Le droit civil français suivant l'ordre du Code Napoléon*, and to two cases from England decided in the late 1820s.

While, however, changes of the kind just illustrated are common, many other passages survive unaltered from the first edition to the fourth; and even where the text is adjusted or expanded there is usually little real difference between Bell's first thoughts and his last. What is most striking about successive editions of the *Principles* is continuity, not change.

Sources

"If Stair be taken as the type of the philosophical and Erskine of the common-sense lawyer", wrote Aeneas Mackay, "Mr Bell may perhaps be styled the lawyer of precedent."[89] There is something to be said for this view. Certainly no writer before Bell made such extensive use of case law, and its comforting presence in his footnotes helps explain why the *Principles* has the feel of a modern textbook – indeed of the first modern textbook on Scots law.[90] Of course, the idea of decisions as an authoritative source of law was an older one, dating back at least to the middle of the previous century:[91] "decisions of the Supreme Court, when pure", Bell said, "are received as precedents for

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[87] 1st edition § 39; 2nd edition § 81; 3rd edition § 81.

[88] § 77.

[89] A J G Mackay, *Memoir of Sir James Dalrymple, first Viscount Stair* (1873) 172–73.

[90] Bell's *Commentaries*, also rich in case law, is not a textbook in the same sense.

[91] J W Cairns, "Historical introduction", in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000) vol 1, 14 at 172–75.

future cases".[92] But Bell's career coincided with a revolution in the availability of reports of cases, both old and new. Morison's multi-volume *Dictionary of Decisions* – the "great Collection of Morrison" as he later described it to his students[93] – began to appear in 1801, at the end of Bell's first decade at the bar, and reproduced reports contained in many of the existing collections of decisions, published and unpublished. This was followed by Tait's "most correct Index of Names" in 1823,[94] and by Mungo Brown's five-volume supplement to Morison in 1826. Meanwhile in 1807 David Robertson had published the first collection of decisions of the House of Lords in Scottish appeals, covering the early years of the Union.[95] The reporting of contemporary cases was also much improved, with the inauguration of the series that was later to be known as Session Cases in 1821 and of Faculty Decisions in 1825. The former was the work of Bell's brother-in-law, Patrick Shaw. So successful was the reporting of cases that, as Bell later noted, "complaints have been made of the unwieldy mass thus accumulated".[96]

In all Bell cites around 6000 cases in the *Principles*. In an astonishing display of drudgery and determination, each was reduced to a convenient summary in the three volumes of his *Illustrations from Adjudged Cases of the Principles of the Law of Scotland* (1836–39). Although most were from the Scottish courts, a significant number of cases were English, and Bell went to the trouble of including a brief guide to English procedure in the first volume of the *Illustrations*.[97] "English Cases", Bell informed his students, "are of authority in Mercantile Law, and frequently of the greatest use in illustration, or in contrast, on other parts of jurisprudence."[98] In the *Principles*, English cases are usually listed separately, after the Scottish cases, and in the third edition – though rarely in the fourth[99] – are sometimes preceded by the words of warning "English cases". As well as cases, Bell also cites statutes where appropriate, covering topics such as authentication of deeds, illegal contracts, carriage, insurance, shipping law, copyright, and prescription.[100]

The jurists most frequently relied on by Bell are Stair[101] and, especially, Erskine.[102] Erskine's *Principles*, Bell explains, "is excellent, although it appears

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92 Lees, *Notes* (n 41) 3.

93 Bell, *Outline* (n 20) iv. The spelling is Bell's.

94 Bell, *Outline* (n 20) iv.

95 Appeals for the years 1726–1821 were not reported until after Bell's death. Thomas Paton's reports were published between 1849 and 1856.

96 G J Bell, *Illustrations from Adjudged Cases of the Principles of the Law of Scotland* vol I (1836) v.

97 *Illustrations* vol I, xxi–xxiv.

98 Bell, *Outline* (n 20) v. This is repeated in the first three editions but, for some reason, is dropped from the 4th. See 1st edition xxvi; 2nd edition xxvi; 3rd edition xviii.

99 But see § 34.

100 The text of the statutes is given in Bell, *Illustrations* (n 96) vol I, 485–508.

101 Stair, *Institutions* (n 60).

102 Erskine, *Principles* (n 24); Erskine, *Institute* (n 60).

dry to a person commencing his studies".[103] The *Institute* "is posthumous, and was therefore received at first with some degree of suspicion" but "is now firmly established as an authority".[104] It is "the most useful book which a Student can possess".[105] In all, the works of Erskine – usually the *Institute* – are cited on more than 400 occasions, while Stair is cited on more than 200. Craig's *Jus Feudale*[106] is used frequently in the treatment of land law. Bankton,[107] on the other hand, is barely mentioned: his work, apparently, "is not well digested, and is seldom consulted".[108] For English law, Bell relies mainly on Blackstone[109] or on specialist works such as Charles Abbot's *Treatise of the Law relative to Merchant Ships and Seamen* (1802 and subsequent editions).

Roman sources and the writers of the *ius commune* are largely absent, although there is occasional citation of Justinian's *Institutes* and *Digest* and of writers such as Voet.[110] For this neglect a plausible explanation is Bell having left school at the age of eleven without acquiring a proper mastery of Latin.[111] Another reason may have been that, after Pothier and the *Code civil*, there could be no going back to the "doctors" of an earlier period.[112]

The works of Pothier (1699–1772) had been known in the British Isles since at least the publication of Sir William Jones' *An Essay on the Law of Bailments* in 1781 – a work cited on a number of occasions by Bell[113] – with its graceful acknowledgement that "if my undissembled fondness for the study of Jurisprudence were never to produce any greater benefit to the

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[103] Lees, *Notes* (n 41) 5.

[104] Lees, *Notes* (n 41) 5. But see *Kibble v Stevenson* (1831) 5 W & S 553 at 565 per Lord Brougham LC: "I have the greatest deference for his works, particularly his first work [ie Erskine's *Principles*], which had his own revision when it passed through the press."

[105] Bell, *Outline* (n 20) iii.

[106] T Craig, *Jus Feudale* (1655).

[107] Bankton, *Institute* (n 60).

[108] Lees, *Notes* (n 41) 5. The verdict of More, Bell's successor in the Chair, is more flattering: "though it has never stood so high in public estimation" as the works of Stair and Erskine, it "is a publication of considerable merit": see McLaren (ed), *More's Lectures* (n 38) vol I, 13.

[109] W Blackstone, *Commentaries on the Laws of England* (1765–69).

[110] J Voet, *Commentarius ad Pandectas* (1698–1704).

[111] The *Letters of Sir Charles Bell* (n 8) 8–9 refers to and quotes from some "memoranda of my life, to tell my children somewhat of those who gave them birth, and to furnish them with lessons for the conduct of their lives" – now apparently lost – in which George Joseph Bell records that, after leaving school: "I tried to continue with my Latin education at home, but having no master and no one to direct me – to point the path or smooth its ruggedness – I made poor progress."

[112] The citation pattern in the *Commentaries*, in its origins a much earlier work, is to some extent different: see G Gorla, "Bell, one of the founding fathers of the 'common and comparative law of Europe' during the nineteenth century" 1982 JR 121. Gorla's view that, in his use of foreign materials, Bell was working in the same tradition as the *ius commune* writers of the sixteenth to eighteenth centuries is more true of the *Commentaries* than of the *Principles.*

[113] Eg §§ 133, 154, 155, 215 of the 4th edition.

publick, than barely the introduction of POTHIER to the acquaintance of my countrymen, I should think that I had in some measure discharged the debt which *every man*, according to Lord Coke, owes to his profession".[114] By the time that Bell wrote the *Principles* he had been familiar with Pothier for at least thirty years.[115] Indeed he claimed to have been the first person to import Pothier's works to Scotland.[116] J S More, Bell's successor in the Chair of Scots Law, was later to tell his students that:[117]

> Without meaning to disparage in the slightest degree the ponderous and valuable labours of CUJACIUS, MOLINAEUS, and VOET, and other eminent commentators on the Civil Law, I may be permitted to give it as my opinion that POTHIER has done more substantial service to this system, by his judicious arrangement of the Pandects, and by the few short notes he has occasionally given, than all the other commentators put together.

But while Bell made use of Pothier's *Pandectae Justininae*, his main interest lay in the treatises on individual branches of the law. In the *Principles*, references can be found to Pothier's writings on property, sale, hire, partnership, deposit, charter party, *condictio indebiti*, among others, but above all Bell relies on the *Traité des obligations*, which is cited frequently in the opening part of the work.[118]

The early editions of the *Principles* make relatively little use of works published after 1800, although there are exceptions such as C-B-M Toullier's *Le Droit civil français suivant l'ordre du Code Napoléon* (1811–31). Bell seems not to have read German and so – unlike his contemporary, John Austin, in his lectures at London University[119] – was not in a position to draw on Hugo or Savigny or other writers of the German Historical School.[120] Many of the works cited in the *Principles* can already be found in the first edition of the *Commentaries* thirty years before. If, however, there was a sense that Bell was sometimes failing to keep up with new developments abroad, the position was transformed by the publication, between 1826 and 1830, of James Kent's four-volume *Commentaries on American Law*, with its comprehensive

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[114] W Jones, *An Essay on the Law of Bailments* (1781) 29–30.

[115] There are many references to Pothier's works in the *Commentaries*. Bell was taught French by his mother: see *Letters of Sir Charles Bell* (n 8) 9.

[116] As reported by Charles Sumner to Joseph Story in a letter from Stirling dated 7 Oct 1838 and reproduced in K H Nadelmann, "Joseph Story and George Joseph Bell" 1959 JR 31 at 37.

[117] McLaren (ed), *More's Lectures* (n 38) vol I, 4.

[118] The last citation appears to be in § 251 in the context of cautionary obligations.

[119] See eg M H Hoeflich, "John Austin and Joseph Storey: two nineteenth century perspectives on the utility of the civil law for the common lawyer" (1985) 29 Am J of Legal History 36 at 38–41.

[120] These writers were already known in Scotland in the 1820s: see J W Cairns, "The influence of the German Historical School in early nineteenth century Edinburgh" (1994) 20 Syracuse J of International Law and Commerce 191.

account of American law and its rich citation, and discussion, of foreign sources, including Bell's own *Commentaries*.[121] Like Bell's *Principles*, Kent's *Commentaries* was the product of a university lecture course, in Kent's case at Columbia.[122] Also important were two works by Joseph Story: *Commentaries on the Law of Bailments with illustrations from the Civil and the Foreign Law* (1832) and *Commentaries on the Conflict of Laws, Foreign and Domestic* (1834).[123] Both works cite Bell's *Commentaries* and the former does so on many occasions. Bell probably came across this American literature between the third edition of the *Principles* in 1833 and the fourth in 1839, and it seems to have reawakened his interest in comparative law.[124] In the fourth edition there are frequent references to Kent and Story, especially the former, and Bell also draws on works cited by Kent and Story, such as the *Cours de droit commercial* of Jean-Marie Pardessus (1813).[125]

What use Bell made of all this material is more difficult to say. His knowledge of Pothier was so long-standing that it seems bound to have influenced his view of Scots law at least in the field of contract, where some claim could be made for a common law of Europe. That is a subject which would repay further study.[126] But in his citation of Kent or Story or Pardessus, Bell was more often engaging in comparative law – pointing out similarities and differences, and adding to the store of knowledge in Scotland without any particular intention of influencing law's future development.[127] Thus in the same way that Kent, for example, noted in his *Commentaries* under reference to Bell that "[i]n Scotland, the true owner may reclaim his

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[121] Bell's *Commentaries* is cited by Kent on a number of occasions, and is referred to at one point (vol 3, 294) as "very valuable".

[122] See J H Langbein, "Chancellor Kent and the history of legal literature" (1993) 93 Columbia L Rev 546 at 564–66. Kent lectured at Columbia between 1824 and 1826 after his retirement as Chancellor of New York.

[123] See more generally Nadelmann (n 116).

[124] Sumner's letter to Story (n 116) says that Bell "was well acquainted with Kent's *Commentaries*, and inquired after the Chancellor as if for an old friend".

[125] Pardessus' work was previously known to Bell and is cited occasionally in the 5th edition of the *Commentaries*.

[126] Bell's treatment of error (*Principles* § 11) is thought to be based on Pothier: see J J Gow, "Culpa in docendo" (1954) 66 JR 253 at 261–62; P Stein, *Fault in the Formation of Contract in Roman Law and Scots Law* (1958) 183. McBryde doubts this conclusion on the basis that the reference to Pothier in § 11 does not appear until the 4th edition: see W W McBryde, "Error", in Reid and Zimmermann (eds), *History of Private Law in Scotland* (n 91) vol 2, 72 at 76–77. On the other hand, there are many references to Pothier in earlier editions of the *Principles* and it may be wrong to place weight on precise citation patterns. In relation to Bell's discussion of a different topic – damages for breach of contract in *Commentaries* I, 479–80 – Johnston concludes that "his primary inspiration was Pothier": see D Johnston, "Breach of contract", in Reid and Zimmermann (eds), *History of Private Law in Scotland* vol 2, 175 at 191.

[127] For the view that Kent's citation of foreign law was, likewise, usually decorative, see A Watson, "Chancellor Kent's use of foreign law", in M Reimann (ed), *The Reception of Continental Ideas in the Common Law World 1820–1920* (1993) 45.

property, even from the bona fide purchaser in market overt",[128] so Bell noted in his *Principles* under reference to Kent that "In America the rule of damage on returned foreign bills is different, and varies in the several States".[129] Brief comments like these are the only published indication of how Bell thought this material could best be used, but such points are likely to have been more fully developed in his lectures. If that is correct, it may not have been popular with students. Law teachers are unhappily accustomed to complaints of the kind made by a member of Bell's class for 1824–25:[130]

> Professor Bell seems rather to be the Professor of French and English law than of Scots … not that I find any fault with him for explaining to us the principles of the English or of the French law, or for quoting them at times; but surely it is chiefly incumbent upon him to expound to us the principles of Scots law, and to quote authorities from Scots cases rather than from those of other countries.

When More said in his introductory lecture that he did not "mean to convert this Chair into a medium for disseminating the knowledge of Foreign Law", he was no doubt responding to the unfortunate reputation in this regard which had been acquired by his predecessor.[131]

It would be wrong, of course, to present the *Principles* as a work dominated by comparative law. Thick on the ground in the treatment of contract law or of certain commercial topics, comparative references are uncertainly distributed in other parts of the book. In the more than 200 pages devoted to land law – a subject "more liable to peculiarities in national jurisprudence"[132] – they are largely absent even where they might have been useful or illuminating. Thus it was left to another book published in 1839, Gale and Whatley's account of the *Law of Easements*,[133] to draw on Pardessus' *Traité des servitudes*, first published in 1806, and so to introduce into English law certain aspects of the French law of servitudes.[134] And it was Kent[135]

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[128] J Kent, *Commentaries on American Law* (4th edn, 1840) vol 2, 324 note a. The reference to Bell was to § 527 of the *Principles*.

[129] *Principles* § 342. The reference to Kent was to vol 3 of the *Commentaries* (2nd edn, 1832) 116.

[130] *The New Lapsus Linguae or The College Tatler* 11 Feb 1825, quoted in Bates (n 49) 176–77. For the very brief history of this publication, see R L Stevenson, "College Papers", in *Lay Morals* (1911) 83–84.

[131] McLaren (ed), *More's Lectures* (n 38) vol I, 5–6.

[132] Bell, *Principles* § 636.

[133] C J Gale and T D Whatley, *A Treatise on the Law of Easements* (1839).

[134] See A W B Simpson, "The rule in *Wheeldon v Burrows* and the *Code civil*" (1967) 83 LQR 240; C Seebo, *Servitus und Easement: Die Rezeption des römischen Servitutenrechts in England* (2005) 103 ff; K G C Reid, "Praedial servitudes", in V V Palmer and E C Reid (eds), *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (Edinburgh Studies in Law vol 6, 2009) 1 at 25–28.

[135] J Kent, *Commentaries on American Law* (3rd edn, 1836) vol 3, 435. The reference is absent from earlier editions, including the edition (the 2nd) which seems to have been used by Bell.

and, much later, Rankine,[136] who made use of Fournel's *Traité du Voisinage* (1800); Bell's own, quite extensive, account of neighbour law is untroubled by comparative references.[137] Yet patchy as the pattern is, there are probably more citations of foreign texts in the fourth edition of the *Principles* than in any work on Scots law published before or, it may be, since.

Influence and reputation

From as early as 1832 – two years after the second edition and one before the third – the *Principles* was being cited to, and sometimes by, the courts.[138] But it was not yet viewed as an authoritative text or perhaps even as a reliable one. In *Herriot's Trs v Stevens' Trs*,[139] for example, a case concerning the recall of arrestments and inhibitions, Lord Chancellor Cottenham quoted the *Principles* at some length but with the rider "assuming this to be a correct representation in the law of Scotland". And in *Dixon v Dixon*[140] Lord Meadowbank, referring to a passage by Bell on the renunciation of legitim which was in conflict with both Stair and Erskine, said that "with the greatest respect for him – a living author, too[141] – we cannot compare the weight of authority".[142] By the second half of the century, however, Bell was being cited with increasing frequency and respect.[143] Looking back in 1889, Goudy wrote of the *Principles*:[144]

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[136] J Rankine, *The Law of Landownership in Scotland* (4th edn, 1909) 632, 633, 636 and 653. The references first appear in the 2nd edition of 1884.

[137] §§ 964–972 of the 4th edition. I owe this point to Elspeth Reid.

[138] *Magistrates of Montrose v Scott* (1832) 10 S 211 at 212 per the Lord Ordinary (Corehouse) ("the note in Connel on Parishes, p 370, relative to that case, as a late writer observes [Bell's Principles of the Law of Scotland, p 302] is not to be relied upon"); *Duke of Portland v Gray* (1832) 11 S 14 at 18 (defenders' authorities).

[139] (1839) Macl & Rob 192 at 214.

[140] (1840) 2 D 1121 at 1160.

[141] See also *Kibble v Stevenson* (1831) 5 W & S 553 at 565 per Lord Bougham LC: "I do not cite him [Bell] as any authority for a living author cannot be cited in a court of justice."

[142] In *McRobert v Martin* (1840) 2 D 752, Lord Justice-Clerk Boyle and Lords Glenlee, Meadowbank, Medwyn and Moncreiff said (at 771): "A passage in Mr Bell's *Principles* [§ 1627], which is quoted by the pursuer, has, with the usual care and accuracy of that author, been materially qualified in the fourth edition, lately published, where he states the present question as entirely open".

[143] One example among many is the prominent part played by Bell's discussion of *rei interventus* in the speech of Lord Chancellor Chelmsford in *Bargaddie Coal Co v Wark* (1859) 3 Macq 467. In *Swans v Western Bank* (1866) 4 M 663, where the First Division discussed (and declined to follow) a doubt expressed in § 882 of the *Principles* as to whether there could be accretion of infeftments where the granter had no title at all, Lord Deas said (at 669) that: "No doubt could be entitled to more respect than a doubt expressed by the late Professor Bell."

[144] Goudy (n 68). See also the anonymous review which appeared in (1872) 1 Law Magazine and Review: A Quarterly Review of Jurisprudence 165 at 167: "The work has been found so extremely useful by the legal profession in Scotland, that we never heard of any person at all connected with the law who ventured to live without it."

> For nearly half a century it has been recognised as a standard work, cited daily in the Courts, and accepted by the judges as possessing the highest authority. There never was a greater municipal lawyer than George Joseph Bell.

Bell's influence was not confined to Scotland.[145] Courts in America – but not, on the whole, in England – were perfectly willing to cite Bell during this period,[146] no doubt largely because of the advocacy of writers such as Kent and Story, already referred to. Indeed volume 3 of the fourth edition of Kent's *Commentaries*, published in 1840, contains a gushing testimonial:[147]

> There is an admirable summary of the law of contracts, express and implied, treated of in this and the preceding volume, to be seen in the *Principles of the Law of Scotland*, by Professor Bell, of the University of Edinburgh, 3d edition, 1833. The essential principles of the law of contracts, of *sale, hiring, bailment, surety, negotiable paper, partnership, maritime contracts of affreightment, average, salvage, bottomry and respondentia, marine insurance,* and *insurance against fire and of lives*, are stated with all possible brevity consistent with perspicuity, precision, and accuracy. The cases and authorities are annexed to each proposition, and the adjudged cases are given at large in some succeeding volumes as *illustrations* of the principles declared. I do not know of a more convenient and useful manual of the kind to the student and practising lawyer. Though the principles of Scotch law are drawn from the civil law, yet they agree in most of the material points, with the doctrines and adjudications in the English and American law.

Even into the twentieth century someone wanting to find out about Scots law, in America or elsewhere, was quite likely to have recourse to Bell's *Principles*.[148]

At least at first, the popularity of the *Principles* depended on the fact that it was kept up to date in the frequent new editions published after Bell's

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[145] In *Boak v Megget* (1844) 6 D 662, decided within months of Bell's death, Lord Moncreiff commented, at 675, that: "The law of this country, and of Europe in general, is much and deeply indebted to Mr Bell, and I know that the value of his works have been appreciated not only here, but in other countries; but at the same time I hold that he is not quite correct in this instance."

[146] R H Helmholz, "Scots law in the New World: its place in the formative era of American law", in H L MacQueen (ed), *Miscellany Five* (Stair Society vol 52, 2006) 169 at 175–76.

[147] J Kent, *Commentaries on American Law* (4th edn, 1840) vol 3, 376. It is interesting to note that this passage survived in the final, "thoroughly revised" editions of Kent published at the end of the century – for example, it can be found at vol 3, 406 of the 1889 edition – although the fact that the reference was still to Bell's 1833 edition suggests either lip service or editorial inertia.

[148] See eg R Pound, "Individual interests in the domestic relations" (1916) 14 Michigan L Rev 177 at 185. In a review (n 144) the anonymous reviewer comments (at 167): "To a stranger wishing to acquire a knowledge of Scots law the work is invaluable. … [H]ad we such a book on English law as this, many of us would be as learned in the law of England as a Chief Justice." For the tradition of overview literature on Scots law, see eg P Birks, "The foundation of legal rationality in Scotland", in R Evans-Jones (ed), *The Civil Law Tradition in Scotland* (1995) 81.

death. No mere historical text, it was a statement of the current law and could be used by lawyers to guide their daily practice. New editions were produced at regular intervals from 1860 until 1899, the year of the tenth and last edition. The editor for all editions other than the fifth, of 1860, was William Guthrie. Although originally written as a student text, the *Principles* seems to have lost the battle for the student market to a much earlier work, Erskine's *Principles*, the last edition of which (the twenty-first) was published in 1911.[149] In truth, the later editions of Bell's *Principles* had become too long for a student textbook, and in 1903 Frank H Morrison produced a *Synopsis of Bell's Principles of the Law of Scotland* written specially for students.[150] But by then, presumably, it was too late to dislodge the preference for Erskine.

The abandonment of fresh editions in the twentieth century was a sign, not that Bell's *Principles* had ceased to be useful, but rather that it had become useful in a different way. During his lifetime Bell was already being referred to as an "institutional writer" or the author of an "institutional work"[151] but, in the usage of the day, this signified little more than that he was the author of a text on the municipal law of a comprehensive and systematic nature.[152] By the end of the century the meaning had changed, and an institutional work had become, not merely a work of a particular type, but one imbued with a degree of authority not afforded to other works, including, sometimes, other works by the same author.[153] Bell's *Principles* was incontestably among the canon of institutional works. A review of the sixth edition, in 1872, began with the following passage:[154]

> Three Scotch lawyers have risen to real greatness as writers on the law of their country. These we style institutional writers, and their opinions, when they agree, which for the most part they do, are received by our courts as conclusive.

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[149] In the preface to the 1st edition of W M Gloag and R C Henderson, *Introduction to the Law of Scotland* in 1927, it is said that Erskine's *Principles* "has held a leading place as a text-book in the classes of Scots Law in the Universities".

[150] A brief review published at (1903) 15 JR 437 said that it "appears to be admirably adapted to serve the purposes of refreshing the memory of candidates on the eve of examination".

[151] See eg *Dixon v Dixon* (1840) 2 D 1121 at 1135 per Lord Moncreiff ("the only institutional work in Scotland where such a doctrine is laid down"); H Cockburn, *Memorials of His Time* (1856) 206 ("our greatest modern institutional writer"). The extract of 1822 from the *Caledonian Mercury* which opens this Introduction refers to Bell's "eminent services as an institutional writer". See also J W G Blackie, "Stair's later reputation as a jurist", in D M Walker (ed), *Stair Tercentenary Studies* (Stair Society vol 33, 1981) 207 at 210–11.

[152] J W Cairns, "Institutional writings in Scotland reconsidered" (1983) 4 J Leg Hist 76 at 76–81. Even so, it seems that institutional writers already had some kind of status. In the notes on Bell's lectures taken by Thomas Lees in 1825–26, institutional writers are listed as a fifth and final source of law (after statutes, court decisions, acts of sederunt, and deeds and forms). The relevant passage reads (Lees, *Notes* (n 41) 4): "The Books of our Institutional Writers are also considered evidence of Law. These afford proof of the Common Law, as sanctioned by the Judges."

[153] Cairns (n 152) at 102–04.

[154] Review (n 144).

The writers in question were Stair, Erskine and Bell. One result of this change of status was a growing tendency to distinguish between those parts of the *Principles* which had been written by Bell and those parts which had been added by later editors, for only the former were "institutional".[155]

As an institutional work (in the modern sense), the *Principles* has continued to be influential. Although more consulted in the nineteenth century than in the twentieth,[156] as one would expect, the *Principles* has been cited more than 700 times in reported cases since 1900 and there is no sign of a falling off in its use.[157] The range of topics for which it was used reflects the extraordinary range of the work itself: leases,[158] servitudes,[159] accession,[160] parts and pertinents,[161] succession,[162] husband and wife,[163] nuisance,[164] liability of joint wrongdoers,[165] novation,[166] retention,[167] prescription,[168] assignation,[169] partnership,[170] evidence,[171] and so on. Lord Cooper described Bell as "our chief authority on the law of contract",[172] and indeed in 1847 Patrick Shaw had published *A Treatise on the Law of Obligations and Contracts* – the first on the topic in Scotland – compiled entirely from Bell's writings. Other areas to which the *Principles* has made a notable contribution include personal bar,[173] warrandice,[174] and

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[155] See eg *Grant v Heriot's Trust* (1906) 8 F 647 at 655 per Lord President Dunedin; *Trades House of Glasgow v Ferguson* 1979 SLT 187 at 188–89 per Sheriff I Macphail.

[156] A search in the Justis database of Session Cases reveals the 1870s as the peak, with a gradual falling off thereafter. The search term used was "Bell near Principles".

[157] The figure is obtained from searches in Westlaw.

[158] Eg *DFR Properties Ltd v Glen House Properties* 2007 SC 74.

[159] Eg *Romano v Standard Commercial Property Securities Ltd* [2008] CSOH 105, 2008 SLT 859.

[160] Eg *Boskabelle Ltd v Laird* [2006] CSOH 173, 2006 SLT 1079.

[161] Eg *Compugraphics International Ltd v Nikolic* [2009] CSOH 54.

[162] Eg *De Lathouwery* [2007] CSOH 54, 2007 SLT 437.

[163] Eg *SH v KH* 2006 SC 129.

[164] Eg *Robb v Dundee City Council* 2002 SC 301.

[165] Eg *Wright v Stoddard International plc* [2007] CSOH 138.

[166] Eg *M R S Distribution Ltd v D S Smith (UK) Ltd* 2004 SLT 631.

[167] Eg *Charles Brand Ltd v Orkney Islands Council* 2001 SC 545.

[168] Eg *Mason's Exrs v Smith* 2002 SLT 1169.

[169] Eg *Caledonia North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123.

[170] *Thurso Building Society's JF v Robertson* 2000 SC 547.

[171] Eg *HM Adv v Duffy* [2009] HCJAC 5, 2009 SLT 47.

[172] Lord Cooper, *The Scottish Legal Tradition* (new enlarged edn by M C Meston and W D H Sellar, 1991) 80 (= Lord Cooper, *Selected Papers* (1957) 190). Bell's contribution has sometimes been controversial, especially in the area of error: see W W McBryde, *The Law of Contract in Scotland* (3rd edn 2007) paras 15–04 ff but compare J MacLeod, "Before Bell: the roots of error in the Scots law of contract" (2010) 14 EdinLR 385, arguing (at 417) that Bell's account is no more than "a work of minor synthesis, bringing together strands already present in the Scottish discourse".

[173] See eg *William Grant & Sons Ltd v Glen Catrine Bonded Warehouse Ltd* 2001 SC 901; E C Reid and J W G Blackie, *Personal Bar* (2006) paras 1–16 ff.

[174] See eg *Clark v Lindale Homes Ltd* 1994 SC 210, a case which, unusually, picks up Bell's references to Pothier.

common property,[175] where the rules taken for granted today were more or less invented by Bell.[176] The *Principles* is also cited occasionally in the English courts, most recently in 2009 in the context of shipping law.[177] Of particular value is the definition of legal concepts: Bell, as Lord Dunedin acknowledged, is "a very much greater framer of definitions than any of us can hope to be".[178] Definitions from the *Principles* have launched a thousand legal arguments, and have often been praised as "classic"[179] or "the best and most useful"[180] or impossible to be "better stated".[181]

Today the value of the *Principles* is seen to lie in its authoritative status, in its comprehensiveness, and, perhaps above all, in its economy of thought and expression. The *Principles* is brief but not bland. Complex ideas are reduced to bare essentials. Rules are stated succinctly and often eloquently.[182] Obscurities are generally avoided.[183] By and large, the Scots law which emerges from Bell's pages is principled, rational and coherent. In its very accessibility, however, lies possible disadvantage. Often, one senses, the *Principles* is read but not studied, quoted but without proper consideration of the context in which the words appear. In court decisions it tends to be the point of departure rather than the basis of subsequent argument.[184] In short, the *Principles* can seem to demand too little of the reader. It is hoped that the reprinting of the fourth edition – the edition which contains Bell's final thoughts – will encourage a re-engagement with this rich and important text.

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[175] See eg *Rafique v Amin* 1997 SLT 1385; K G C Reid, *The Law of Property in Scotland* (1996) paras 23-33 ff.

[176] *Principles* §§ 1072–1085.

[177] *Colour Quest Ltd v Total Downstream UK plc* [2009] EWHC 540 (Comm), [2009] 2 Lloyd's Rep 1.

[178] *Edinburgh & District Tramways Co Ltd v Courtenay* 1909 SC 99 at 104. Lord Dunedin then proceeded to criticise the definition in question, of recompense, as being too general: "I think if one could have got Mr Bell back again to ask him, that he would not have been very pleased with his own definition."

[179] *Rutterford Ltd v Allied Breweries Ltd* 1990 SLT 249 at 251 per Lord Caplan; *Royal Bank of Scotland plc v Watt* 1991 SC 48 at 54 per Lord Justice-Clerk Ross.

[180] *Robb v Dundee City Council* 2001 Hous LR 42 at para 62 per Sheriff Principal J F Wheatley QC.

[181] *Cowan v Lord Kinnaird* (1865) 4 M 236 at 243 per Lord Cowan.

[182] *Farmers' Mart Ltd v Milne* 1914 SC (HL) 84 at 85–86 per Lord Dunedin; *Caledonia North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123 at 1144 per Lord President Rodger.

[183] Of course, what is usefully general to one reader may seem "abundantly vague" to another: for the latter thought, see *Paterson v Paterson* (1850) 7 Bell App 337 at 368 per Lord Brougham.

[184] But not always: see eg *Clark v Lindale Homes Ltd* 1994 SC 210 at 212 per Lord President Hope; *William Grant & Sons Ltd v Glen Catrine Bonded Warehouse Ltd* 2001 SC 901 at paras 34–35 per Lord President Rodger.

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