# Commentaries on the Laws of Scotland and on the Principles of Mercantile Jurisprudence

Volume I

### OLD STUDIES IN SCOTS LAW

Series Editor Kenneth G C Reid

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### **OLD STUDIES IN SCOTS LAW**

VOLUME 6

# Commentaries on the Laws of Scotland and on the Principles of Mercantile Jurisprudence

Volume I

Fifth Edition

## GEORGE JOSEPH BELL

With an introduction by
LAURA MACGREGOR
Professor of Scots Law, University of Edinburgh

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### INTRODUCTION

The chief design of this work ... is to present a full body of information for the use of the professional lawyer; to connect, in one systematical view, the peculiar rules and institutions of the Bankrupt Law of Scotland. How far I may be thought to have succeeded in this attempt, I am afraid even to conjecture. I have indeed subjected myself to a very high responsibility; but I know, how candid the Profession is, to which I address myself, and how sensible they will be of the difficulty of the task which I have undertaken.<sup>1</sup>

With these words, George Joseph Bell introduced his book, Commentaries on the Municipal and Mercantile Law of Scotland considered in relation to the subject of Bankruptcy, to the legal world. His words communicate both his aims and his concerns. The book was to be very different in character from the Scottish institutional works which had preceded it. Those works explained "the general outlines of the law", whereas Bell sought, in the context of the law of bankruptcy, to "exhibit a comprehensive view of the principles of each division; to show their application to the business of life". The passage of time has proved Bell's concerns on the success of his book to be unwarranted. More than two hundred years later, it remains the classic text on commercial law in Scotland. This introduction to the reprinting of the fifth edition, the last to be published during Bell's lifetime, reflects on the contribution of Commentaries to commercial law, placing the book in its legal, historical and economic context.

### Bell's career at the time of writing the Commentaries

In the Introduction to an earlier volume in this series, reprinting the fourth edition of Bell's *Principles of the Law of Scotland*, an account was given both of Bell's life and of the contribution the *Principles* has made to Scots law.<sup>3</sup> Less attention has, to date, been given to the *Commentaries*, Bell's earlier, longer, and more detailed work.

<sup>&</sup>lt;sup>1</sup> G J Bell, Commentaries on the Municipal and Mercantile Law of Scotland considered in relation to the subject of Bankruptcy (1st edn, 1804) vol I, Preface v. This first volume was originally published in 1800 and then reissued, along with volume II, in 1804.

<sup>&</sup>lt;sup>2</sup> Bell, Commentaries (1st edn, 1804) vol I, Preface iii.

<sup>&</sup>lt;sup>3</sup> G J Bell, *Principles of the Law of Scotland* (4th edn, 1839, reprinted as Old Studies in Scots Law vol 1, 2010). A revised version of the introduction was published as an article: K G C Reid, "From Textbook to Book of Authority: the Principles of George Joseph Bell" (2011) 15 Edin LR 6

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Bell first published the Commentaries in two volumes between 1800 and 1804. Whilst the initial focus, as the title suggests, lay upon the law of bankruptcy, later editions saw an expansion of coverage to include other parts of commercial law. The widening of coverage was reflected in a change to the title which, from the second edition of 1810 onwards, became Commentaries on the Laws of Scotland and on the Principles of Mercantile *Jurisprudence*. This title was retained for the remaining editions published during Bell's lifetime: the third of 1816-1819, the fourth of 1821,5 and the fifth (the edition reprinted here) of 1826. The fifth edition was the last for which Bell was personally responsible, although he was engaged in preparing a new edition at the time of his death in 1843. No manuscript, however, has been traced. After Bell's death two further editions were published: the sixth edition, edited by his brother-in-law, Patrick Shaw, Advocate, in 1858,6 which made use of Bell's incomplete manuscript of a new edition;<sup>7</sup> and the seventh, edited by John McLaren, Advocate (the future Lord McLaren), in 1870.8 The latter has hitherto been used as the standard edition,9 and has the merit of reproducing (with one exception) the entire text of the fifth edition but with the addition of detailed footnotes within square brackets which seek to update the law to 1870.10 To most modern readers, the footnotes serve as a distraction from Bell's text;11 hence the decision in the present volume to reprint the fifth edition in its unadorned form.

Bell wrote the *Commentaries* whilst working as a practising advocate. <sup>12</sup> The balancing of commitments which this would have entailed is referred

<sup>&</sup>lt;sup>4</sup> To which the second edition added: *Considered in relation to Bankruptcy; Competitions of Creditors; and Imprisonment for Debt.* This addition was dropped in the later editions.

<sup>&</sup>lt;sup>5</sup> In order to save members of the legal profession the expense of buying the fifth edition, Bell produced in 1828 a supplement to the fourth edition which incorporated much of the material which was new to the fifth edition: see *Commentaries on Some Detached Branches of the Law of Scotland*. The supplement was anticipated in the closing paragraph of the preface to the fourth edition.

<sup>&</sup>lt;sup>6</sup> In the sixth edition, the title changed to Commentaries on the Laws of Scotland, in relation to Mercantile and Maritime Law, Moveable and Heritable Rights, and Bankruptcy.

As indicated by Shaw in his prefatory note: "For some time prior to his death, the Author was engaged in preparing a new edition. He had expunged and re-written a considerable portion of the first volume of the last edition. Of that manuscript I have availed myself."

In the seventh edition, the title reverted back to the title used in the third to fifth editions except that "Laws of Scotland" became "Law of Scotland". The reason for the change was not explained and may even have been a typographical error.

<sup>9</sup> It was reprinted by Butterworths and the Law Society of Scotland in 1990, the only edition of the Commentaries hitherto to have been reprinted.

McLaren's editorial approach was set out clearly in his preface. The one departure from the fifth edition was to substitute for Bell's chapter on the Bankruptcy Acts (which by 1870 had been repealed) the chapter written by Patrick Shaw for the sixth edition on the same subject. In all other respects, Shaw's edition was discarded.

<sup>11</sup> They remain of value to legal historians.

Bell was admitted to the Faculty of Advocates on 22 November 1791: see F J Grant, The Faculty of Advocates in Scotland 1532-1943 (1944) 12.

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to by Bell in the preface to the first edition. Writing such a book is, we read, an ideal way for a Scottish lawyer to employ the "leisure, which the intervals of his professional duties happily afford him". Others have suggested, less flatteringly, that Bell's expansive leisure time was due to under-employment at the Scottish Bar: "time was hanging heavily on his hands", the fate of many young advocates of the time. In combining advocacy and writing, Bell was not unusual for his time. He is part of a Scottish legal tradition in terms of which law books were written by advocates, often "under-employed ... in the early years of their career". Bell's aspiration of being appointed to the bench was not realised. 16

After he had produced the first four editions of *Commentaries*, Bell lobbied successfully for a position which would have reduced his writing time significantly. This was his appointment, in 1822, to the Chair of Scots Law at Edinburgh University.<sup>17</sup> The position was part-time, for law professors' salaries were relatively meagre and they were expected to supplement their earnings by working at the Bar.<sup>18</sup> Bell's subsequent appointment to the post of Principal Clerk of Session in 1831, whilst providing an additional salary, would have reduced his writing time yet further.<sup>19</sup>

These biographical details suggest that the *Commentaries* is a book produced by an author who was destined to be both litigator and teacher. At times in the *Commentaries* Bell speaks as a working member of the Bar, as for example where he states that a certain view on maritime hypothecs "prevails universally at the Bar in Scotland, though it has not yet been precisely determined".<sup>20</sup> At other times, the focus on structure and logic is characteristic of a teacher of the law.

<sup>&</sup>lt;sup>13</sup> Bell, Commentaries (1st edn, 1804) vol I, Preface iv.

R Black, "Introduction" to G J Bell, Commentaries on the Law of Scotland and on the Principles of Mercantile Jurisprudence (7th edn, 1870, reprinted 1990) 1.

K G C Reid, "Scottish Law Students in Germany in the 19th Century and Their Influence on Legal Culture in Scotland", in N Jansen and S Meier (eds), *Iurium Itinera: Historical Comparative Law and Comparative Legal History* 195 at 205. Reid's comment, although made with reference to writers of the later nineteenth century, could equally be applied to Rell

<sup>&</sup>lt;sup>16</sup> Reid, "From Text-Book to Book of Authority" (n 3) 7–8.

<sup>&</sup>lt;sup>17</sup> From 1816 to 1818, Bell delivered his brother Robert's lectures on conveyancing after Robert's death. Bell seems, however, to have simply delivered the lectures without developing them further: see D M Walker, *The Scottish Jurists* (1985) 337. Appointment to the Chair of Scots Law therefore marked, in effect, the beginning of Bell's career as a teacher.

Reid, "Scottish Law Students in Germany" (n 15) 209.

<sup>&</sup>lt;sup>19</sup> W M Gordon, "Bell, George Joseph (1770–1843)", in Oxford Dictionary of National Biography (2004) vol 3, 925.

This example is taken from Bell's discussion of maritime hypothecs in vol I of the fifth edition at 527: "There seems reason to hold, that should the creditors of the foreign owners attach her before she left the country, and have her brought to sale, the repairers here would be entitled to a preference."

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Bell's thoughts on the delicate balancing act in his working life are expressed in the prefaces to successive editions of the *Commentaries*. The positive tone of the preface to the first edition was eroded as the editions progress. In the third edition, for example, Bell complained that "I have found the revisal of this work almost as laborious as the original composition of it". The fourth opened with a heart-felt apology: "I cannot but regret the size to which this Work has grown."

The growth in the size of each successive edition reflected the extensive changes which Bell was making. He was not simply updating the text with footnote references to recently decided cases. Rather, between editions, he appears to have been actively reconsidering subjects. New editions disclosed a reordered treatment, and a shifting of sections.<sup>23</sup> Aware that this might prove annoying to the reader, he apologised in the preface to the fourth edition<sup>24</sup> and promised more restraint in future.<sup>25</sup> The size of the task is evidenced by his comment, in the preface to the fifth edition, that he had taken into account 3,000 new cases (both Scots and English).<sup>26</sup>

### Aims in writing the Commentaries

In the opening pages of the fifth edition, Bell's designation as advocate is highly visible, with the description "Professor of the Law of Scotland in the University of Edinburgh" appearing in much smaller print. In addition, the book was dedicated to "the Dean and the Faculty of Advocates". "The chief design of this work", Bell explained, was "to present a full body of information for the use of the professional lawyer". There was, therefore, a significant contrast in aims between the *Principles* and the *Commentaries*. The former was largely produced from an extended synopsis of Bell's lectures with the aim, initially at least, of supporting the teaching of Scots law at Edinburgh

<sup>&</sup>lt;sup>21</sup> Bell, Commentaries (3rd edn, 1816) vol I, Advertisement v.

Bell, Commentaries (4th edn, 1821) vol I, Preface v. Initial optimism which dissipates with the publication of later (and larger) editions is a feeling with which many modern authors of academic textbooks will empathise. See, for example, Roderick I'Anson Banks, author of the twentieth edition of the leading English text, Lindley & Banks on Partnership (2017), who begins the preface with a quote from Chief Brody in the film, Jaws (1975): "We're gonna need a bigger boat".

<sup>&</sup>lt;sup>23</sup> Bell describes this process in the preface to the second edition at xvii–xviii.

<sup>&</sup>lt;sup>24</sup> Bell, *Commentaries* (4th edn, 1821) vol I, Preface v.

<sup>&</sup>lt;sup>25</sup> Bell, Commentaries (4th edn, 1821) vol I, Preface vii: "If I should ever be called on to revise the Work for republication, I can now securely engage that there will be no change which I shall not be able to throw into an Appendix for the benefit of those who may be possessed of the present Edition". He did not, however, honour that promise, as the contents of the fifth edition attest although, as mentioned in n 5, an appendix or supplement was published in 1828.

 $<sup>^{\</sup>rm 26}~$  Bell, Commentaries (5th edn, 1826) vol I, Preface vii.

<sup>&</sup>lt;sup>27</sup> Bell, Commentaries (1st edn, 1804) vol I, Preface v.

University.<sup>28</sup> The *Commentaries*, by contrast, was a book designed for use in legal practice.

Bell was writing at a time of significant economic change in Scotland, a fact reflected in the *Commentaries*. In the preface to the second edition he charted the progress from the disaster of Darien to the creation of the Union in 1707, and through the two Jacobite rebellions and the forfeitures which followed.<sup>29</sup> Devine has described how much weaker Scotland's economy was than England's in the eighteenth century, Scotland being in greater need of external supplies of capital.<sup>30</sup> It was not until 1840, in Devine's view, that a greater degree of convergence between the countries' economies became more evident.<sup>31</sup> It is not surprising, therefore, that the weakness of the Scottish economy relative to the English should form an important point of reference throughout the *Commentaries*.

In these changing economic conditions, the failure to produce Scottish lawbooks, and particularly books on commercial law, was, in Bell's view, highly regrettable. He contrasted Scotland unfavourably in this respect with countries such as France, Holland, Germany and particularly England.<sup>32</sup> The national jurisprudence, in short, had been "neglected". For this, the institutional writers who preceded him should bear a share of responsibility. The first, dramatic, sentence of Bell's analysis of maritime contracts is typical: "In the great department of national jurisprudence relative to maritime affairs, there is a great deficiency in the works of the institutional writers of Scotland."34 Perhaps because of such failure, criticism of the earlier writers permeates the whole of the Commentaries. Some are criticised to a greater degree than others. Bell considered Stair's Institutions to be a work of "extraordinary perfection," describing it as "unrivalled for arrangement, clearness, deduction from principles, illustration and combination". Not surprisingly therefore, references to Stair's work in the Commentaries are generally positive.36 Erskine's Institute, whilst "admirable for clearness of

On the change in the nature of the *Principles*, Reid, "From Text-book to Book of Authority" (n 3) 29–30 explains that: "Although originally written as a student text, the *Principles* seems to have lost the battle for the student market to Erskine's *Principles*, which had the advantage of covering criminal law as well as civil. In truth, the later editions of Bell's *Principles* had become too long for a student textbook."

<sup>&</sup>lt;sup>29</sup> Bell, *Commentaries* (2nd edn, 1810) Preface x.

<sup>&</sup>lt;sup>30</sup> T M Devine, "Did Slavery Make Scotia Great?", in T M Devine (ed), Recovering Scotland's Slavery Past. The Caribbean Connection (2015) 225 at 233.

Devine, "Did Slavery Make Scotia Great?" (n 30) 233.

<sup>&</sup>lt;sup>32</sup> Bell, Commentaries (1st edn, 1804) vol I, Preface iii.

<sup>&</sup>lt;sup>33</sup> Bell, Commentaries (1st edn, 1804) vol I, Preface iii.

<sup>&</sup>lt;sup>34</sup> Bell, Commentaries (5th edn, 1826) vol I, 496.

<sup>35 &</sup>quot;George Joseph Bell's Inaugural Lecture" (2014) 18 EdinLR 341 at 356.

<sup>36</sup> Bell, Commentaries (2nd edn, 1810) Preface x, describes Stair, for example, as "our great master in the law of Scotland".

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principle," "in a few instances it betrays some degree of looseness". Although it is generally referred to with approval in the *Commentaries*, Erskine's failure to contribute much analysis of commercial law does not go unnoticed, and Erskine's work is certainly criticised on occasion. Bell does not appear to have had a high opinion of Kames' work, strongly disagreeing with the separation of common law and equity in a Scottish context. References to the work of Kames in the *Commentaries* are almost always negative.

At one time bankruptcy law too had been, in Bell's view, "in a state so imperfect, as to deter English merchants from investing capital in this country; as to oppose the best interests of Scotland; and to retard her progress as a nation". Here we see concern about the lack of capital in the Scottish economy. The position had changed, however. More recently, bankruptcy law had "grown into a system, of which we have no little reason to be proud". Bell also held a highly positive view of the abilities of Scottish lawyers to rise to these challenges:

[T]here is no country in which men may be named, better skilled in the doctrines of mercantile law, or with more enlightened and liberal views, in this department of legislation and of jurisprudence, than have, within half a century, arisen in Scotland.<sup>44</sup>

### English law, the law merchant, and comparative law

Poised at he was at the beginning of the new century in times of fast-paced economic growth, Bell needed to fashion a book which was both modern and also appropriate for Scotland. Naturally, he looked to English law to do so. English law had left Scots law far behind in tackling commercial issues. <sup>45</sup> The treatment of both Scots and English law would require particular care, however. Bell's primary aim was to set out "the pure law of Scotland". <sup>46</sup> He could sense a "danger lest the purity of mercantile jurisprudence, and the

<sup>&</sup>lt;sup>37</sup> "George Joseph Bell's Inaugural Lecture" (n 35) 356.

<sup>&</sup>lt;sup>38</sup> Bell, Commentaries (2nd edn, 1810) Preface x.

<sup>&</sup>lt;sup>39</sup> For example in relation to whether a bond of bottomry imposed a personal obligation on the borrower: see Bell, *Commentaries* (5th edn, 1826) vol I, 533, referring to Erskine, *Institute* III 3 17

<sup>&</sup>lt;sup>40</sup> "George Joseph Bell's Inaugural Lecture" (n 35) 355.

<sup>&</sup>lt;sup>41</sup> As for example in Bell's discussion (*Commentaries* (5th edn, 1826) vol I, 591) of the implications for general average in insurance where freight was paid at the loading port, where he uses the example of pearls or gems. He adds in a footnote, citing *Principles of Equity* 187: "Lord Kames has speculated on this subject against the united authority of all the codes and all the commentaries; but with no great force of reason".

 $<sup>^{\</sup>rm 42}~$  Bell, Commentaries (1st edn, 1804) vol I, Preface vi.

Bell, *Commentaries* (1st edn, 1804) vol I, Preface vi.

<sup>&</sup>lt;sup>44</sup> Bell, Commentaries (2nd edn, 1810) Preface xi.

<sup>&</sup>lt;sup>45</sup> Bell, Commentaries (2nd edn, 1810) Preface xiii.

<sup>&</sup>lt;sup>46</sup> Bell, Commentaries (2nd edn, 1810) Preface xvii.

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integrity of our own system of law, should be impaired by too indiscriminate a use of English authorities".<sup>47</sup> As we can see, therefore, Bell explicitly cautioned *against* indiscriminate borrowing from English law.<sup>48</sup>

The extensive discussion within the *Commentaries* of English law is provided for a number of different purposes. Sometimes it is used to identify the goal or end to be achieved, before identifying the legal tools available in Scots law to achieve that end.<sup>49</sup> At other times Bell used English law where there was no Scottish legal rule nor any relevant Scottish cases.<sup>50</sup> Where there was no suitable rule in either legal system, Bell generally noted this fact, before proceeding to fashion a solution from first principles.<sup>51</sup> Despite explaining that he was not "actuated by the vain ambition of contending for national superiority, which has been too much, perhaps, the fashion of our day",<sup>52</sup> Bell was not above identifying a Scottish legal rule as superior to the equivalent English one. Numerous examples of this tendency appear in his extensive discussion of maritime contracts.<sup>53</sup> The reader is sometimes struck by Bell's pride in the Scottish legal system.

Bell's use of English law must be understood against the backdrop of his views on the international law merchant. Commercial law was not, in his

Bell, Commentaries (2nd edn, 1810) Preface xiv.

<sup>&</sup>lt;sup>48</sup> Bell, Commentaries (2nd edn, 1810) Preface xiv.

<sup>&</sup>lt;sup>49</sup> This process continues to take place in Scots commercial law today. In *Smith v Bank of Scotland* 1997 SC (HL) 111 the House of Lords sought to achieve, for Scots law, an outcome that had been achieved in the English case of *Barclays Bank v O'Brien* [1994] 1 AC 180, but using a Scottish legal route. The context was the development of legal rules protective of guarantors where a close relationship existed between guarantor and debtor, and the debtor sought to secure a business debt using a standard security granted over the matrimonial home. See L Macgregor, "The House of Lords 'applies' *O'Brien* north of the border" (1998) 2 Edin LR 90

<sup>50</sup> See, for example, Bell's discussion of contracts of *respondentia* in *Commentaries* (5th edn, 1826) vol I, 535–36: "In Scotland, we are not very familiar with this contract; and no cases are to be found in our books in which it has become the subject of discussion. It is to be expected, that were any case to occur, our Judges would pay much regard to the English rules; and that they would be brought, with great reluctance, to sanction a real security upon goods on the footing of a respondentia bond, unless on special stipulation."

See the discussion of damage by collision of ships, in *Commentaries* (5th edn, 1826) vol I, 581, where the only Scottish source cited is Balfour's *Practicks*: see now *The Practicks of Sir James Balfour of Pittendreich* vol II (ed P G B McNeill, Stair Society vol 22, 1963) 625 c LII.

<sup>52</sup> Bell, Commentaries (1st edn, 1804) vol I, Preface vi.

<sup>&</sup>lt;sup>53</sup> Bell, Commentaries (5th edn, 1826) vol I, 539: "In Scotland, the charter-party is not trammelled by those technical rules which, to a stranger, appear to oppose so many bars to the efficacy of the contract, according to the jurisprudence of England" or, discussing shipping contracts, vol I, 554: "In England, there has been much discussion on the nature and effect of such stipulations, under the doctrine of conditions precedent, and simple covenants. The doctrine is plain and intelligible, and well understood in Scotland." While discussing whether goods can be transferred to the third-party holder of a bill of lading, Bell notes (vol I, 567) that the position was clarified earlier in Scotland than in England. See also his discussion of the rules relating to freight at vol I, 570.

view, either Scottish or English. It was rather the law merchant, which was "universal":

It is a part of the law of nations, grounded upon the principles of natural equity, as regulating the relations 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.<sup>54</sup>

Each national system of commercial law was, in effect, a blend of the international law merchant and the municipal law or custom of the nation. This blend had been formed in different ways in Scots and English law. This was why, in Bell's view, great caution must be exercised in the use of English precedents in a Scottish context. Rather than following English law, we should aim towards a "gradual, and, at last, a perfect assimilation of the English and Scottish jurisprudence". Bell therefore envisaged a new legal order for the United Kingdom which would be a blend of both Scots and English law. By setting out the Scottish case law in the *Commentaries*, he saw himself as facilitating that very task.

Bell's views on the international law merchant also explain, at least in part, his frequent recourse to comparative law. The international law merchant had, in his view, been integrated into the law of other countries as well as in Scotland and England. It made sense, therefore, to consider the law of other European states to observe this same process of reception and "nationalisation". Additionally, the dearth of materials published on Scots law made reference to sources from other countries a necessity.<sup>58</sup> The *Commentaries* therefore contains a wealth of discussion of material from other, mostly European, legal systems. Scots law is often placed within the context of European debates. One example of this tendency can be seen in Bell's discussion of the standard of seaworthiness of a ship, where Scots law was said to follow the view of Valin rather than of Pothier.<sup>59</sup>

The civilian sources and authors chosen differ from book to book of the *Commentaries*. As noted later, Pothier is the primary point of reference in relation to partnership law. Bell's approach to comparative law is expansive yet light-touch. This is visible, for example, in his discussion of the Roman rule on fitting out or repairing a ship. Discussing that rule, he

<sup>&</sup>lt;sup>54</sup> Bell, *Commentaries* (2nd edn, 1810) Preface xii. See also 4th edn (1821) vol I, Preface v.

<sup>55</sup> Bell, Commentaries (2nd edn, 1810) Preface xvii.

<sup>56</sup> Lord Cooper, writing in a similar vein, stated that "Bell thus paved the way for the rapprochement between the two systems which has since enured so greatly to the benefit of both ...": see Selected Papers 1922–1954 (1957) 51.

<sup>57</sup> Bell, Commentaries (2nd edn, 1810) Preface xiv-xvii.

<sup>&</sup>lt;sup>58</sup> As he explained in Commentaries (2nd edn, 1810) Preface xii.

<sup>59</sup> Bell, Commentaries (5th edn, 1826) vol I, 550, citing (in n 2) R J Valin, Nouveau Commentaire sur l'Ordinance de la Marine, Du Mois d'Août 1681 (1760) vol I, 620, and R J Pothier, Supplement au traité du contrat de louage ou traité des contrats de louage maritime (1765) para 30.

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explains that it still prevails "in most of the nations of Europe. In Holland, in Hamburgh, and all the other Hanseatic towns; in France, in Spain, and in Italy, this prevails". In the same vein, bills of lading are "called by the French authors *Connoissement*; by Italian, *Polizza di Carico*; and by the Latin authorities of the Continent, *Apocha Oneratoria*". This approach reaches its zenith, perhaps, in his discussion of maritime contracts where he begins by outlining seven different international "codes". It is worth making clear, nevertheless, that Bell places greater emphasis on case law than on comparative sources.

Producing a rational, well-integrated analysis whilst discussing so many legal systems and sources is a difficult task which would have entailed an enormous amount of work. It is to Bell's credit that the result is both readable and interesting. The size of this task clearly made him anxious, nevertheless: he expressed concerns that he might not always have kept up to date with English law in producing each new edition.<sup>64</sup>

### Structure of the Commentaries

When Bell is placed within the canon of the Scottish institutional writers (Bell being considered as the last of that group), what is immediately noticeable is the departure within the *Commentaries* from the institutional structure. The earlier institutional writers had used a structure common throughout Europe at the time, which rested on the pattern of the *Institutes* of Justinian. Not surprisingly for a book dedicated to bankruptcy law, the first edition of the *Commentaries*<sup>65</sup> adopts a structure appropriate to that focus. The two volumes are divided into nine books, <sup>66</sup> those books being further subdivided

<sup>60</sup> Bell, Commentaries (5th edn, 1826) vol I, 526.

<sup>&</sup>lt;sup>61</sup> Bell, Commentaries (5th edn, 1826) vol I, 542.

Bell, Commentaries (5th edn, 1826) vol I, 498–500. The "codes" are: (1) the Rhodian Laws; (2) the Code of Maritime Law adopted on the Continent during the eleventh, twelfth and thirteenth centuries; (3) the laws of Oleron and Wisbuy, capital of the Isle of Gothland; (4) the Ordonnances of the Hanseatic Towns; (5) le Guidon de la mer; (6) l'Ordonnance de la Marine of Louis XIV; and (7) the Code de Commerce.

English decisions were also more important than decisions of other legal systems: for example, the decisions of the High Court of Admiralty in England were, Bell suggested, "of greatest authority" compared to other collections of foreign decisions on maritime contracts: see Commentaries (5th edn, 1826) vol I, 500.

<sup>&</sup>lt;sup>64</sup> Bell, Commentaries (1st edn, 1804) vol I, Preface v–vi.

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The titles of the books are: (I) Of Bankruptcy; (II) Of the laws directed against fraudulent obligations and conveyances; (III) Of the laws by which judicial preferences are equalized in relation to bankruptcy; (IV) Of the processes by which the funds of bankrupts are distributed among the creditors; (V) Of the funds or divisible estate of the bankrupt; (VI) Of the claims of the creditors; (VII) Of the division of the funds among the creditors; (VIII) Of the bankruptcy of companies; (IX) Of the mutual relations of the Scotch and foreign laws in cases of bankruptcy.

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into individual chapters. In particularly long books, chapters are collected within parts.<sup>67</sup> In the first edition, the titles of the books suggest a focus on judicial processes relative to the law of bankruptcy rather than, perhaps, the structure and logic of the law. Even at this early stage in his work on the *Commentaries*, a final, separate chapter is dedicated to the relationship between Scots law and the law of other nations – proof of Bell's expansive geographic approach.

The reduction in the number of books in the second edition<sup>68</sup> from nine to six heralds a more logical approach, beginning with bankruptcy laws, moving to the divisible estate, and then on to the distribution of the estate.<sup>69</sup> The third edition<sup>70</sup> maintains this inherent logic, and also the number of books, although for the first time a book on partnership appears (the focus of a case study below). The number of books increases again in the fourth edition,<sup>71</sup> this time to eight, although the change is less one of logic than of detail. Finally, the fifth edition extends again to seven books, with the appearance, rather curiously, of a new penultimate book entitled "System of the Bankrupt Laws", presumably designed to collect all of the statutory material in one place.

In summary, the changes made to the structure of the *Commentaries* as it progressed from edition to edition are probably less radical than might first appear from a simple counting of the constituent books. Views will differ on where the greatest change occurred. Arguably, this took place between the first and the second edition as the book moved from, in effect, a discussion of different legal processes concerning bankruptcy to a more principled and logical analysis of the law. The advent of the partnership section in the third edition was also a significant change. The fact that a new book (System of the Bankrupt Laws) appeared in the fifth edition suggests that Bell was still revising the structure of his book, even at this late stage in his overall endeavour.

We can reflect here on bankruptcy law, not only as a key theme, but also as underpinning the structure adopted for the *Commentaries*. This focus is not surprising for a book written at a time of Scottish economic growth, and also of repeated economic crises.<sup>72</sup> In these uncertain times, bankruptcies will have come thick and fast. The shift from a largely agrarian economy towards

<sup>&</sup>lt;sup>67</sup> Thus, for example, Book IV (Of the processes by which the funds of bankrupts are distributed among the creditors) is divided into three parts.

<sup>68 1810.</sup> 

<sup>(</sup>I) Of Bankruptcy; (II) Of the funds, or divisible estate of the bankrupt; (III) Of the distribution of funds among the creditors; (IV) Of the bankruptcy of companies; (V) Of imprisonment for debt; (VI) Of the mutual relation of the Scotch and foreign laws in bankruptcy.

<sup>&</sup>lt;sup>70</sup> 1816–19.

<sup>&</sup>lt;sup>71</sup> 1821.

<sup>&</sup>lt;sup>72</sup> S Mullen, *The Glasgow Sugar Aristocracy: Scotland and Caribbean Slavery, 1775–1838* (2022) 273 suggests that Scotland experienced financial crises in 1793, 1803, 1809–12, 1815, 1818–19, 1825–26 and 1836–37.

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a mercantile one, with a move from investment in land to investment in other types of business, brought with it the need for a comprehensive system of commercial law. Notwithstanding Bell's (slightly exaggerated) views on the strength of Scottish bankruptcy law, at the time he was writing that law was in its infancy. It is hard to disagree with Fry's view that "it cannot be said that the law was ready for the tidal wave of commercial progress that swept over Scotland in the eighteenth century".

Certain events may have contributed to Bell's decision to focus primarily on bankruptcy law. One such event may have been the collapse, on 22 June 1772, of Douglas Heron & Co (trading under the name of the Ayr Bank) with liabilities exceeding £1,000,000 sterling. The financial implications were huge, Kerr stating (in 1918) "With the exception of the Darien scheme ... there has never been in the history of Scotland so signal an instance of financial mania". Although Adam Smith does not name this Bank crash specifically in the *Wealth of Nations* (1776), it is generally thought to have significantly influenced his treatment. Given that the Scots economy was not a closed one, the impact was felt outside the UK, in countries such as Holland and even in the North American colonies.

This event is likely to have loomed large in the national consciousness, even many years later when Bell was writing. There are repeated references to this crash within the *Commentaries*. In Bell's view, the crash, combined with the "distressed state of the country after the fall of the Douglas Bank, put a stop to joint stock companies in Scotland, or restrained them to undertakings so safe and successful that no question arose upon them". Case reports containing the name of the bank are littered throughout Bell's footnotes, and their implications are discussed in the text itself. The story is a long and painful one, those in charge of the bank seeking to print money as a possible escape route from the bank's problems. The crash in fact took

<sup>&</sup>lt;sup>73</sup> M Fry, A Higher World: Scotland 1707–1815 (2014) 153.

 $<sup>^{74}\,</sup>$  A W Kerr, History of Banking in Scotland (3rd edn, 1918) 83.

<sup>&</sup>lt;sup>75</sup> P Kosmetatos, "The Winding-Up of the Ayr Bank, 1772–1827" (2014) Financial History Review 165 at 165.

<sup>&</sup>lt;sup>76</sup> Kosmetatos, "Winding-Up of the Ayr Bank" (n 75) 173.

Bell, Commentaries (5th edn, 1826) vol II, 628. This is in the context of discussion of an ongoing failure to distinguish between the descriptive name and the personal name of firms. Referring to the Ayr Bank, he stated: "And the deep responsibility which fell upon the partners of the Douglas Bank, tended very much to confound all distinction".

<sup>&</sup>lt;sup>78</sup> Such references appear from the third edition onwards. The discussion of the crash in the body of the text in the fifth edition is supported by reference in footnotes to *Douglas Heron & Co v Hair* (1778) Mor 14605 (vol II, 628 n 2), and see also discussion of *Douglas Heron & Co v Gordon of Culvenan* 16 June 1792 FC at 637 n 5.

<sup>79</sup> R Perman, The Rise and Fall of the City of Money. A Financial History of Edinburgh (2019) ch 10 (Collapse of the Avr Bank) 82.

<sup>80</sup> Kerr, History of Banking (n 74) 94 questions whether the printing of money was a contributory factor to the bank's failure. Identifying the orthodox view that "an over-issue of notes was a leading feature in the failure of the bank", he counters, "this was not so. A vigorous

place in the same month that a new Scottish Bankruptcy Act received Royal Assent.<sup>81</sup>

Rather than being linked to any specific event, Bell's structure may be a reflection of a deeper Scottish focus on, even an obsession with, debt. Other legal systems do not appear to focus on debt to the same degree as the Scottish legal system. Bell's focus on bankruptcy may therefore reflect wider religious or cultural attitudes to debt in Scotland at the time. De thinks, for example, of Sir Walter Scott working himself into an early grave in order to repay the debts incurred when the publishing venture in which he had invested failed. And, of course, one cannot exclude the possibility that Bell's focus was a cause rather than a consequence of the Scottish obsession with bankruptcy within legal circles.

Bell had produced four editions of the *Commentaries* before his appointment to the Chair of Scots law in 1822. The book had therefore largely been developed before Bell acquired any experience of teaching. The decision to focus on bankruptcy law may nevertheless provide evidence of an interest in teaching which was later to emerge. Bankruptcy is a natural focus for those teaching the law not least because it is the ultimate true test of the successful creation of rights in security. He nother respects too, the *Commentaries* resembles a modern textbook. It shows a particular concern for third parties. The focus lies to a significant degree on the people *outside* the commercial arrangement who have been harmed by it. Commercial law is not, for Bell, purely a route to wealth-maximisation for commercial actors.

This third-party focus necessitates a very particular approach. All relevant legal rules require to be applied at the same time. Discussion in the *Commentaries* does not, therefore, proceed by analysis of discrete topics. The totality of the legal rules must be applied at once. This method gives to the *Commentaries* a very modern feel, resembling, for example, the

and sustained effort at over-issue was made all along; but the effort failed by the physical impossibility of making the public hold more notes than they required". The essential errors of the Ayr Bank were, in Kerr's view, "trading beyond their means; divided control by permitting branches to act independently; forcing the circulation of their notes; giving credit too easily; ignorance of the principles of business; and carelessness or iniquity of officers".

<sup>&</sup>lt;sup>81</sup> Kerr, *History of Banking* (n 74) 91–92 viewed the advent of the new Act as "a fortunate circumstance", the Act abolishing ranking by priority of arrestment and, in Kerr's view, introducing a fairer system of ranking for creditors.

<sup>82</sup> For an anthropological perspective on debt which considers debt as a reflection of both religious and cultural ideas, see D Graeber, Debt: The First 5,000 Years (2011).

<sup>83</sup> See Perman, The Rise and Fall of the City of Money (n 79) ch 17 (The Ruin of Walter Scott (and how he got out of it)) 148. Sir Walter Scott seconded Bell's nomination to the Chair of Scots Law: see Walker, Scottish Jurists (n 17) 337.

<sup>84</sup> Black, "Introduction" (n 14) 3 has expressed a similar view: "In commercial dealings the ultimate test of the strength and efficacy of a right or claim is its treatment in the event of the obligor's insolvency."

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globally influential idea of organisational law developed by Hansmann and Krakmann in the early years of the present century.<sup>85</sup> Bell shares with those modern theorists a reluctance to be constrained by discrete legal categories.

Not everyone agrees that the structure of the *Commentaries* is successful. David Walker notably dissented from this view, stating that Bell's "greatest weakness is in systematic arrangement of his material". It is a badly arranged book." Walker considered that Bell had "a pathological approach to commercial relations; he views every relationship as a potential or actual bankruptcy". This criticism becomes less persuasive, perhaps, as Walker proceeds to note that the book was "well received from the start". The fact that the book is being discussed over two hundred years later perhaps provides all the proof that we need of the book's success. It must be conceded, nonetheless, that the structure does make the *Commentaries* a difficult read at times. It is redolent of the type of exam problem not favoured by law students, in which every branch of private law is brought to bear at the same time. This, of course, reflects the legal practitioner's task, the very person for whom Bell was writing.

### Case study in legal method: partnership law

It is difficult within the limits of a short introduction to analyse the substantive legal contribution of a vast book like the *Commentaries*. One can, nonetheless, use a particular topic as a case study in order to illustrate Bell's legal method. This makes it possible to shed light on issues such as Bell's use of case law, of English law, and wider comparative law. Partnership law is chosen for this task, and is considered not only by reference to its main treatment, in Book VII of the fifth edition, but also where it is discussed in other parts of the *Commentaries*, specifically in the analysis of maritime contracts in Book III.

### Structure, definition, and relationship to Roman law

As already mentioned, partnership law was first covered in detail only in the third edition of the *Commentaries*, where it appeared as Book V. In the short "advertisement" at the beginning of the first volume of this edition, partnership law was singled out. Amidst "unprecedented circumstances", Bell wrote, the law of partnership has "undergone much discussion" and

<sup>85</sup> H Hansmann and R Kraakman, "The Essential Role of Organizational Law" (2000) 110 Yale LJ 387; and with R Squire, "Law and the Rise of the Firm" (2006) 119 Harvard L Rev 1335.

<sup>&</sup>lt;sup>86</sup> Walker Scottish Jurists (n 17) 348.

<sup>&</sup>lt;sup>87</sup> Walker, Scottish Jurists (n 17) 348.

<sup>&</sup>lt;sup>88</sup> Walker, Scottish Jurists (n 17) 341.

Walker, Scottish Jurists (n 17) 342. In a similar vein, Black, "Introduction" (n 14) notes that the book was "an immediate success" (4), and "enough of a commercial success for Bell to contemplate matrimony" (1).

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has not been fully investigated.<sup>90</sup> Thus, even as Bell wrote the first volume (published in 1816), he clearly intended to dedicate a significant amount of space to analysis of partnership law in the second volume (published three years later, in 1819). The addition of partnership law therefore falls roughly in the middle of Bell's overall enterprise of writing five editions. His treatment of the topic changes significantly from the third through the fourth and fifth editions. This dynamic area of law, resting on the Roman consensual contract of *societas* but subject to extensive English influence, provides an ideal vehicle to illustrate Bell's legal method, in particular the balance he sought to strike between Scots and English law.

In his analysis of partnership law, Bell broadly used a tripartite scheme:

- (1) constitution, partner to partner and partner to the outside world;
- (2) claims entered in bankruptcy on the failure of the individual partner or the partnership as a whole; and
- (3) proceedings in sequestration.

For someone whose main skill is often identified as developing definitions,<sup>91</sup> the failure to define partnership on its first appearance in the third edition is perhaps surprising.<sup>92</sup> Bell began not with a definition, but rather by explaining partnership in economic terms. In essence, partnership joined those who have the expertise but no money, with those who have the money but no expertise.<sup>93</sup> The assumption that one partner is completely devoid of cash is immediately interesting, and not necessarily the way partnership law is defined in other legal systems. Again, we are reminded of the shortage of capital for commercial enterprise in Scotland described in the prefaces to successive editions of the *Commentaries*.<sup>94</sup> Partnership as a legal concept is therefore introduced by rooting it strongly in the economic conditions of the time. The urgent need to examine it is also explained by its key role

<sup>90</sup> Bell, Commentaries (3rd edn, 1816) vol I, Advertisement vi.

<sup>&</sup>lt;sup>91</sup> Edinburgh & District Tramways Co Ltd v Courtenay 1909 SC 99 per Lord Dunedin at 104: Bell is "a very much greater framer of definitions than any of us can hope to be".

<sup>&</sup>lt;sup>92</sup> Bell, Commentaries (3rd edn, 1816) vol II, 506 states: "According to the definition of lawyers, Society or Partnership is a contract of contribution of stock, or labour, or both, for the purpose of making a common profit in a lawful course of employment. But definitions, if not dangerous, are not always very useful in jurisprudence; and instead of attempting to comprehend an extensive practical doctrine within the limits of a single proposition, I shall proceed to mark in detail the essential and radical points of the contract."

<sup>93</sup> Bell, Commentaries (3rd edn, 1816) vol II, 505.

Modern research provides a more nuanced view of the Scottish economy relative to the English economy at this time. Devine, "Did Slavery Make Scotia Great?" (n 30) 233, explains: "As a poorer country it [Scotland] was in much greater need of external supplies of capital during the industrialisation process than its neighbour to the south." Mullen, The Glasgow Sugar Aristocracy (n 72) 21, suggests that, "beginning in 1778, Scotland experienced industrial growth at a quicker pace than England, despite starting from a more modest base".

in contemporary international trade (a topic returned to below). The law of limited companies was, of course, in its infancy at this time.<sup>95</sup>

Two observations can be made about the structure used for Bell's treatment of partnership law. The first is the continuing importance of bankruptcy law: even at the stage of the third edition, two-thirds of the coverage examines partnership law through the lens of bankruptcy.

The second observation relates to part (1) of Bell's structure, in which he considers both partner-to-partner relations, and relations between an individual partner and the outside world. Here we see Bell poised, as it were, between the essentially Roman-inspired approach of the institutional writers and the new modern world of commercial law. For Roman lawyers the main focus of attention in partnership law was the bilateral contract of *societas*, one of the consensual contracts. For Bell and his contemporaries, the main focus was third parties who can suffer economic harm through the operation of partnerships. This difference in focus is also reflected in the changing ability of a partner to bind the firm.

A partner in a Roman partnership lacked the ability to bind the firm in its dealings with the outside world. This position was not limited to partnership law: Roman law did not contain what the modern lawyer would recognise as agency or direct representation. Functional equivalents were used instead. For Bell, the agency powers of a partner were perhaps the key legal issue for consideration. Economic harm is often caused by the partner who steps beyond his or her mandate. In short, the new world of commercial law within which Bell was writing required a significant shift in focus away from the historical roots of Scottish partnership law (in Roman law) towards the realities of modern commerce.

This shift in focus may explain some of the criticism levelled at Roman partnership law in the *Commentaries*, criticism which increased in the later editions produced during Bell's lifetime. In the fifth edition, he explained:

In the infancy of trade it [partnership law] is little regarded or understood; and no proofs perhaps are more decisive of the low state of mercantile intercourse in Rome, than the very imperfect state of the Roman jurisprudence with respect to partnership.<sup>98</sup>

<sup>95</sup> The bankruptcy of companies appears as a new Book IV of the second edition of the Commentaries (1810). As noted above, Bell had also identified the negative impact the crash of the Ayr Bank had had on the use of joint-stock companies.

<sup>&</sup>lt;sup>96</sup> B Abatino, G Dari-Mattiacci and E C Perotti, "Depersonalization of Business in Ancient Rome" (2011) 31 Oxford Journal of Legal Studies 365 at 369; W Broekaert, "Joining Forces: Commercial Partnerships of Societates in the Early Roman Empire" (2012) 61 Historia 221 at 232

<sup>&</sup>lt;sup>97</sup> W M Gordon, "Agency and Roman Law", in W M Gordon, Roman Law, Scots Law and Legal History: Selected Essays (Edinburgh Studies in Law vol 4, 2007) 54.

<sup>98</sup> Bell, Commentaries (5th edn, 1826) vol II, 611.

Underlining the contrast between Roman law and the modern law, Bell stated:

In modern times, the effects of this contract, in its relations to third parties, are by far the most important. The question in this view is, not what share of profit, or what proportion of loss, upon a common stock, each partner is to gain or to suffer; but what are the rights of those who deal with the company in claiming preferably on its common stock, and what responsibility is undertaken by the several partners for contracts bona fide entered into by third parties?<sup>99</sup>

Yet, even taking into account the need to move away from the Roman contract of *societas*, the influence of Roman law remains highly visible in the *Commentaries*. Two concepts derived from Roman law continue to be significant in Bell's treatment. The first of these is *delectus personae*, Bell explaining:

In a contract of such exuberant confidence as partnership; where a man may, to the whole extent of his fortune, be made responsible for the obligations of others, the delectus personae forms one of the most essential points. 100

To say that a contract involves *delectus personae* is to recognise that the partners have chosen one another for reasons of the special skill or talent that they possess, and that, as a result, rights and duties under that contract cannot be assigned or transferred.<sup>101</sup> The key partnership law ideas which, for Bell, rested on *delectus personae* included the need for unanimity for the purposes of the assumption of a new partner, the ability of an individual partner to terminate the partnership at will (absent agreement to the contrary), and the termination of the firm by the death, renunciation, incapacity or failure of one partner.<sup>102</sup>

The second Roman legal concept, much used by Bell and closely connected to *delectus personae*, is the good faith inherent in the partnership. Bell famously described partnership as a contract of "exuberant confidence". There are several possible sources for this expression. It may have been derived by Bell from a passage in Justinian's *Codex*. The phrase was, however, also used by authors of French and English partnership treatises published during the eighteenth century. This raises the possibility that

<sup>99</sup> Bell, Commentaries (5th edn, 1826) vol II, 611.

<sup>100</sup> Bell, Commentaries (5th edn, 1826) vol II, 630.

<sup>&</sup>lt;sup>101</sup> W W McBryde, The Law of Contract in Scotland (3rd edn, 1997) paras 12-36 to 12-41.

<sup>&</sup>lt;sup>102</sup> Bell, Commentaries (5th edn, 1826) vol II, 630.

<sup>&</sup>lt;sup>103</sup> Bell, Commentaries (5th edn, 1826) vol II, 630.

<sup>&</sup>lt;sup>104</sup> C. IV.37.3: "In societatis contractibus fides exuberet".

J Domat, The Civil Law in its Natural Order: Together with the Public Law vol 1 (transl W Strahan, 1722) 157; W Watson, A Treatise of the Law of Partnership (1794) 6. I am grateful to James Bailey for these suggestions on Bell's inspiration for the phrase, and for drawing these sources to my attention.

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Bell's usage was inspired by a contemporaneous treatise rather than Roman law, thus reflecting his characteristic borrowing of material from other legal systems. The phrase "exuberant confidence" or "exuberant trust" appears in reported Scottish cases on agency,<sup>106</sup> trust,<sup>107</sup> and partnership<sup>108</sup> from as early as the seventeenth and early eighteenth centuries. This being the case, it seems likely that Bell's use of the phrase was inspired by native Scottish sources. Whatever his inspiration, however, his use of this phrase exerted a strong influence on later writers of Scottish treatises on partnership law<sup>109</sup> and on the courts.<sup>110</sup>

Bell's work on partnership law illustrates the nature of Scots commercial law as law in transition. In many respects, the Roman consensual contract of *societas* was unfit for the modern partnership which Bell was analysing. Nevertheless, key concepts derived from Roman law such as *delectus personae* and good faith remained highly relevant, and permeated the entirety of Bell's treatment of partnership law in the *Commentaries*.

### Legal method

Described (by Aeneas Mackay) as "the lawyer of precedent", <sup>111</sup> Bell is the first of the Scottish legal writers fully to integrate case law into his analysis of commercial law. A clear illustration can be found in Bell's treatment of partnership law. Although there is extensive citation of English cases, Scottish cases predominate. The references to English cases are explanatory in nature – Bell notes differences, but does not suggest that Scots law should follow English law. Only rarely is an English case discussed in the text itself. Bell's legal method in this context illustrates the aim expressed in the prefaces, namely the "perfect assimilation" of the two legal systems. <sup>112</sup>

Duchess of Buccleuch v Ancrum (1702) 4 Br Supp 519; Carmichael v Grierson (1707) 4 Br Supp 664; Creditors of John Brough v Jollie (1793) Mor 2585; Rose v Spaven (1880) 17 SLR 583

Alexander v Lord Bargeny (1695) 4 Br Supp 288; Higgins v Callander (1696) Mor 16182; Williams v Wakefield (1883) 21 SLR 182; Maclean v Turnbull (1888) SLR 25.

Lord George Murray v Miln (1692) 4 Br Supp 28.

The actual phrase "exuberant trust" is used by the following writers, with specific reference to the work of Bell: F W Clark, A Treatise on the Law of Partnership and Joint Stock Companies, according to the Law of Scotland (1866) vol I, 182; J J Gow, The Mercantile and Industrial Law of Scotland (1964) 552. Twentieth-century writers have tended to refer instead to partnership as a contract uberrima fides: see W M Gloag, The Law of Contract (2nd edn, 1929) 507; J B Miller, The Law of Partnership in Scotland (2nd edn by G Brough, 1994) 156–76 and in particular 156 nn 19 and 20.

Alexander v Lowson's Trustees (1890) 17 R 571 per the Lord Ordinary (Kinnear) at 575; Heberstein v TDR Capital General Partner II LP [2021] CSOH 64, 2021 SC 348 per Lord Ericht at para 28; University Court of the University of St Andrews v Headon Holdings Ltd [2017] CSIH 61, 2017 GWD 32-507 per Lord Malcolm at para 76.

<sup>&</sup>lt;sup>111</sup> A J Mackay, *Memoir of Sir James Dalrymple, first Viscount Stair* (1873) 172–73, cited in Reid, "From Text-book to Book of Authority" (n 3) 22.

<sup>&</sup>lt;sup>112</sup> Bell, Commentaries (2nd edn, 1810) Preface xvii.

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Bell cites civilian sources throughout his treatment of partnership law. French law predominates, particularly Pothier's famous treatise on the law of partnership.<sup>113</sup> The comparative material is not, however, used as inspiration for the future direction of Scots law. Rather, it appears to be provided for the interest of the reader.<sup>114</sup> Indeed, the comparison is sometimes made to the detriment of other legal systems. An example is his criticism of Continental attempts to produce national registers of partners. Those registers fall quickly into disuse and are a "dead letter".<sup>115</sup> References to the work of civilian authors are significantly outnumbered by references to case law.

### Style of writing

Bell often refers to contemporary legal debates before setting out his own view on the law. His discussion of the separate legal personality of the Scottish partnership, where he contrasts Scots with English law, illustrates this tendency:

Some lawyers have considered the obligation of the company<sup>116</sup> as only the joint and several obligations of the partners. But this is not correct in the law of Scotland. The partnership is held as in law a separate person  $\dots$ <sup>117</sup>

Additional examples of this tendency can be found elsewhere in the partnership section. Noting that the duration of a partnership is usually established by the written partnership contract, Bell comments, "But it has sometimes been questioned", whether the duration can be proved in other ways, for example, by reference to the duration of a lease which the partnership has entered into as tenant. "It has been much doubted", he observes, whether dissolution by death requires notice to the world, or to the customers of the firm. This discursive style is highly effective as a way of communicating the existence and nature of legal debates. It also provides a refreshingly honest view of the complexity of the legal issues concerned: nothing is over-simplified.

Although the tone adopted is usually serious, light-hearted observations can also be found. For example, in his discussion of the types of issue which might place the continuation of a partnership in doubt, Bell's suggested example is the "uncontrollable habits of intoxication in the partner of a gunpowder manufactory". <sup>120</sup>

R J Pothier, *Traité du contract du société* (1775).

<sup>114</sup> This strategy seems to be common to both the *Principles* and the *Commentaries*: see Reid, "From Text-book to Book of Authority" (n 3) 26.

<sup>&</sup>lt;sup>115</sup> Bell, Commentaries (5th edn, 1826) vol II, 624.

<sup>&</sup>quot;Company" was commonly used at this time to mean partnership.

<sup>&</sup>lt;sup>117</sup> Bell, Commentaries (5th edn, 1826) vol II, 619.

Bell, Commentaries (5th edn, 1826) vol II, 633.

<sup>&</sup>lt;sup>119</sup> Bell, Commentaries (5th edn, 1826) vol II, 639.

<sup>&</sup>lt;sup>120</sup> Bell, Commentaries (5th edn, 1826) vol II, 635.

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### Hypothetical examples, slavery and trade with the West Indies

Bell frequently uses hypothetical examples to explain complex ideas. He often asks the reader to imagine a scenario involving international trade, and where he does so, the trade tends to be with the US or the West Indies. The following is typical: "Thus, a young man goes out to the West Indies or America to manage the consignments of a Scottish mercantile house abroad…"<sup>121</sup> This hypothetical example is used to illustrate the ease with which the same individuals can be partners of different partnerships in Scots law, a position not possible in English law.<sup>122</sup>

Hypothetical examples referring to trade with the West Indies appear not just in Book VII on Partnership but throughout the *Commentaries*, for example in the discussion of bankruptcy law more generally.<sup>123</sup> Bell's analysis of maritime contracts is notable for the direct discussion of the legal regulation of West Indian trade. He notes the policy of a particular statute as securing the trade of the British colonies in the West Indies to British shipping,<sup>124</sup> and highlights differences between Scots and West Indian law in relation to contracts with seamen.<sup>125</sup> Analysing the advantages of a composition clause, Bell states: "This advantage is, however, felt chiefly where there are funds situate abroad, as frequently happens in Glasgow, and on the West coast, among traders to the West Indies and America".<sup>126</sup> More generally, facts of cases recounted in footnotes (English as well as Scottish)<sup>127</sup> often have as their setting the West Indies, or a voyage to the West Indies.

Bell's hypothetical examples reflect the importance to Scotland of trade with the West Indies at the time he was writing. This was a particular focus for

<sup>&</sup>lt;sup>121</sup> Bell, Commentaries (5th edn, 1826) vol II, 627.

<sup>&</sup>lt;sup>122</sup> Bell, Commentaries (5th edn, 1826) vol II, 627.

Bell, Commentaries (4th edn, 1821) vol II, 261: "Thus, a debtor may collusively give his debtor a draft on a correspondent abroad, in the West Indies, or on the continent, which will operate as a payment."

Bell, Commentaries (5th edn, 1826) vol I, 153. See also, in the context of the ability of the master of a ship to sell where a loan is secured over the ship, Bell's statement in Commentaries (3rd edn, 1819) vol II, 85: "I understand from a gentleman very conversant with the Commerce of the West Indies, that it is by no means unfrequent for an application to be made to the Vice-Admiralty Courts in that part of the world, for leave to empower the master to sell."

<sup>&</sup>lt;sup>125</sup> Bell, Commentaries (5th edn, 1826) vol I, 510.

<sup>&</sup>lt;sup>126</sup> Bell, Commentaries (4th edn, 1821) vol II, 482.

Examples of Scottish and English cases with a clear connection to trade with the West Indies drawn from the fifth edition of the *Commentaries* include: *Colquhoun v Findlay, Duff, and Company* 15 Nov 1816 FC 208 (vol I, 488 n 1); *Campbell v Henderson* (1826) 5 Shaw & Dunlop 86 (vol I, 488); *Cary v White* (1706) 1 Brown's Parl Cases (vol I, 507 n 3); *Appleby v Dods* (1807) 8 East 300, 103 ER 356 (vol I, 515 n 1); *Hunter v Fry* (1819) 2 Barn and Alder 421, 106 ER 420 (vol I, 566 n 1); *Haigh v De La Cour* (1812) 3 Camp 319, 170 ER 1396 (vol I, 613 n 1); *Adam and Mathie v Murray* 22 May 1804 FC (vol I, 620). See also the extensive discussion in the fourth edition of a House of Lords case important for the distinction between partnership and joint venture, where one of the litigants, Wilkie, was located in Jamaica: *Wilkie v Gregg*, 1799 (vol II, 541).

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Scottish (rather than English) trade at the time. After Britain ended the slave trade in 1807, and slaves were emancipated in 1834, such trade continued, although in decline. Mullen, drawing on adverts which appeared in the Glasgow Herald, estimates that over 1,700 voyages departed from Clyde ports to the West Indies between 1806 and 1834. This time period overlaps significantly with publication of the five editions of Commentaries for which Bell was responsible. Mullen suggests that in 1772, the West Indies took less than 4% of Scotland's export trade, this percentage rising to almost 50% by 1808. According to Devine, this rose further to 65% by 1815. Clearly, the Caribbean was Scotland's largest overseas market in the early years of the nineteenth century. The principles of Scots law governing international trade which Bell analysed in the Commentaries are likely to have been developed largely in this West Indian arena.

What is striking to the modern reader about Bell's examples is the implicit but unmistakeable connection to the trafficking of enslaved people. Recent scholarship has begun to shed light on this practice, and on the economic benefits it provided to Scotland. Such benefits were both direct and indirect. Where Scottish partnerships financed or conducted a voyage transporting slaves to the West Indies, the economic benefits, in the form of profit gained by that business, were obvious and direct. More indirectly, the slave trade provided a market for goods manufactured in Scotland, such as textiles, including linen, herring, ironware and manufactured goods. It was as consumers that the British slave colonies were so valuable a cog in the global British economic machine. Less direct benefits accrued to those

<sup>&</sup>lt;sup>128</sup> Mullen, *The Glasgow Sugar Aristocracy* (n 72) 6.

<sup>129</sup> Mullen, The Glasgow Sugar Aristocracy (n 72) 139. Mullen identifies Jamaica as the main destination, accounting for 615 of these voyages.

<sup>&</sup>lt;sup>130</sup> Mullen, The Glasgow Sugar Aristocracy (n 72) 30. Mullen describes the West Indies (at 23) as the "main focus" of Scotland's Atlantic commerce after 1790.

<sup>&</sup>lt;sup>131</sup> T M Devine, "Introduction: Scotland and Transatlantic Slavery", in T M Devine (ed), Recovering Scotland's Slavery Past: The Caribbean Connection (2015) 1 at 11.

Devine, "Did Slavery Make Scotia Great?" (n 30) 228. See also N Ascherson, "Scotland, Brexit and the Persistence of Empire", in S Ward and A Rasch (eds), Embers of Empire in Brexit Britain (2019) 71 and 76.

<sup>&</sup>lt;sup>133</sup> T M Devine, "Conclusion: History, Scotland and Slavery", in T M Devine (ed), Recovering Scotland's Slavery Past: The Caribbean Connection (2015) 246 at 249; Mullen, The Glasgow Sugar Aristocracy (n 72).

T M Devine, "Foreword", in T M Devine (ed), Recovering Scotland's Slavery Past: The Caribbean Connection (2015) xiv. Devine states elsewhere: "it can be argued that the slave-based economies of the Atlantic had a powerful impact on Scottish economic growth as a source of raw materials for industrialism, market expansion and capital transfers to manufacturing, mining and agriculture": see "Did Slavery Make Scotia Great?" (n 30) 234. A Durie, The Scottish Linen Industry in the Eighteenth Century (1979) 152 estimates that in 1796, 90% of all exports of Scottish linen went to North America and the West Indies.

<sup>135</sup> A Renton, Blood Legacy. Reckoning with a Family's Story of Slavery (2022) 53. Renton notes that the slave-based economies were almost entirely dependent on supplies from Britain.

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living in Scotland who invested in the West Indian slave plantations. The database produced by the Centre for the Study of the Legacies of Slavery at University College London analyses compensation payments made on the abolition of slavery in 1834. <sup>136</sup> Research resting on this database suggests that ordinary Scots were significantly involved. <sup>137</sup> In particular, Scots appear to have had a greater role as absentee slave-owners than those from other parts of the UK: Scotland had 15% of the identified absentee slave-owners, while constituting only 10% of the UK population. <sup>138</sup>

Whilst the economic benefits of the slave trade to Scotland are being uncovered in modern scholarship, less attention has been given to the legal dimensions of this trade. It is important to note, for example, that the business vehicle of choice for voyages to the West Indies was the partnership. The pooling of resources characteristic of partnership was necessary for the expensive and risky international business ventures which were being undertaken.<sup>139</sup> When risks such as accidents, <sup>140</sup> hurricane, <sup>141</sup> piracy, capture

https://www.ucl.ac.uk/lbs/maps/britain/#zoom=11&lng=-4.592285&lat=55.760350.
For further analysis of economic implications of compensation, see S Sanghera, *Empireland* (2021) 143–46.

<sup>&</sup>lt;sup>137</sup> For the town of Ayr, the database discloses four individuals, residing at five addresses. One of those individuals (residing at two different addresses at different times between 1851 and 1871) is Frances Catherine Heron. It is impossible without further research to identify whether this person was part of the family involved in Douglas Heron & Co, the Ayr Bank, as the surname might suggest.

N Draper, "Scotland and Colonial Slave Ownership: The Evidence of the Slave Compensation Records", in T M Devine (ed), Recovering Scotland's Slavery Past: The Caribbean Connection (2015) 166 at 174; Renton, Blood Legacy (n 135) 27. Claims could only be made by individuals: see Draper, 169. This will have proved difficult for the slave-owning Scottish (and not English) partnership given the separate personality of the Scottish partnership. One assumes that an individual partner will have been required to make a claim on behalf of the Scottish partnership. The high percentage of women compensated is fascinating: 40% of awards were paid to women (Draper, 170); this percentage is not specific to Scotland. Clearly this type of investment was popular with members of the relatively well-to-do female population who were either unmarried or widowed (where a woman was married, claims would have been made by a husband).

<sup>&</sup>lt;sup>139</sup> Devine shows that a group of partnerships dominated Clyde-Caribbean commerce between 1750 and 1815: T M Devine, "An eighteenth century business elite: Glasgow-West India merchants 1750–1815" (1978) 57 Scottish Historical Review 53.

<sup>140</sup> Bell, Commentaries (5th edn, 1826) vol I, 529 n 5 refers to Bogle, Jopp and Co v Adam and Mathie, 15 May 1801, Judge Cay's MS vol A 296, in which a ship struck a rock at Jamaica, triggering a dispute over repair.

The frequency with which these perils impacted on trade are visible in the cases Bell discussed in footnotes, for example, from the fifth edition (vol I, 561 n 1), *Johnston v Benson* 1819 1 Brod and Bing 454, 129 ER 798, in which a small boat unloading goods in Anotta Bay, Jamaica was lost in a hurricane, with the loss of all goods carried. See also *Appleby v Dods* (1807) 8 East 300, 103 ER 356, in which the ship appears to have been lost on her way home from the West Indies (vol I, 515–16 n 1 and elsewhere).

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by a hostile power or a privateer,<sup>142</sup> or local insurrection came to fruition, even if those risks were insured, litigation was likely to ensue.<sup>143</sup> As Bell wrote the different editions of the *Commentaries*, he will have looked back over the commercial case law from the late 1700s to the early 1800s. During this period, litigation often centred around a trade venture between Scotland and the West Indies. And, as already stated, the business entity of choice for that trade was generally the partnership. This diet of cases and the growth in the usage of partnerships may explain, at least in part, why Bell felt such an urgent need to include partnership law in his third edition.

Yet in Bell's extensive analysis of the law of international trade, references to the institution of slavery itself are few and far between. He notes that goods stowed on deck are liable to average if saved, before proceeding to state: "There is no contribution for the passengers or crew; for it is impossible to put a value on the life of a free man". He presence of the word "free" in this sentence is notable. The application of the principles of insurance law to slave voyages had reached the notice of the public during Bell's lifetime. In *Gregson v Gilbert*, He and English decision from 1783, an insurance claim was litigated where slaves had been thrown overboard from the slave ship *The Zong*. The claim was made for the loss of 132 humans being trafficked as slaves. It was argued that perils of the sea had so damaged and delayed the vessel that the inadequacy of water for the full remaining journey necessitated the jettisoning of the "cargo". This resulted in a public outcry. He It is interesting, particularly given Bell's expansive approach, that this case does not appear to be mentioned in the *Commentaries*.

In the *Principles*, Bell includes contracts for defeating the laws of slavery within the class of illegal and immoral contracts. <sup>147</sup> Explaining that such a contract would be void, Bell supports his conclusion with reference to a Scottish case decided in 1828, *Gibson v Stewart* (discussed below). <sup>148</sup>

As seen in Curling v Long (1797) 1 Bos and Pull 634, 126 ER 1104 (vol I, 574 n 5, the location being Jamaica); Gibson v Stewart (1828) 6 S 733 (Principles (4th edn, 1839) § 41); Davidson v Gwynne (1810) 12 East 381, 104 ER 149 (vol I, 554 n 5).

<sup>&</sup>lt;sup>143</sup> It is likely that many of these claims would be raised, not by the insured, but rather by insurers, subrogated to the claim of the insured. This fact would not be visible from the case reports themselves, given that, where the insurer raises a subrogated claim, it does so in the name of the insured.

<sup>&</sup>lt;sup>144</sup> Bell, Commentaries (5th edn, 1826) vol I, 590 n 4, citing D.14.2 ff on the Lex Rhodia de iactu.

<sup>145 (1783) 3</sup> Dougl 232, 99 ER 629.

<sup>&</sup>lt;sup>146</sup> For full analysis of this case from a legal perspective, see H Bennett, "Reading marine insurance contracts: determining the scope of cover" (2019) 27 Asia Pacific Law Review 239. See also J Webster, "The *Zong* in the Context of the Eighteenth-Century Slave Trade" (2007) 28 Journal of Legal History 285.

 $<sup>^{147}</sup>$  Bell, Principles (4th edn, 1839)  $\,$  41, under the particular heading, "Contracts tending to disturb public arrangements".

<sup>148 (1828) 6</sup> S 733. This case is also discussed in G J Bell, Illustrations from Adjudged Cases of the Principles of the Law of Scotland (1836–38) 103.

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Discussion of an arguably related issue, whether it was possible to bind oneself in a contract of employment for life, is found in the Commentaries, although the cases cited are not connected to the transatlantic or West Indian slave trade. 149 The facts of Gibson v Stewart, the case referred to by Bell in Principles, provide an apt illustration of the ventures being carried out by partnerships at this time which involved the trafficking of enslaved people. The case, decided by the First Division of the Inner House, arose from a dispute between partners who had formed a joint venture. It had been agreed that a ship, The Washington, would be purchased from an owner in the US and sent to the coast of Africa to buy slaves, after which she was to take the slaves to Charlestown, South Carolina. This was in 1806, before the abolition of the slave trade. The finance for the voyage appears to have come from the pursuer, while the defender, who had a one-eighth interest in the venture, sailed on board as supercargo and commander of the ship. Another ship, The Croydon, was also sent on a similar route as part of the joint venture, carrying muskets and gunpowder to be bartered for slaves. Both ships arrived on the coast of Africa, but The Washington was seized by a British ship and condemned as a lawful prize by the King in Council. The pursuer brought an action against the defender, requiring the defender to pay his share of the loss. The Inner House held that the pursuer could not raise an action against the defender because the contract was an illegal contract (pactum illicitum). The contract was treated as illegal not because of any connection with slavery, however, but rather because it contravened a statute prohibiting the carrying of arms. 150 Whilst this case is not discussed in the Commentaries, the latter book does discuss forfeiture of ships for breach of the law preventing the slave trade.151

Thus it seems, neither in *Commentaries* nor in *Principles* does Bell really engage with the institution of slavery. In making this observation, the author does not intend to level any criticism at Bell in this respect. It is certainly not suggested, for example, that Bell supported the institution of slavery. <sup>152</sup> The

Bell, Commentaries (5th edn, 1826) vol I, 302, under the heading "Restraints on Natural Liberty". The cases cited are Wedderburn v Monorgan (1612) Mor 9453, in which the legal issue was whether an individual could by contract agree to perpetual banishment, and Caprington v Geddew (1632) Mor 9454, in which the legal issue was whether a collier could bind himself to perpetual service. Whilst Bell uses the name "Geddie" for the defender in the second case, the case report uses "Geddew". See also D J Cusine, "Colliers, salters and fishermen of Auchmithie" 2021 JR 137, in which the case is discussed at 142.

<sup>150</sup> The contract appears to have infringed the Exportation Act 1756 c 16, the Militia Act 1759 c 2, and Order in Council 11 May 1803.

<sup>&</sup>lt;sup>151</sup> Bell, Commentaries (5th edn, 1826) vol I, 154 and 155.

We could, in this context, assess the extent to which the earlier institutional writers had analysed the institution of slavery; see, in this respect, J Brown, "Servitude, slavery and Scots law: historical perspectives on the Human Trafficking and Exploitation (Scotland) Act 2015" (2020) 40 LS 353. Lord Kames, Sketches on the History of Man (1774, repr ed J A Harris, 2007) 46–47 considered the mixing of races and seemed to at least ask the question whether all men

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references to trade with the West Indies are highlighted in this Introduction in order to explore the economic backdrop for Scots commercial law at the time Bell was writing.

The relationship between Scots commercial law, slavery and the slave trade is a topic which cannot be fully analysed here. Nevertheless, it seems appropriate to acknowledge this relationship given that Bell was writing the *Commentaries* at a time when trade with the West Indies was such a dominant factor in the Scottish economy. The modern reader (for whom this reprint is designed) may, like this author, see these connections, even if they are visible only by reading between the lines of the *Commentaries*.

Possible directions for future legal research (to complement the economic and historical research already progressing apace) are many and varied. These include the extent to which decided cases involving the slave trade have developed discrete parts of Scots commercial law. We should also consider whether Scottish legal concepts may actually have facilitated this type of trade. The suitability of the Scottish partnership for the businesses involved in the West India trade, namely businesses containing networks of Scots, related by family or marriage, has not gone unnoticed. 153 The "greater receptivity" of Scots law (presumably compared to English law) to the recognition of collective legal bodies has also been noted in the context of analysing investments by UK nationals in West Indian plantations, where those nationals were resident in the UK.154 Some conclusions on Scots law which have already appeared in print are, however, questionable. These include the suggestion that the separate legal personality of the Scottish partnership somehow protected the partners in a Scottish partnership to a greater degree than partners in an English partnership.<sup>155</sup> This is, of course, to ignore the joint and several liability of partners in a Scottish partnership. 156

are of "one kind". He stopped short, however, of answering this question positively, ending his discussion by observing the conflict with the Bible that this would entail. As already noted, Bell seems not to have valued Kames' work and might be unlikely to refer to it. Adam Smith had famously identified the inefficiencies of a slave economy, given that, in contrast to the slave-owner, an investor paid only for work provided, and did not require to feed or house the worker: see *An Enquiry into the Nature and Causes of the Wealth of Nations* (1776, repr eds R H Campbell and A S Skinner, 1984) 387.

Stephen Mullen, "The Great Glasgow West India House of John Campbell, senior, & Co", in T M Devine (ed), Recovering Scotland's Slavery Past: The Caribbean Connection (2015) 124 at 126–27; Mullen, The Glasgow Sugar Aristocracy (n 72) 91. Devine, "Did Slavery Make Scotia Great?" (n 30) 231 suggests that the West India trade was dominated by eighty individuals, joined in partnerships, and amongst this was an inner group of twelve families who ran much of the business.

<sup>&</sup>lt;sup>154</sup> Draper, "Scotland and Colonial Slave Ownership" (n 138) 179.

<sup>&</sup>lt;sup>155</sup> T M Devine, "Sources of Capital for the Glasgow Tobacco Trade c1740–1780" (1974) 16 Business History 122; Mullen, *The Glasgow Sugar Aristocracy* (n 72) 87.

Now embodied in the Partnership Act 1890 s 9.

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### The legacy of the Commentaries: Scotland and beyond

### Scotland

Bell's achievement in writing the *Commentaries* is all the more significant given the neglect of commercial law by the earlier institutional writers, as already mentioned, and the dearth of Scottish reported cases on the topic.<sup>157</sup> It is hard, therefore, to disagree with Black's characterisation of Bell as the creator of Scottish commercial law.<sup>158</sup> It is indeed a significant achievement that Bell's published work was being cited in the Scottish courts at the same time as his appearances before the courts as a member of the Bar.

Bell did not have to wait long before the *Commentaries* was cited in the Scottish courts, the first citation taking place as early as 1808.<sup>159</sup> Citation of Bell's works in the courts has clearly continued. A Westlaw search suggests that the *Principles* has been cited to Scottish courts to a significantly greater degree than the *Commentaries*.<sup>160</sup> This statistic, taking in cases on any topic, may be slightly misleading, however. A narrower pool of cases comprising those which deal with commercial law only may produce a different picture. This is certainly what is suggested by the analysis of partnership cases described immediately below.

I have identified 74 cases on the law of partnership where the Principles or the Commentaries or both were cited to the Scottish courts.<sup>161</sup> In 18 cases both works were cited, in 8 cases the Principles alone, and in 48 cases the Commentaries alone. Thus it seems that, in partnership law, the courts have used the Commentaries to a significantly greater degree than the Principles. There may be several reasons for this position, which bucks the general trend of greater usage of the Principles compared to the Commentaries in the Scottish courts. Many of the 74 partnership cases are Inner House cases, and it may be that advocates are more likely to cite the Commentaries in important cases heard in the higher levels of the Scottish courts. The greater depth of analysis found in that book, in contrast to the Principles, would be of undoubted assistance to a court deciding at a high level in the judicial hierarchy. Alternatively, the presence within the sample of so many cases from the Inner House may be simply because only cases from the higher levels are thought sufficiently important to be worth reporting. Whatever the explanation, it seems clear that the Commentaries and not the Principles has been the work of choice in Scottish partnership litigation. What is true

<sup>157</sup> Black, "Introduction" (n 14) 3.

Black, "Introduction" (n 14) 3.

<sup>&</sup>lt;sup>159</sup> Broadfoot v Leith Banking Co 9 Dec 1808 FC, as noted by Black, "Introduction" (n 14) 4.

<sup>160</sup> According to Westlaw, the Principles has been used on 3,971 occasions and the Commentaries on 785 occasions.

<sup>161</sup> The cases were found by searching on HeinOnline, Westlaw and BAILII. These databases did not identify all of the relevant cases, however. The author was able to add cases which she had already read which were not picked up by a relevant search of these databases.

of partnership may be true of commercial law generally; but only once Bell's work in other commercial contexts has been fully explored can a comprehensive and accurate picture be obtained.

### **Beyond Scotland**

Commentators have suggested that Bell's work has had significant influence beyond Scotland. Lord Cockburn stated that "it has done, and will do, more for the fame of the law of Scotland in foreign countries than has been done by all our other law books put together". To Black the *Commentaries* "was a pioneering work not only as regards Scotland but for all English-speaking jurisdictions". <sup>163</sup>

Bell's Commentaries seem to have exerted a strong influence on the English reform of bankruptcy and insolvency law during the nineteenth century.<sup>164</sup> Enthusiasm for the assimilation of Scots and English law in these areas clearly existed both north and south of the Border. 165 It is not surprising that the Commentaries was useful in this context given Bell's expressed aim in writing the book, namely assimilation of Scots and English law. 166 Ultimately, English reform inspired by Scots law and Bell's work seems to have been less than successful for reasons common to many unsuccessful legal transplants: a failure to compare like with like; and the attempt to transplant isolated rules without considering differences in overall framework.<sup>167</sup> Assimilation did not, of course, take place. It is nevertheless notable that it was the English business community, rather than, for example, the English courts, who "liked much of what they read" in Bell's work. 168 This provides more evidence of the practical orientation of the Commentaries. The book would no doubt have been appreciated by a business community accustomed to trading across the border between England and Scotland.

Whilst it has not been suggested that the English courts used the *Commentaries* to a significant degree, there is certainly evidence of its usage in the US courts. Writing in 1990, Rogers concluded that evidence of usage of the works of Scottish legal writers and of Scottish cases in the US courts was relatively sparse, despite the close ties created by extensive emigration from Scotland to the US during the eighteenth and nineteenth centuries.<sup>169</sup> Richard Helmholz, benefitting from modern electronic search facilities, was

<sup>&</sup>lt;sup>162</sup> Memorials of His Time (1856) 163.

<sup>&</sup>lt;sup>163</sup> Black, "Introduction" (n 14) 3.

<sup>&</sup>lt;sup>164</sup> See M Lobban, "Reshaping Private Law in Victorian Britain: the view from Westminster", in H L MacQueen (ed), *Miscellany VII* (Stair Society vol 62, 2015) 337 at 349–58.

<sup>&</sup>lt;sup>165</sup> Lobban, "Reshaping Private Law" (n 164) 349-58.

<sup>&</sup>lt;sup>166</sup> Bell, Commentaries (2nd edn, 1810) Preface xvii.

<sup>&</sup>lt;sup>167</sup> Lobban, "Reshaping Private Law" (n 164) 358.

<sup>&</sup>lt;sup>168</sup> Lobban, "Reshaping Private Law" (n 164) 339.

<sup>169</sup> C P Rogers III, "Scots Law in Post-Revolutionary and Nineteenth Century America: the Neglected Jurisprudence" (1990) 8 Law & History Review 205.

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able to offer a more nuanced and positive view, suggesting that Rogers had underestimated the extent of such usage.<sup>170</sup> Rogers had identified 12 citations of Bell's work in the US Supreme Court and the Supreme Court of Idaho.<sup>171</sup> Helmholz concluded "there are actually far more; I myself counted more than 200 citations before retiring from the hunt". 172 Given what has been said above, it is interesting to note that Helmholz's first example is a partnership case, namely the impact on ownership of partnership assets where one of the partners has died.<sup>173</sup> Also notable is his conclusion that the Commentaries has been cited more than the *Principles*. <sup>174</sup> More broadly, Helmholz indicates that Bell's work has been cited most commonly for "a rule or general proposition of commercial law".175 He concludes that the US courts at the time were more likely to cite contemporaneous authors such as Bell rather than earlier authors, including the earlier institutional writers.<sup>176</sup> "For the most part, they looked for what would help them in current controversies". 177 As citation of Scottish material appears to have increased towards the end of the nineteenth century, this would have provided fertile ground for usage of Bell's work in particular. 178

### Conclusion

Those of us in the legal community (whether academics or legal practitioners) who write books on Scots law can only marvel at Bell's prodigious output of publications. The jewel within the crown of these is, for this author at least, the *Commentaries*. In a book so extensive, there is something for every reader, no matter his or her area of expertise. It is hoped that the reprinting of this edition will mark a reawakening of interest in Bell's remarkable book. It seems fitting to close with his own words, taken from the preface to the last edition produced during his lifetime – the edition reprinted here. The pride in his work which these words communicate must have lightened some of the darker days of his later years:<sup>179</sup>

<sup>&</sup>lt;sup>170</sup> R 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.

<sup>&</sup>lt;sup>171</sup> Helmholz, "Scots Law in the New World" (n 170) 175.

Helmholz, "Scots Law in the New World" (n 170) 175.

<sup>&</sup>lt;sup>173</sup> Helmholz, "Scots Law in the New World" (n 170) 175, referring to Bank of Montreal v Page 98 Ill 109 at 116 (1881).

Helmholz, "Scots Law in the New World" (n 170) 176.

<sup>175</sup> Helmholz, "Scots Law in the New World" (n 170) 175.

<sup>176</sup> Helmholz, "Scots Law in the New World" (n 170) 179.

<sup>177</sup> Helmholz, "Scots Law in the New World" (n 170) 179.

<sup>&</sup>lt;sup>178</sup> Helmholz, "Scots Law in the New World" (n 170) 186.

<sup>179</sup> Bell's last years were difficult, Cockburn commenting: "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 because he would not be dishonest, life for him had lost most of its attractions": H Cockburn, Circuit Journeys (1888) 203, quoted in Reid, "From Text-book to Book of Authority" (n 3) 9.

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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 ... 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. 180

### LAURA MACGREGOR\*

\* Professor of Scots Law, University of Edinburgh. This introduction is an expanded and developed version of the author's inaugural lecture, delivered at Edinburgh Law School on 16 November 2022. The lecture commemorated the 200th anniversary of Bell's inaugural lecture as Professor of Scots Law, which took place on 12 November 1822.

<sup>&</sup>lt;sup>180</sup> Bell, Commentaries (5th edn, 1826) vol I, Preface xvii.