

Ius Civile in Scotland, ca. 1600

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In 1922, J. D. Mackie and W. C. Dickinson published in the *Scottish Historical Review* an important document "unearthed from among the treasures of the British Museum."¹ The soil in which it had lain concealed was that of the famous Cottonian manuscripts. The particular manuscript was entitled *Relation of the Manner of Judicatures of Scotland*.² The editors provided a short introduction in which they were mainly concerned with dating the text and speculating on its authorship through an analysis of the contents; while there was some contradictory evidence, they concluded, somewhat cautiously, that there was no reason why the "document should not be dated soon after the Union of 1603."³ This seems convincing. They also speculated — quite plausibly — that "it was one of the very documents which formed the basis of negotiations between the commissioners appointed by England and Scotland"⁴ to fulfil James VI's dream of a union — including a union of the laws — of his kingdoms.⁵ The nature of the text — evidently drafted by a Scottish lawyer to inform an English lawyer about the institutions of the Scottish legal system and their procedures — supports this, although one could well imagine other reasons for its composition. Mackie and Dickinson suggested two possible authors: Thomas Hamilton, Earl of Melrose, and Sir John Skene, both of whom were Scottish commissioners for Union; one might also add the possibility of Thomas Craig of Riccarton, another Scottish commissioner, although this is unlikely. The two scholars also suggested that the memorandum was probably intended for the English Lord Chancellor, Thomas

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¹ J. D. Mackie and W. C. Dickinson, "Relation of the Manner of Judicatures of Scotland," 19 *Scot. Hist. Rev.* 254, 254 (1922).

² *Id.* at 262–72.

³ *Id.* at 261.

⁴ *Id.* at 262.

⁵ *Id.* at 261–62.

Ellesmere, largely because at one spot the intended recipient was apostrophized directly as "your Lordship."⁶

This fascinating document has attracted little attention from legal historians, although mentioned in Goodare's recent study, *State and Society in Early Modern Scotland*.⁷ It does, however, provide a starting point for this discussion. Whoever drafted the *Relation* was indeed very knowledgeable about the working of the Scottish courts. For example, the brief discussion of the College of Justice rather nicely supplements the account of procedure before the Court of Session found in Sir John Skene's *Ane Short Forme of Proces*, which is rather technical, by focusing on the way matters were practically managed, such as the layout of the Court of Session, how Outer House business relates to that of the Inner House, and so on.⁸

As well as dealing with procedure and structures, the author of the *Relation* discussed, with tantalizing brevity, the sources of Scots law. He told the English lawyer: "There is noe common lawe in Scotland, but the Judge eyther proceedeth accordinge to warrant of the muncypall lawe, which is the statutes of Parliament, and that faylinge they have recourse to the ymperiall civill lawe." He then added:⁹

Albeyt there be many conclusions as verie Axioms never contraverted upon, as particularly in matters of discent and succession of Landes and such other thinges, whereupon the Judges doe proceede havinge noe particular warrant for the same but in all former ages havinge bene acknowledged as infallible and allowed customes and consuetudes.

Remembering the intended reader of this document, it is obvious that the author's use of the term "common lawe" was geared to the understanding of an English lawyer; this was a reference to the concept of the "common law" as understood by Coke and

⁶ *Id.* at 254, 255–56, 262, 269.

⁷ J. Goodare, *State and Society in Early Modern Scotland* (Oxford, 1999), 34. See also J. W. Cairns, "Historical Introduction," in K. Reid and R. Zimmermann (edd.), *A History of Private Law in Scotland* (Oxford, 2000), 1:14, 99. The reference here is slight; I hope to develop the discussion more in J. W. Cairns, *A History of Scots Law* (Edinburgh, 2004) (forthcoming), ch. III.

⁸ J. Skene, *Ane Short Forme of Proces, Presentlie used and Observed Before the Lords of Counsell and Session*, in J. Skene, *Regiam Majestatem* (Edinburgh, 1774; 2nd ed. based on that of Edinburgh, 1609). Further on the physical organization of the Court at this period, see now: H. L. MacQueen, "Two Visitors in the Session, 1629 and 1636," in H. L. MacQueen (ed.), *Miscellany Four* [Stair Society, vol. 49] (Edinburgh, 2002), 155.

⁹ Mackie and Dickinson (note 1), 268.

Ellesmere. The author was therefore asserting that, in Scotland, in contrast to England, there was no law existing from time immemorial evidenced by authoritative statements in the reports of the courts. Reflecting a strong, continuing theme in Scots law, clearly exemplified in the writings of Sir George Mackenzie towards the end of the century, the *Relation* stated that the most important source of Scots law was the legislation of Parliament, specifically described as the "municipal law."¹⁰ This view was common. George Buchanan, for example, emphasized that the only truly Scottish law, that is, municipal law, was the written law, the acts of Parliament.¹¹ Further, in the absence of statutes, according to the *Relation*, recourse was had to imperial civil law. Ancient custom was, of course, given a role; it would indeed have been difficult in any other way to explain the origins of the Scottish practice in descent and landholding.

There are, however, some interesting *lacunae* in this listing of the sources of Scots law. The first worthy of note is the absence of any specific mention of *Regiam Majestatem*, which features in other, roughly contemporary, equivalent accounts.¹² This absence might reflect contemporary questioning of its authority as a source and might even provide some pointers to the authorship of

¹⁰ G. Mackenzie, *Observations on the Acts of Parliament, Made by King James the First, King James the Second, King James the Third, King James the Fourth, King James the Fifth, Queen Mary, King James the Sixth, King Charles the First, King Charles the Second. Wherein 1. It is Observ'd, if they be in Desuetude, Abrogated, Limited, or Enlarged. 2. The Decisions relating to these Acts are mention'd. 3. Some new Doubts not yet decided, are hinted at. 4. Parallel Citations from the Civil, Canon, Feudal and Municipal Laws, and the Laws of other Nations, are adduc'd for clearing these Statutes* (Edinburgh, 1686), sig. A4r.

¹¹ See A. H. Williamson, *Scottish National Consciousness in the Age of James VI: The Apocalypse, the Union and the Shaping of Scotland's Public Culture* (Edinburgh, 1979), 184. See also D. M. Abbott, "George Buchanan, the Court of Session and the Law," in H. L. MacQueen (ed.), *Miscellany Four* [Stair Society, vol. 49] (Edinburgh, 2002), 139, 140: "[I]n Scotland . . . there are almost no laws except Acts of Parliament." Further on Buchanan and statutes, see J. W. Cairns, T. D. Fergus, and H. L. MacQueen, "Legal Humanism and the History of Scots Law: John Skene and Thomas Craig," in J. MacQueen (ed.), *Humanism in Renaissance Scotland* (Edinburgh, 1990), 48, 61–62.

¹² See, e.g., *The Historie of Scotland Wrytten First in Latin by the Most Reverend and Worthy Jhone Leslie Bishop of Rosse and Translated in Scottish by Father James Dalrymple Religious in the Scottis Cloister of Regensburg, the Yeare of God, 1596*, ed. E. G. Cody, [Scottish Text Society, old series, 4] (Edinburgh, 1888–1895), 1:119–20; [C. Lowther], *Our Journall into Scotland Anno Domini 1629, 5th of November From Lowther*, ed. W. Douglas (Edinburgh, 1894), 31.

the document.¹³ It is always possible that *Regiam* and the "auld lawes" were intended to be encompassed in the general expression "statutes of Parliament," or perhaps, alternatively, by the words "infallible and allowed customes and consuetudes." Supporting the latter possibility, one may note that such customs were described as governing "matters of discent and succession of Landes." This was not too implausible a description of the matter in *Regiam* still of current value around 1600. One may also note that Spottiswoode's *Practicks* (of around 1625–1637) directly cited *Regiam* only five times, each time concerning land or succession; two of those references occur in quotations from the *Jus feudale* of Thomas Craig and are not for current propositions of law.¹⁴ In comparison, the same author, for example, cited Jean Papon's *Recueil d'arrests notables des cours souverains de la France* no less than twenty times on a wide range of topics.¹⁵ By 1600, *Regiam* clearly had an understandably restricted utility as a direct source of current law.

The second interesting omission is that of any mention of or reference to the significance of the Canon law in Scotland. It is with this that this article will be primarily concerned. Of course, such an omission was not unprecedented. In the 1570s, John Leslie, Bishop of Ross, Senator of the College of Justice, gave an account of Scots law in his *Historie of Scotland*. Leslie had studied law in Poitiers, Toulouse, and Paris, before becoming Canonist

¹³ See H. L. MacQueen, "Glanvill Resarcinate: Sir John Skene and *Regiam Majestatem*," in A. A. MacDonald, M. Lynch, and I. B. Cowan (edd.), *The Renaissance in Scotland: Studies in Literature, Religion, History and Culture Offered to John Durkan* (Leiden, 1994), 385. The absence of a mention of *Regiam* suggests to me that it is unlikely that Sir John Skene was the author of the *Relation*.

¹⁴ *Practicks of the Laws of Scotland, Observed and Collected by Sir Robert Spottiswoode of Pentland, President of the College of Justice, and Secretary of State to K. Charles the I. As Also, Abstracts Taken out of the Ancient Records of This Kingdom, whereby is declared the manner of Administring Justice in Civil Causes, before the College of Justice was Erected. And Propositions and Questions in Law Made by the same Author. With Memoirs of his Life and Trial For an alleg'd Crime of High Treason against the States: In the Pretended Parliament at St. Andrews, in December 1645, and January 1646*, ed. J. Spottiswoode (Edinburgh, 1706), 27 (twice) (bastards not lawful heirs), 143 (heir and heirships), 216 (morgagium), and 305 (reversion). The last two are embodied in quotations from T. Craig, *Jus Feudale* (Edinburgh, 1655), 172, or *Jus Feudale*, 3rd ed., ed. J. Baillie (Edinburgh, 1732), II.vi.27 and 26. All subsequent references to Craig will be to the third edition.

¹⁵ Spottiswoode (note 14), 5, 13, 14 (four times), 76, 78, 79, 95 (twice), 120, 126, 157, 185, 216 (twice), 225, 227, 349.

in the University of Aberdeen and then Official of that diocese.¹⁶ Leslie wrote that Scots municipal law was partly in Latin and partly in the Scots language. The law book written in Latin was *Regiam Majestatem*, while, for Leslie, the rest of the books of the laws consisted of the acts of the Parliaments (written in Scots). He added:¹⁷

Albeit heir sulde be vnderstandet, that this far to the lawis of the Realme we ar astricted, gif ony cummirsum or trubilsum cause fal out, as oft chances, quhilke can nocht be agriet be our cuntrey lawis, incontinent quhateuir is thocht necessar to pacifie this controuersie, is citet out of the Romane lawis.

This statement is comparable to that in the *Relation*, although it should be noted that Leslie here made no mention of ancient customs and the decisions of the courts.

One ought not to conclude too easily, however, that, perhaps due to the Reformation of religion in Scotland, Canon law had simply been rejected. For example, Leslie, as Bishop of Ross, remained true to the Roman Catholic faith and died abroad in Brussels. Furthermore, one can note that, writing around 1600, Thomas Craig still echoed Baldus' two hundred year-old view, when he stated that, where there was a conflict between the Canon law and the Civil law, the former was to be preferred, especially in those areas under the jurisdiction of the Commissary courts. This was so, even though Scotland had "shaken off the papal yoke."¹⁸ The rest of this article will be devoted to considering and exploring the possible significance of the omission of the mention of Canon law in the document and the importance of this for our understanding of Scottish legal history.

The issue is fundamental for the modern historian of Scots law. It raises crucial questions about the appropriate framework

¹⁶ See G. Brunton and D. Haig, *Historical Account of the Senators of the College of Justice, from its Institution in M.D.XXXII* (Edinburgh, 1832), 116–19.

¹⁷ Leslie (note 12), 1:119–20. See also *Journall into Scotland* (note 12), 31: "Most of their law is Acts of Parliament and Regiam majestatem, and their judgments given in court which we call reports, only they corroborate their cause with civil arguments and reasons."

¹⁸ Craig (note 14), I.iii.24; I.viii.17. See *Baldi Ubaldi . . . in Institutiones, Digestum vetus/infortiatum/novum, XII libros Codicis . . . commentaria* (Turin, 1576), vol. 3, part 1, fo. 20vb, here found quoted and translated in J. Witte, "Canon Law in Lutheran Germany: A Surprising Case of Legal Transplantation", in M. Hoefflich (ed.), *Lex et Romanitas: Essays for Alan Watson* (Berkeley, 2000), 181, 193: "Where the civil law is contrary to the canon [law], the canons ought to be preserved and not the civil law."

within which we ought to understand the history of Scots law and also about the nature of Scots law. Our current state of knowledge of Scottish legal history leaves much uncertain; much may always remain so. Any interpretative framework will be inevitably provisional. Yet, by focusing on this point we can see how appropriate competing frameworks may be.

In a volume honoring the memory of David Daube, the master of my master, to tease out the insights that may be gained from investigation of this issue seems especially fitting, even if, at first sight, only small differences in perhaps obscure texts seem at stake. Daube, however, always emphasized the importance of very close attention to texts.¹⁹ His work has shown that it is often from investigation of such small points that greater understanding develops. I hope that this is so here, even if the conclusions reached will be relatively tentative.

I. Canon Law before the Court of Session

As a central court, the Court of Session developed out of the King's Council, which, by the late 15th century, was regularly hearing an increasing range of essentially civil cases, although initially declining to hear matters of fee and heritage.²⁰ With a significant number of Canon lawyers dealing with the legal business before the Council, it is no surprise that the Court adopted a version of Romano-Canonical procedure.²¹ It is accordingly plausible that well-known commentaries on that procedure were consulted and cited for litigation before the Session. For example, a submission to arbitration by the Lords of Council in 1498 referred to a style in Durandus' *Speculum Judiciale*.²² Indeed, it is even

¹⁹ Consider, e.g., D. Daube, *Forms of Roman Legislation* (Oxford, 1956), and the remarks of Alan Rodger, above, 11–14.

²⁰ A. M. Godfrey, "Jurisdiction over Rights in Land in Later Medieval Scotland," 2000 *Jur. Rev.* 243; A. M. Godfrey, "Jurisdiction in Heritage and the Foundation of the College of Justice in 1532," in H. L. MacQueen (ed.), *Miscellany Four* [Stair Society, vol. 49] (Edinburgh, 2002), 9. On the general development of the Session in this period, see Cairns, "Historical Introduction" (note 7), 57–64.

²¹ Cairns, "Historical Introduction" (note 7), 62–64. Robertson has pointed out that the interlocutors of the Lords resemble those of the Roman Rota: J. J. Robertson, "The Development of the Law," in J. Brown (ed.), *Scottish Society in the Fifteenth Century* (London, 1977), 136, 151–52; J. J. Robertson, "The Canon Law Vehicle of Civilian Influence with Particular Reference to Scotland," in D. Carey Miller and R. Zimmermann (edd.), *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays* (Berlin, 1997), 117, 118–20.

²² *Acta Dominorum Concilii. Acts of the Lords of Council in Civil Causes, vol. II, A.D. 1496–1501. With some Acta Auditorum et Dominorum*

likely that citation of such Canonists was common, as the libraries collected by those active in the legal system at this time would suggest.²³ Unfortunately, the way in which the formal record of the Court was kept was such that clear indications of citation of Canonist works are infrequent.

Proceedings before the Lords of Council were in essence oral; it is evident, however, that the practice early developed of the production to the Lords of written exceptions and pleadings. The nature of the record of the proceedings of the Court means that it is rare for such written pleadings to have survived; but it is clear that they became relatively common in the 16th century and it is fair to suppose that this was how tricky legal and procedural arguments were commonly developed.²⁴

The survival of such a written document from 1503 provides good evidence of the nature of reference to the sources and literature of the Canon law before the Lords of Council prior to the erection of the College of Justice. This written pleading (described as "certane lawis"²⁵) was produced before the Lords of Council by the forespeaker for Alexander, Earl of Buchan. The King had claimed the Barony of Kingedward as successor to John Stewart, Earl of Buchan, and had raised a summons of error against the finding of an inquest that had retoured Alexander, Earl of Buchan, as heir to the Barony. The Earl sought reduction of the summons on the ground that he had been retoured heir, had been given sasine, and had paid the blenchferme *reddendo* to the sheriff and officers of the sheriffdom.²⁶ The written pleading first argued that the Earl's father, James, had had possession, time out of mind, with a title and *bona fides*. However, continuous possess-

Concilii A.D. 1469-1483, edd. G. Neilson and H. Paton (Edinburgh, 1918), 281-82. See W. M. Gordon, "The Acts of the Scottish Lords of Council in the Late Fifteenth and Early Sixteenth Centuries: Records and Reports," in C. Stebbings (ed.), *Law Reporting in England* (London, 1995), 55, 59 n.15.

²³ L. J. Macfarlane, "William Elphinstone's Library," 37 *Aberdeen U. Rev.* 253 (1958); L. J. Macfarlane, "William Elphinstone's Library Revisited," in A. A. MacDonald, M. Lynch, and I. B. Cowan (edd.), *The Renaissance in Scotland: Studies in Literature, Religion, History and Culture Offered to John Durkan* (Leiden, 1994), 66. For another example, see the library of Patrick Paniter, Royal Secretary, 1505-1519: J. Durkan and A. Ross, *Early Scottish Libraries* (Glasgow, 1961), 134-35; E. G. Duff, "Some Early Scottish Book-bindings and Collectors," 4 *Scot. Hist. Rev.* 430, 432-33 (1907). Other individuals can be traced through Durkan and Ross, *Early Scottish Libraries*.

²⁴ See the discussion in Cairns, *History of Scots Law* (note 7), ch. III.

²⁵ *Acts of the Lords of Council. Vol. III: 1501-1503*, ed. A. B. Calderwood (Edinburgh, 1993), 310.

²⁶ *Id.* at 309.

ion for forty years with title and good faith sufficed against the *princeps*, the church, and the *civitas*. The foundation of this argument was Panormitanus (Nicholas de Tudeschis) on the *Decretals* and Johannes de Ferrariis' well-known work, *Practica libellorum papiensis*, which was concerned with the practice of libels before the Papal *Curia*. The two Canonists were concerned in the passages cited with the elaboration and discussion of the well-known rules, clarified by Pope Alexander III, regarding the forty-year period necessary to acquire a prescriptive right against the church, and the good-faith requirement, the latter rule also made clear in the *Liber Extra*.²⁷ The second argument was that the King's claim was as successor to Earl John, who was a private individual, by which it followed that the period of prescription against the King should be the same as that against a private person. This was shown by the laws cited by Panormitanus in a passage in his commentary on the title on prescription in the *Liber Extra*, where he stated that in these circumstances the Pope's rights were those of a private person, and as was also stated in another Canon in that title and noted by Johannes Andree, another prominent Canonist.²⁸ A period of thirty years with continuous possession was sufficient to prescribe ownership of property, as was demonstrated by two *leges* of Justinian's *Code* and a number of Canons in the title on prescription in the *Liber Extra*.²⁹ The thrust of the argument on behalf of the Earl was thus that the King should be compared to the Pope and that the Canon law's rules on prescription, supported by those of the Civil law, were applicable.

This practice of citation of Canonist authors continued after the reformation of the Lords of Council into the College of Justice in 1532. Sinclair's *Practicks* demonstrates this beyond doubt.³⁰

²⁷ *Id.* at 310; X 2.26.4 and 5.

²⁸ The passages from the *Liber Extra* were X 2.26.14 and X 2.26.4.

²⁹ C.7.39.3 and 4; X 2.26.4, 8, 6 and 9.

³⁰ The best text of Sinclair's *Practicks* is Edinburgh University Library, MS La.III.338a. This manuscript also contains an anonymous contemporary collection of practicks. Dr. A. Murray is preparing the text for definitive publication. Professor G. Dolezalek has worked on the identification of the *ius commune* references: see www.uni-leipzig.de/~jurarom/scotland/dat/sinclair.htm. Dr. Murray has divided the text into different numbered headings and divisions, which will be used here to cite it, such as No. 2 or Nos. 3 and 4 and so on. He numbered Sinclair's *Practicks* from 1 to 509, and the anonymous collection from 510 to 596. Citations here will be to the above text put on the web by Professor Dolezalek, although Professor Dolezalek has inserted the entries from the anonymous collection into their correct position in Sinclair's *Practicks* to show the historical practice of the Court. In the few references below to

This vitally important source is a collection of decisions of the Lords during the 1540s made by John Sinclair and allows us an insight into the actual working of the College of Justice. Sinclair had studied Canon law in Paris, was a licentiate in Civil and Canon law, and from 1537 until 1542 held the office of Canonist at the University of Aberdeen. He was appointed to the Session in 1540; lacking sympathy with the Reformers, he was absent from 1561 in Paris, where he now gained a doctorate in Civil and Canon Law. In 1565 he returned to Scotland, resuming his place on the bench, soon being appointed President of the College of Justice. He died in 1566.³¹

Sinclair's *Practicks* shows that one of the most important works on procedure then used in Scotland was Panormitanus' commentaries on the *Decretals*. A few examples will suffice here. Panormitanus is found cited on the faith of instruments, on exceptions against witnesses, on whether an exception should be put to proof or not, on the authenticity of documents, on whether someone who promises *sub fide sua* has sworn an oath or not, on the impugning of public documents, on defects in documents. One could go on.³² Other Canonists were similarly cited on such issues; for example, the less well-known writer Felinus Sandaeus was evidently also fairly regularly consulted.³³ As in 1503, Johannes de Ferrariis' work was still evidently found a useful authority on how libelled summonses should be framed, being cited in a case of spuilzie for the drafting of libels in such cases (*in forma libelli in causa possessionis*), while being relied on by the Lords in the reduction of an instrument of resignation of land, when one of the witnesses to the deed rejected its validity.³⁴ Likewise, the *Decisiones Rotae Romanae Novae* of Guilielmus Horborch were cited on spuilzie (several times), on when a defender founding his

cases from the anonymous collection, I have not generally bothered to differentiate them from Sinclair's *Practicks*. The reader should remember that any entry numbered above 509 is from the anonymous collection rather than Sinclair.

³¹ On Sinclair, see A. L. Murray, "Sinclair's Practicks," in A. Harding (ed.), *Law-Making and Law-Makers in British History* (London, 1980), 90, 94–95; D. B. Smith, "The Dean of Restalrig's Book," 39 *J.L. Soc. Scotland* 409 (1994); G. Dolezalek, "The Court of Session as a Ius Commune Court — Witnessed by 'Sinclair's Practicks'," in H. L. MacQueen (ed.), *Miscellany Four* [Stair Society, vol. 49] (Edinburgh, 2002), 51, 56–59, Brunton and Haig (note 16), 63–64.

³² Sinclair's *Practicks* (note 30), Nos. 1, 3, 214, 254, 258, 288.

³³ *Id.* at Nos. 174, 258, 261, 428, 578. (The last (dated 1542) is from the anonymous contemporary collection of practicks.)

³⁴ *Id.* at Nos. 574, 578, 581. (These 1542 reports are, of course, from the anonymous contemporary collection of practicks.)

exceptions on writs had to produce them, and on when a pursuer had to produce writs on which he was founding.³⁵ Of course, legists such as Bartolus, Baldus, Jason de Mayno, Paulus de Castro, Alexander Tartagnus, Zasius, and others are also found cited, and there are numerous references to the *Digest* and *Code*, as well as to the *Decretals*;³⁶ yet, the overwhelming significance of Panormitanus on the *Liber Extra*, especially its second book, is evident on the most casual consultation of Sinclair's *Practicks*. Judged by citations, Bartolus was the only author who approached the significance of Panormitanus.³⁷ It is worth noting that Bishop Elphinstone of Aberdeen owned Panormitanus' commentaries on the *Decretals*, in a set made up of manuscript and printed editions. Possession of these works may have had importance for his work as a Canonist and Official; but they undoubtedly would have assisted him as a Lord Auditor and Lord of Council.³⁸

Examination of Sinclair's *Practicks* demonstrates the all-prevailing significance of the *ius commune* in Scottish legal practice in this era. There can be no doubt that, in the 1540s, Scottish sources of law, such as statutes, customs, and *Regiam Majestatem*, were regarded as *ius proprium* in opposition to the *ius commune*. From this source we see Scots law as a largely unwritten customary system, cited imprecisely as "practick" or "custom," in contrast to *ius*, a term that nearly always refers to the *ius commune*, unless qualified in some way to indicate that Scots law is meant. Thus, "practica Scotie" is contrasted with "jus scriptum," and rules can be described as originating "de practica et municipali jure Scotie non scripto et consuetudinario."³⁹ The attitude revealed by the *Practicks* is important. It shows us the Lords preferring a disposition of the common law (in the sense of *ius commune*) to an alleged "consuetude of this realme" demonstrated by an earlier decision, because "thai culd nocht understand the consuetude allegit in the contrair to be trew in the selff, nor yit thair wes ony sic praktik or consuetude."⁴⁰ A litigant argued explicitly in a case concerning restitution on the ground of

³⁵ *Id.* at Nos. 95, 106, 158, 388, 389–391.

³⁶ See, e.g., *id.* at Nos. 76, 214, 215, 224, 230, 238, 254, 261, 319, 415, 470, 471.

³⁷ Panormitanus is mentioned at least 30 times; Bartolus around 25 times; Baldus and Paulus de Castro around 5 times each; Jason de Mayno over 10 times. See also Dolezalek (note 31), 73–74.

³⁸ See Macfarlane, "Elphinstone's Library" (note 23), 256–57; Macfarlane, "Elphinstone's Library Revisited" (note 23), 79–80.

³⁹ Sinclair's *Practicks* (note 30), No. 503.

⁴⁰ *Id.* at Nos. 284–285.

minority that "because the municipal law of the kingdom of Scotland did not decide this issue, so the Civil Law must be followed . . . since a *casus omissus* remains at the disposition of the *ius commune*."⁴¹

I have discussed this elsewhere; I do not propose to go into it further here.⁴² All that I wish to stress is that the Canon law was central to the *ius commune* in Scotland and hence central to legal practice before the Lords of Council and the Session in the first half of the 16th century.⁴³ It is evident, to give one example, that the Scottish delict of *spuilzie*, the most commonly litigated wrong in this period, was developed and interpreted by relying on the texts of the *Decretals* on the Canon law *actio spoli* with their commentators, such as Panormitanus.⁴⁴ I also suspect that the development of much of the Scots law on probative writs has been — at the least — strongly influenced by the practice of the Canonists. Practical requirements for training in Canon law as well as academic tradition thus lay behind the establishment of a royal lectureship "in the lawis" (that is, both the Canon and Civil laws) by Mary of Lorraine in the 1550s and Bishop Reid's bequest to

⁴¹ *Id.* at No. 444: "quod ius municipale regni Scotie hunc passum non determinabat, ideo sequenda esse iura civilia . . . quia casus omissus remanet in dispositione iuris communis." I am here following Murray (note 27), 101–2, though I have varied his translation.

⁴² See Cairns, "Historical Introduction" (note 7), 71–74; Cairns, *History of Scots Law* (note 7), ch. III; J. W. Cairns, "*Ius Commune; Ius Proprium*: Legal Practice in Sixteenth-Century Scotland," unpublished paper, Colloquium on the Civil Law Tradition, University of London, June 22, 2001 (revised version given as a seminar paper, Faculty of Law, University of Stockholm, Nov. 29, 2002).

⁴³ In this Scotland was rather like Germany: see, e.g., J. Q. Whitman, *The Legacy of Roman Law in the German Romantic Era* (Princeton, 1990), 9–10; Dolezalek (note 31), 52–53. Further on the not unproblematic concept of *ius commune*, see K. Pennington, "Learned Law, droit savant, gelehrtes Recht: The Tyranny of a Concept," 20 *Syracuse J. Int'l L. & Com.* 205 (1994).

⁴⁴ See Cairns (note 42); further on *spuilzie*, see A. Harding, "Rights, Wrongs and Remedies in Late Medieval English and Scots Law," in H. L. MacQueen (ed.), *Miscellany Four* [Stair Society, vol. 49] (Edinburgh, 2002), 1, 5–8. It is worth noting that in the "Annotatio" to *Statuta Roberti Tertii*, cap. 15, which concerns *spuilzie*, in *Regiam Majestatem Scotiae, Veteres leges et constitutiones, ex archivis publicis, et antiquis libris manuscriptis collectae, recognitae, et notis Juris Civilis, Canonici, Nortmannici auctoritate confirmatis, illustratae, opera et studio Joannis Skenaei, Regiae Maiestati a Conciliis et Archivis Publicis. Annotantur in margine, concordantiae Juris Divini, Legum Angliae, et iuris novissimi Scotiae quod Acta Parliamenti, vulgo vocant. Catalogum eorum quae in his libris continentur vicissima pagina, indicat. Cum duplici indice, altero Rerum, altero verborum locupletissimo* (Edinburgh, 1609), fol. 60v (second sequence of foliation), Skene refers to and cites the Canon law.

found a school "for the teching of the civile and canon lawis" in Edinburgh. As both a Senator and then President of the College of Justice, Reid was well placed to recognize the needs of the developing legal profession.⁴⁵

II. The *Ius Commune* and Practice before the Court of Session

In 1596, the Lords of Session issued an Act of Sederunt to regulate the practice of parties and their advocates soliciting the Lords outside the Court to "inform" them of their arguments on the case.⁴⁶ The attempt to "inform" the judges is not to be taken as evidence of corruption; rather, it reflects the procedure that had developed by this date before the Court of Session, whereby matters initially coming before its Outer House before a single Lord (sitting as the Lord Ordinary) in cases of difficulty could be reported to the whole Lords sitting in the Inner House for decision. When the Lord Ordinary sitting in the Outer House reported a matter to the Inner House for decision, the parties were understandably anxious to inform the Lords of their views on the law. This was because the Lord Ordinary reported the cause between eight and nine in the morning before clients and their lawyers were present. That is, lawyers were not allowed to argue the issue before the Inner House; nor were they or their clients allowed to be present. The judges in the Inner House would then discuss the matter among themselves and then vote; all such advisings were still in private. The Ordinary would then report the decision in the Outer House.⁴⁷

After emphasizing that parties and their agents should not solicit the Lords outside the Court because the report from the Outer House was sufficient information, and providing the penalty of suspension for any advocate who did so and other penalties for the litigants, the Act provided, "for better satisfioun of the parteis quhais actionis being weichtie or intricate," that each Lord should appoint a time when he or a particular servant would receive "the informatioun of the causis in wreitt." In return, the Lords promised that they would "try quhat is prescryeit or de-

⁴⁵ J. Durkan, "The Royal Lectureships under Mary of Lorraine," 62 *Scot. Hist. Rev.* 73 (1983); J. Kirk, "Clement Little's Edinburgh," in J. R. Guild and A. Law (edd.), *Edinburgh University Library, 1580-1980: A Collection of Historical Essays* (Edinburgh, 1982), 2, 7-12.

⁴⁶ *The Acts of Sederunt of the Lords of Council and Session, From the 15th of January 1553, to the 11th of July, 1790* (Edinburgh, 1790), 26-27 (13 July 1596).

⁴⁷ See, e.g., Mackie and Dickinson (note 1), 267-68.

cidet thairanent, als weill be the common law as be the municipall law or practick of this realme."⁴⁸

I have already pointed out that it was quite common for the Lords to receive written argument or to require that parties reduce their answers, replies, duplies and so on to written form, as a case progressed from the libelled summons, through the proponing of dilatory and peremptory exceptions, towards *litiscontestatio*. In these circumstances, the extension of written argument to such informations was in line with general practice before the Session. Indeed, in 1626, "Directions . . . for ordering of the Session" instructed: "That all Causes of importance and difficulty be pleaded by Writ, and Subscribed by the Partie's Advocat."⁴⁹ Written informations were the obvious way to deal with this problem of inconvenient solicitation of the Lords. What is important is that the Lords in this Act of Sederunt stated that they would assess the arguments in the written information by the "common law" as well as by "the municipall law or practick of this realme." It is probable that "municipall law" is to be understood here as referring to the Scottish statutes, and "practick" as referring to Scottish custom and the practice of the court. The term "common law" must thus have been a reference to the *ius commune*, the Canon law and the Civil law as constituting a universally applicable system throughout Christendom. The Scots judges were still willing to draw on this common law, the *utrumque ius*, to help resolve difficulties in Scottish litigation, whether or not there was, in any sense, a *lacuna* in the law.

Yet, we must note that the *Relation of the Manner of Judicatores of Scotland* did not refer to the *ius commune*, but only to "the ymperiall civill lawe." Why was this? One strong possibility is that the author was concerned to avoid any confusion with the term "common law," as understood by his English reader. That in Scotland reference was made to the Civil law was well understood by many contemporary English lawyers. In fact, one of the major English grounds for objections to a union of the laws with Scot-

⁴⁸ *Acts of Sederunt* (note 46), 26–27 (13 July 1596). While "common law" can be used in a variety of senses, it is clear that here it is used in contrast to *ius proprium*.

⁴⁹ Spottiswoode (note 14), 368. The "Directions" also call for the enforcement of the Act of Sederunt of 1596. *Id.* The further elaboration of the development of written pleadings is outside the scope of this paper, but it may be noted that by 1677 it could be stated that such "written informations are become ordinary": *Acts of Sederunt* (note 46), 135 (6 Nov. 1677).

land was that Scots law was a form of Civil law.⁵⁰ Just to refer to Civil law would have sufficed in this short explanation of the Scottish courts and their operation. Moreover, reference to reliance on Canon law could even have raised further alarms for English lawyers.

Another possibility, the one that I wish to explore further here, is that what was said in the *Relation* reflected how Scottish practice had developed since the 1540s. That is, the Canon law component of the *ius commune* either had become less significant in legal practice, or the nature of its use had changed. In either case, this might even affect how we should understand the Act of Sederunt of 1596.

In the current state of knowledge of the Court records and collections of practicks, it is difficult to address the question of whether or not there had been a move away from reliance on Canon law or, perhaps rather, on Canonist authors, in practice before the Session. Also, the nature of the formal records of the Session has meant that information about the sources relied on in legal argument has not survived in a systematic form. An entirely satisfactory answer to the question posed cannot be given.

There are, however, two resources that can be drawn on to consider the problem. The first is Thomas Craig's *Jus feudale*, written about 1600.⁵¹ Craig had been educated at St. Andrews and then in France, certainly at Paris, but perhaps also elsewhere, before pursuing a successful career as an advocate.⁵² Craig's work might seem limited in scope, but it was in fact wider in its interests than its title would initially suggest. Moreover, as the first to give a systematic account of Scots law, Craig was forced to address many issues about the sources of the law used in practice, making *Jus feudale*, in that respect, a particularly valu-

⁵⁰ See B. P. Levack, *The Formation of the British State: England, Scotland, and the Union, 1603–1707* (Oxford, 1987), 88–91.

⁵¹ On the date, see J. W. Cairns, "The *Breve Testamentum* and Craig's *Jus Feudale*," 56 *T. v. R.* 311, 317 & n.36 (1988).

⁵² See *id.*; D. B. Smith, "Sir Thomas Craig, Feudalist," 12 *Scot. Hist. Rev.* 271 (1915) (of fundamental importance); G. Law, "*Cragii Jus feudale*," 10 *Jur. Rev.* 177 (1898); D. Irving, *Lives of Scottish Writers* (Edinburgh, 1839), 1:147; P. F. Tytler, *An Account of the Life and Writings of Sir Thomas Craig of Riccarton: Including Biographical Sketches of the Most Eminent Legal Characters, Since the Institution of the Court of Session by James V. Till the Period of the Union of the Crowns* (Edinburgh, 1823). Please note that the common attribution of a knighthood to Craig is quite mistaken and that the family background given by Fraser Tytler is inaccurate, on which see the forthcoming entry on Craig in the *New Dictionary of National Biography*.

able work for this study.⁵³ The second resource is the *Practicks of the Law of Scotland*, collected by Sir Robert Spottiswoode of New-abbey from the 1620s to the 1640s.⁵⁴ According to his grandson, Spottiswoode was educated in Glasgow and Oxford, before pursuing legal study in Continental Europe, apparently primarily in France, although he also travelled widely. He was initially appointed an Extraordinary Lord of Session, then an ordinary Lord, and finally President of the Session.⁵⁵ The *Practicks* is an important source of information about the sources relied on in legal practice in the first half of the 17th century. While these two authors allow us to explore the issue satisfactorily, I shall also make some remarks on the work of Sir John Skene, Craig's contemporary.

A note of caution should be inserted here. We should not expect to find a complete rejection of Canon law and literature; citation of it is to be found up until the beginning of the 19th century, especially in consistorial issues. Indeed, at the very period when the *Relation* was written, of those advocates (two-thirds) admitted because of their university-training in law, most probably held degrees in both Civil and Canon law.⁵⁶ The practicing bar thus continued to be familiar with the sources and literature of the Canon law. What we are looking for is something more nuanced, perhaps a reduction in the frequency of references to Canon law, with a generally lesser reliance on it and its commentators in litigation outside the consistorial field.

III. Craig's Sources and his Concept of *Ius Commune*

The first aspect of Craig's *Jus feudale* that we should examine is the sources on which he relied. The most obvious development from the range of citations found in Sinclair's *Practicks* is the

⁵³ J. W. Cairns, "The Civil Law Tradition in Scottish Legal Thought," in D. Carey Miller and R. Zimmermann (edd.), *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays* (Berlin, 1997), 191, 200–3.

⁵⁴ On them, see, e.g., H. McKechnie, "Practicks, 1469–1700," in *An Introductory Survey of the Sources and Literature of Scots Law* [Stair Society, vol. 1] (Edinburgh, 1936), 25, 28.

⁵⁵ Spottiswoode (note 14), iii–iv. Study in France is very likely, though Spottiswoode is not mentioned in J. Durkan, "The French Connection in the Sixteenth and Early Seventeenth Centuries," in T. C. Smout (ed.), *Scotland and Europe 1200–1850* (Edinburgh, 1986), 19; cf. J. Foster, *Alumni Oxonienses . . . 1500–1714*, (Oxford, 1892), 4:1400; Brunton and Haig (note 16), 266–69.

⁵⁶ R. K. Hannay, *The College of Justice: Essays on the Institution and Development of the College of Justice* (Edinburgh, 1933), 145–47. This statistic refers to those admitted between 1575 and 1608.

frequent reference to Humanist authors.⁵⁷ In particular, François Hotman was the most cited Humanist author, with twenty-five references; but other noted Humanists cited, with between one and fourteen references, were Andrea Alciato, Ulrich Zasius, Guillaume Budé, and Jacques Cujas.⁵⁸ As well as such Humanist authors, however, Craig also cited some authors of the older *ius commune*; Bartolus and Baldus, for example, were each cited as often as Hotman.⁵⁹ Craig nonetheless distinguished between the older interpreters, culminating in Decio, the teacher of Alciato, and the new interpreters, such as Cujas.⁶⁰ Moreover, of the later medieval Civilians, it was only Bartolus and Baldus whom he prominently and regularly cited. For example, Paulus de Castro was cited only once.⁶¹ There was thus not the width of citation of such older authors that is found in Sinclair's *Practicks*. In itself, of course, the number of citations means little, as such references could be taken at second hand or they could be routine; but even the most cursory reading of Craig's treatise indicates that what was exercising influence on him were the writings of those whom he classed as the *novi interpretes* or *recentiores*. Thus, he was involved in a significant debate with Cujas and was influenced by, above all, Hotman.⁶² This said, he did engage to a significant extent with Bartolus and Baldus.⁶³ Of course, at one level, this means simply that Craig was writing sixty years after Sinclair and drew on the new Humanist literature. Moreover, what should be noted is that these authors were primarily Civilians. If we turn to Canonists, we may note that Craig cited Sinclair's favorite, Panormitanus, only once (along with Hostiensis, who was cited three times), on legitimation, in a discussion of succes-

⁵⁷ On Craig as Humanist, see Cairns, Fergus, and MacQueen (note 11), 56–66; J. G. A. Pocock, *The Ancient Constitution and the Common Law*, 2nd ed. (Cambridge, 1987), 79–90.

⁵⁸ See, e.g., Craig (note 14), I.xvi.1; II.iii.5; I.xvi.43; I.v.2; and I.xvi.38.

⁵⁹ Cited 23 and 25 times respectively, by my count. For random examples, see Craig (note 14), I.ix.9; III.v.15.

⁶⁰ See Cairns, Fergus, and MacQueen (note 11), 58. See also Craig (note 14), I.ix.4. The context is a discussion of the etymology of "feu," but it clearly can be extended more generally.

⁶¹ Craig (note 14), III.v.15.

⁶² See *id.* at I.ix.10. See generally J. W. Cairns, "Craig, Cujas, and the Definition of *Feudum*: Is a Feu a Usufruct?," in P. Birks (ed.), *New Perspectives in the Roman Law of Property: Essays for Barry Nicholas* (Oxford, 1989), 75.

⁶³ In making these calculations, I have ignored mentions of the authors in Craig's general history of the study of Roman law from Irnerius onwards.

sion to feus.⁶⁴ Craig also cited Pierre Rebuffi, commonly described as a Canonist, four times;⁶⁵ the references, however, were not to Rebuffi's works on Canon law. There was an isolated reference to Durandus.⁶⁶ In general, however, one can say that Craig had not openly drawn on writers on Canon law.

If, given the nature of *Jus feudale*, the paucity of references to Canonists may to some extent be expected, it is worth pointing out that Craig nonetheless had several discussions of and allusions to Canon law and did cite its sources, though relatively infrequently. To examine these references is informative. The third title of the first book is *De Juris Canonici Origine, Progressu, & quis apud nos ejus usus*. There are to be found comments such as that, while the decisions of the Roman Rota had no greater authority than those of the Parlement of Paris or that of Toulouse, the stature of the judges made those decisions have particularly great weight if not the force of Canons.⁶⁷ Elsewhere, there were quite regular references to Canon law. Most of these, however, related to the particular sphere of the Catholic church and its courts or to the Scottish ecclesiastical courts. A few examples will suffice. There was a discussion of the effect of a grant of a feu by the Pope to an excommunicated person.⁶⁸ The title *Quae res in feudum dari possint* took as its point of departure the divisions of property found in Justinian's *Institutes*, so that there was a discussion of *res sacrae* and *res religiosae* that inevitably touched on ecclesiastical issues, the feuing of church lands, and, notably, teinds.⁶⁹ Occasional comparative remarks were made, such as that "in the Canon law, which is close to ours, this is the position" or that "bad Latin does not vitiate a princely rescript according to the Canon law, nor does it [vitate] charters among us."⁷⁰ There were other scattered remarks on Canon law. Some examples follow. Craig noted the rule of Canon law on oaths and usurious agreements.⁷¹ He recalled a debate among Canonists on whether resignations of benefices required a public instrument.⁷² At one point he commented that three witnesses were required in certain circumstances by the *ius Civile*, but two by the *ius Can-*

⁶⁴ Craig (note 14), II.xviii.7.

⁶⁵ *Id.* at I.ix.5; I.x.11, 18, 22.

⁶⁶ *Id.* at III.iv.13.

⁶⁷ *Id.* at I.iii.14.

⁶⁸ *Id.* at I.xiv.9.

⁶⁹ *Id.* at I.xv.7-9.

⁷⁰ *Id.* at II.ii.31; II.iv.23. For a similar example, see *id.* at I.viii.14.

⁷¹ *Id.* at II.vi. 28. For other standard rules of Canon law, see *id.* at III.vii.5 and 18.

⁷² *Id.* at II.vii.8.

onicum.⁷³ In the title *De his quae impediunt Successionem*, bastardy was discussed and there was considerable general reference to Canon law, including the specific citation of Panormitanus and Hostiensis already noted.⁷⁴ In discussing the expiry of the time limit to exercise a *ius protimeseos*, he noted that what it was to be absent without fraud or blame on public business could be found in the Canon law.⁷⁵ He commented elsewhere that a Scottish practice was "secundum juris Canonici regulas."⁷⁶ In general, a reading of Craig thus suggests that Canon law now had little continuing impact on the development of Scots law, in comparison with the era of Sinclair, although Craig was well aware of its importance.

To find an explanation of this changed attitude to Canon law, we need to explore Craig's approach to the idea of a *ius commune*. In fact, we shall see that Craig had developed an approach to the *ius commune* notably different from that found in Sinclair's *Practicks*; this helps explain his attitude to Canon law, an attitude that is not solely to be attributed to the content and scope of his work. We can approach this issue by examining his discussion of the hierarchy of sources of law and their links with his ideas of sovereignty.

Craig pointed out in his title *Quando jus Feudale in Scotiam pervenerit, & quo jure hodie Scoti utuntur* that the Scots and English laws on feus had much in common, adding, however, that one should not thereby draw the conclusion that the Scots had once been subject to the English. This was because of the difference between *ius* and *leges*. The Scots might use the same *ius* as the English, but they did not use the same *leges*. *Leges* were made by magistrates without a superior and bound those subject to them; *ius* originated in nature.⁷⁷ Legislation was thus authoritative because enacted by a sovereign power; *ius* derived its authority from nature. It is not surprising to note that Craig's political thinking was influenced by that of Jean Bodin, whom he cited several times, and whose influence can be traced beyond such references.⁷⁸

In his discussions of the difference between *ius* and *leges* and his linking of the latter to sovereignty, Craig had commented: "Thus, *jus Naturale, jus Gentium, thus jus Commune* is said to be

⁷³ *Id.* at II.vii.20.

⁷⁴ *Id.* at II.xviii.

⁷⁵ *Id.* at III.iv.13.

⁷⁶ *Id.* at III.vi.19.

⁷⁷ *Id.* at I.viii.4.

⁷⁸ *Id.* at I.i.8; I.ii.13; I.iii.6; I.vii.3; I.xii.6; II.ii.2; II.xiii.38.

that which is common to almost all peoples, as if a certain innate reason of equity ruling in the souls of men."⁷⁹ He accordingly set out a hierarchy of law, stating that there were three types of *ius*: *ius Naturale*; *ius Gentium*; and *ius Civile*.⁸⁰ The first was the good and the just (*bonum et aequum*) derived from the reason and equity of *ius* inborn in us; against this *ius*, neither statutes of the kingdom, nor prescription of the longest time, nor custom had any argumentative force.⁸¹ The *ius Gentium* was what was observed after the natural inborn reason and understanding of equity and good. What all nations observed ought to have force with us, notwithstanding the *ius Civile* or *Municipale*. He noted that all nominate and innominate contracts originated in the *ius Gentium*. In dealing with foreigners this *ius Gentium* ought to be followed, he said, despite any specific statute of the kingdom; it likewise had force among citizens, unless there was a special *lex* or statute contrary to it.⁸² The third type of *ius* was the *ius proprium* or *Civile* of each people. Thus, "after the *jus Naturale* and that which today is common to almost all nations, in order to resolve controversies and any difficulty, the first recourse ought to be to our *jus scriptum*, should there be any."⁸³ Our *ius scriptum* was the statutes and constitutions that had been enacted by the Three Estates of the kingdom with the consent of the Prince: "this was the *jus proprium* of the kingdom."⁸⁴

On the basis of this analysis, Craig then stated that, when a problem appeared, the *ius scriptum*, the *ius proprium* of the kingdom, had to be investigated, although it was important to recognize that its applicability could have been affected by the doctrine of desuetude. Other than such statutes, there was no certain and fixed *ius scriptum* in Scotland, as the statutes of the Privy Council did not have the force of *lex*; Craig's view was the same regarding enactments of conventions of Estates.⁸⁵ After dismissing the books of *Regiam Majestatem*, Craig reiterated that our only *ius proprium scriptum* was the legislation of Parliament. Thus, if any controversy arose, it was necessary to see first what was in the acts of Parliament, and the decision ought to be made according to them "as if according to the *jus proprium* of the kingdom."⁸⁶ Lack-

⁷⁹ *Id.* at I.viii.4.

⁸⁰ *Id.* at I.viii.6

⁸¹ *Id.* at I.viii.7.

⁸² *Id.* at I.viii.8.

⁸³ *Id.* at I.viii.8.

⁸⁴ *Id.* at I.viii.9.

⁸⁵ *Id.* at I.viii.9 and 10.

⁸⁶ *Id.* at I.viii.11–12. On Craig's view of *Regiam*, see Cairns, Fergus, and MacQueen (note 11), 63–64.

ing such *ius proprium*, attention was then paid to the custom of uninterrupted *res iudicata*, called "practick." Among all peoples, he wrote, custom was given the name of law and law was said to be constituted by custom. Therefore the second *locus* for resolving causes was by custom. But this, no matter how ancient, could never be followed if against *ius proprium scriptum*. Whenever custom was stated to prevail against written law, this, said Craig, was to be understood as referring to the Roman *leges*. Custom sometimes interpreted a law, but did not overthrow it.⁸⁷ If *ius proprium* and custom failed, then there should be arguments by analogy, as the same reasoning should be applied if it led to the same utility; nor should what neighboring nations did be neglected in similar circumstances (so long as they used the same *ius*) and we should turn to their customs, if we lacked *ius proprium* and custom.⁸⁸ If, however, a *novus casus* arose that was covered neither by *ius scriptum* nor by custom, nor by other resources already noted, and a solution was found in the *ius Feudale*, it should be preferred both to the *ius Pontificium* and to the *ius Civile*. This reflected Craig's argument that the ultimate historical origin of Scots law was in the *ius Feudale*, so that it was appropriate to go back to the original source.⁸⁹ Finally, Craig wrote:⁹⁰

If neither from the acts of parliament, nor from judicial custom, nor the *jus Feudale*, can it be resolved what ought to be done in some new question that has occurred, then recourse must be made to the *jus Civile*. . . . And in our court, if anything hard, if anything troublesome comes up, the solution of it is to be sought from the *jus Civile*: if, however, in anything there have been innovations through the *jus Pontificium* or *Canonicum* (and some scholars have collected together all things in which the *jus Civile* and the *jus Canonicum* disagree), in such matters the *jus Pontificium* is to be preferred by us, particularly where it concerns the administration of the Church, or scandal (as Canonists say), where there is danger to the soul.

⁸⁷ Craig (note 14), I.viii.13–14. Craig is using "locus" here in a technical sense derived from the study of rhetoric, namely as a "*sedes argumentorum*." See, e.g., I. Maclean, *Interpretation and Meaning in the Renaissance: The Case of Law* (Cambridge, 1992), 78–82.

⁸⁸ Craig (note 14), I.viii.15.

⁸⁹ *Id.* at I.viii.16.

⁹⁰ *Id.* at I.viii.17.

This echoes the remark Craig made earlier in his work, where he had also stated that, in areas of conflict between the Civil law and the Canon law, the latter was to be preferred. In this earlier reference, he expanded and explained his comment, stating that, always subject to the requirements of sound religion, and granting that we had thrown off the Pontifical yoke, we followed the *ius Pontificium* concerning the administration of the Church as regards those who have the care of souls, benefices, ecclesiastical cases, patronage, testaments, the contracting or dissolution of marriage, and legitimacy, making appropriate allowance for changed circumstances. These matters were referred to the ecclesiastical judge, the Commissary, who had inherited the jurisdiction of the old ecclesiastical courts, most notably those of the Bishop's Officials.⁹¹

Craig thus does not appear exactly to envisage in Scotland the role of Canon law found in the older *ius commune*, as found in Sinclair's *Practicks*. While he did consider that where Canon law and Civil law conflicted the former was generally preferred, he did qualify the use of Canon law as being largely confined to the jurisdiction that succeeded the old ecclesiastical courts. Indeed, as shown above, this was indeed the context of many of Craig's own references to Canon law. His claim that it was preferred generally to Civil law when there was a conflict was most probably alluding to matters such as the likelihood that aspects of the strict Roman rules on contracts may not have been followed. For Craig, as for the author of the *Relation*, Scottish *ius proprium* was the statutes — the municipal law, as the anonymous author put it. A *casus omissus* was referred to the *ius Civile*. The decisions of the courts did have a role as representing custom.

It is easy to see why this was so for Craig. As noted, he related the authority of law to sovereignty. As the law of the Papacy, Canon law had no authority. Indeed, the Pope was probably the Anti-Christ in Craig's view.⁹² As law, Canon law had problems of legitimacy, except so far as it was accepted in practice. It was, however, easy to justify the use of Roman law. Craig argued that in Scotland "we are bound by Roman laws only so far as they are congruent with the laws of nature and right reason." He added:⁹³

Yet surely there is no broader seedbed of natural equity, no more fertile field of articulated reasoning and arguments

⁹¹ *Id.* at I.iii.24.

⁹² *Id.* at I.iii.23.

⁹³ *Id.* at I.ii.14.

from those principles of nature than the books of the Roman jurists; from which ought to be drawn, as if from the very fountain, what is equitable and what inequitable by nature and what most agrees and what disagrees with right reason.

Roman law for Craig was thus valid as a subsidiary law representing the *ius Naturale*. This raises two interesting points. First, the *ius Naturale*, according to Craig, had a higher authority than the *ius proprium* and neither a statute, nor long prescription, nor custom should have greater argumentative force than it. Secondly, for Craig, Scotland's *ius proprium* was the legislation of Parliament. He stressed, however, that there was very little written law in Scotland;⁹⁴ Scotland's *ius proprium* was very restricted indeed, and hence the scope for the *ius Civile* was large. Craig thus wrote:⁹⁵

We accordingly follow the decisions or rules of the Civil law chiefly in the administration of moveable property, granted that each nation will have employed its own particular forms of process. And we use our own forms of actions which are not entirely different from the Civil law; we state, however, that the Civil law must entirely be followed, in pacts, transactions, restitution, decisions or (as we now say) arbitrations, servitudes, contracts both *bonae fidei* and *stricti iuris* as well as nominate and innominate, evictions, pledges, tutory, legacies, actions, exceptions, obligations, and finally in the punishing of wrongs: and to say truly, this Civil law so permeates all our law suits and about all business that scarcely no issue or no type of case arises in which its authority and particular practice is not plainly obvious: whenever anything difficult arises in court or law suits, the solution of it is sought thence.

Of course, this was not the Roman law of Justinian; it was that developed by the *ius commune*, even influenced by Canonist principles of equity and good faith, and in some instances "abrogated" by doctrines taken from the Canon law. Its authority was as natural law.

One may finally note that, when Craig used the term *ius commune*, he did not use it in quite the sense understood by Sinclair. For Craig, the great natural equity of the *ius Civile* shone forth among so many peoples that it was deservedly called the *ius*

⁹⁴ *Id.*

⁹⁵ *Id.*

commune.⁹⁶ Craig identified the *ius commune* with the *ius Gentium*, and the *ius Civile*, because of its natural equity and representation of *ius Naturale*, had such widespread use that it truly constituted the *ius commune*. Craig's *ius commune* was no longer that based on the almost unexamined authority of the *utrumque ius*; rather, it was founded on the *ius Gentium* and *ius Naturale*. So far as the Civil law embodied this, and only so far, it could be regarded as *ius commune* binding on all nations.

IV. *Ius Commune* after Craig

Craig's new understanding of the concept of *ius commune* was a development of profound importance, marking a significant change from the epoch of Sinclair. He had in fact propounded a view of *ius commune* potentially highly subversive of the traditional role of the *utrumque ius* in Scotland. Of course, older modes of thinking remained embedded in his work: witness his repetition (twice) of the traditional view that when there was a conflict between the Civil and the Canon law the view of the latter was preferred.⁹⁷ Baldus, for example, had written the same.⁹⁸ It is difficult to see why this should be so if Civil law was authoritative only as natural equity. This perhaps explains why to this view he added the rider that this preference for the Canon law was "particularly where it concerns the administration of the church" and where the Commissary had jurisdiction.⁹⁹

It is impossible in our current state of knowledge to know to what extent Craig's contemporaries shared this vision. For example, it is evident that Sir John Skene saw Scots law as related to the more universal systems of Civil and Canon law. Skene had been educated in law at Wittenberg under the Humanist Matthäus Wesenbeck.¹⁰⁰ The *Annotationes* to his Latin edition of *Regiam Majestatem* drew extensively on the learning of the *utrumque ius*. These notes varied between the comparative, the etymological, and the historical. Skene saw the Canon law (along with the Civil, the Norman, and the English) as helping to confirm readings in *Regiam*; he also claimed to point out where individual *leges* were derived from or agreed with the Civil, Canon, or Norman laws.¹⁰¹ A similar approach is found in his work *De ver-*

⁹⁶ T. Craig, *De unione regnorum Britanniae Tractatus* [Scottish History Society, first series, vol. 60] (Edinburgh, 1909), 90, 328.

⁹⁷ Craig (note 14), I.iii.24; I.viii.17.

⁹⁸ Baldus (note 15), vol. 3, part 1, fol. 20vb.

⁹⁹ Craig (note 14), I.iii.24; I.viii.17.

¹⁰⁰ Cairns, Fergus, and MacQueen (note 11), 52.

¹⁰¹ Skene (note 44), address to the reader.

borum significatione.¹⁰² Skene cited a broad range of sources in many ways comparable to those cited by Craig: one can thus note many Humanists. How exactly Skene understood the relationship between Scots law and the more universal systems of law is not yet entirely clear; but it seems unlikely that he had radical views on the *ius commune* comparable to those of Craig. Nonetheless, he undoubtedly favored the Civil law over the Canon in citations of the *utrumque ius* (in his notes to *Regiam*, the most cited author is Bartolus) and his pattern of citations in this respect is very similar to that of Craig. It seems likely that Skene's view of the relationship between Scots law and the *ius commune* (however understood), if not that of Craig, was also not that of Sinclair.

Spottiswoode's *Practicks* allows us to explore the point more thoroughly by examining the law in practice and how it was understood in a way that Skene's works do not permit. The collection is not directly comparable with that of Sinclair, as it is not a type of "journal" of the court, although there is extensive discussion of some cases. Rather, it contains an account, organized alphabetically, of various areas of law, in some of which there is a strong focus on the practice of the court. Some of the cases discussed were drawn from Spottiswoode's own experience, others have been taken from different collections and works. Hector McKechnie, in his somewhat unsatisfactory terminology, accordingly classified the volume as one of "digest" rather than "decision" practicks.¹⁰³ The editor, Spottiswoode's grandson, described it as "a Collection of Materials for a Pandect of the *Scots* law."¹⁰⁴ Whether or not Spottiswoode intended to compose a "pandect," presumably meaning a work somewhat of the nature of Stair's later *Institutions of the Law of Scotland* (1681), this does indeed give more of a sense of what the work is like than the classification "digest practicks." The contents of each title often resemble the type of collection one might associate with a lawyer's commonplace-book, with a whole array of different material in either Scots or Latin — quotations, accounts of cases, references to statutes and to the Civil law — gathered together with little in the way of discernible structure or order. One could easily imagine it was a collection made with a view to a further purpose.

¹⁰² J. Skene, *De verborum significatione. The Exposition of the Termes and Dificill Wordes Contained in the Four Buikes of Regiam Majestatem, and Uthers, in the Acts of Parliament, Infestments; and used in Practique of this Realme; with Diverse Rules and Common Places, or Principalles of the Lawes* (Edinburgh, 1681; reprinted Edinburgh, 1826).

¹⁰³ McKechnie (note 54), 28.

¹⁰⁴ Spottiswoode (note 14), sig. b.

Turning to the materials collected by Spottiswoode, as well as court decisions, the most important materials on Scots law for him were Craig's *Jus feudale* and Balfour's *Practicks*, both of which were extensively quoted.¹⁰⁵ Neither of these were yet printed at the time Spottiswoode collected his materials together. The work also contains, often long, apparent quotations in Latin, not all of which have been traced to an author, supposing they were not Spottiswoode's own composition (as seems unlikely). There are many of these on a whole variety of topics and they usually embody Civil law. Further research may trace a source for some of them at least. The citations, even when they are second hand, reveal the type of material used by and familiar to those in practice, and on which the members of the Court of Session will have relied to construct their decisions and understanding of Scots law. Further, there are sometimes, in Spottiswoode's discussion of a case, whether based on his own experience on the bench or drawn from another source, indications of the reasons in law for the decision. In all of this it is important to compare the range and nature of Spottiswoode's citations of sources of the *ius commune* with those noted in Sinclair's *Practicks*.

The first point to make is that there would appear to have been only two direct citations of the texts of Canon law; in contrast, direct citations of the texts of Roman law were quite common, though, of course, tending to cluster in certain titles. The first citation of Canon law was in Spottiswoode's title on "Contracts and Obligations," where the examples he gave of individuals "forbidden by law to Contract" were "Monks and Friars." His authority for this was the *Liber Sextus*, the terms of the relevant provisions of which he paraphrased in Latin.¹⁰⁶ He also then wrote that it was "said in the Canon Law, *Monachus habens aliquid de proprio sepeliri debet in sterquilinio*."¹⁰⁷ This, of course, cannot be an account of law as practiced in Scotland, since there were no longer monks or friars. In the title on "Kirk Men and Kirk Patrimony," he discussed the case of *Erskine v. Pitcairn* (1566); in his report of that case, there was a reference to Canon law, again to the *Liber Sextus*.¹⁰⁸ That these two were the only direct citations of the *Corpus iuris canonici* in the whole work

¹⁰⁵ *The Practicks of Sir James Balfour of Pittendreich*, ed. P. G. McNeill [Stair Society, vols. 21–22] (Edinburgh, 1962–1963).

¹⁰⁶ VI 3.11.2; VI 3.12.2.

¹⁰⁷ Spottiswoode (note 14), 71–72: "A monk holding on to something of his own ought to be buried in a dung pit."

¹⁰⁸ *Id.* at 187–88; VI 3.8. The case is reported (from Spottiswoode) as *Erskine v. Pitcairn*, (1566) M 7962; it is also discussed in Craig (note 14), I.xiii.16.

indicates the slight role that Spottiswoode was willing to attribute to it.¹⁰⁹ Moreover, one related to a matter that could not be the law in Scotland any longer; both concerned issues directly connected to the Canon law proper.

Turning to authors, we can note that no citations of any major Canonist authors of the classical period of Canon law are to be found, and this despite titles on topics such as bastardy, marriage, and tiends. Thus, Panormitanus, so important for Sinclair, was nowhere cited.¹¹⁰ In the title "Kirk Men and Kirk-Patrimony," Hostiensis was mentioned in a lengthy Latin passage (a quotation?); but this was not a citation of the works of the Canonist.¹¹¹ In fact, like Craig, Spottiswoode had a knowledge of Canon law (as his French education would lead one to expect) and he made a number of general allusions and references to it similar to those found in the earlier author. Thus, *ius Pontificium* was referred to in his title *De praescriptione & usucapione*;¹¹² similarly he stated that there "are likewise *Canon-Law* Actions as Spuilzie of Teinds, Testaments and Executries."¹¹³ In his title "Criminal matters" he reported that under Civil law a wife was not admitted in accusing her husband of adultery, but "jus Canonicum id permittit."¹¹⁴ Further, it is obvious in reading parts of the *Practicks* that doctrines of Canon law underpinned the thinking they contain. Nonetheless it is the virtual lack of any citations of that law and its commentators that is most obvious.

It is easy to pick an example to demonstrate this further. Examination of Sinclair's *Practicks* shows particularly extensive use of Canon law and its commentators in interpreting and developing the Scottish action of spuilzie. It is thus particularly notable that, in Spottiswoode's title "Ejection and Spoliation," there was no direct citation of Canon law sources or authors.¹¹⁵ This is particularly telling, given that much of the doctrine there discussed, such as "oportet spoliatum semel restitui, antequam spo-

¹⁰⁹ I am fairly confident that these are the only direct citations of Canon law texts; I should point out, however, that it is not always easy either to identify citations or to identify their nature.

¹¹⁰ In the following, I have counted references. While I have I have tried to ensure accuracy, by their very nature there will be some mistakes. These are unlikely to alter the *balance* of comparative citations, which is more important than total figures.

¹¹¹ Spottiswoode (note 14), 186–87.

¹¹² *Id.* at 234.

¹¹³ *Id.* at 5.

¹¹⁴ *Id.* at 78.

¹¹⁵ *Id.* at 87–95.

liator possit rem spoliatam ulla ratione acquirere"¹¹⁶ (which embodies a standard brocard of the *ius commune*), undoubtedly originated in the Canon law, as the slightest examination of the relevant sections of the *Decretum Gratiani, Liber Extra* or *Liber Sextus* reveals.¹¹⁷ In discussing cases on spuilzie and ejection, Spottiswoode certainly referred to Civil law and made some general references to the "doctores," which might well be taken as including Canonists; he also included a lengthy (unattributed) Latin passage on *violentia*, which stated that "[i]n jure Civili et Canonico habentur quinque species violentiarum."¹¹⁸ This account of spuilzie is in dramatic contrast to the treatment of this possessory action in the 1540s, as demonstrated by Sinclair's *Practicks*, which largely relied on the texts of the *Decretals* and the commentaries on them.

Examination and analysis of the actual citations made by Spottiswoode is potentially helpful in trying to determine whether or not he used more modern Canonist authors. This said, to divide authors into Canonists and Civilists can be rather difficult, especially by this period. One can note, however, that the arguably Canonist treatises Spottiswoode cited on specific points of law included those of two English "Civilians." Thus, he twice cited Henry Swinburne's *Treatise of Testaments and Last Wills* in his title on "Testaments" and three times William Fulbeck's *Parallel, or Conference of the Civil Law, Canon Law, and the Common law of England*, once each on husband and wife, master and servant, and minor and pupil.¹¹⁹ One can also note a single citation on a point of law of J. B. Nicolai, *Regularum juris tam civili quam pontificii* in the title on the Act of Sederunt of 1612 on possession of Kirklands.¹²⁰ What one finds then is remarkably little mention of more modern Canonists. The two English writers were roughly contemporary with Spottiswoode and his references to them probably were a reflection of his period at Oxford, just as were those to, for example, Coke's *Institute* and to Bracton.¹²¹

In contrast, reliance on works that can easily be described as on Civil law, as well as citation of the *Corpus iuris civilis*, was much more frequent. There was a quotation from the *Commentaria iuris civilis* of Franciscus Connanus in the title on servi-

¹¹⁶ "The thing taken ought to be restored at once, before the taker is able to acquire ownership of it on some other ground."

¹¹⁷ *Id.* at 92; see C. 3 q. 3 c. 1–2; X 2.13; VI 2.5.

¹¹⁸ Spottiswoode (note 14), 89, 91, 94–95: "The Civil and Canon law recognize five kinds of violence."

¹¹⁹ *Id.* at 159, 205, 213, 337, 339.

¹²⁰ *Id.* at 194.

¹²¹ *Id.* at 7.

tudes.¹²² Antoine le Conte was cited, judging by context probably from his work on the *libri feudorum*.¹²³ Franciscus Duarenus was quoted or cited three times in the title *de iudiciis et iudicibus*, both his commentary on the *Corpus iuris civilis* and his *Disputationum anniversarium libri duo*.¹²⁴ The two well known works of the English Civilian, John Cowell, *Interepreter: Or Booke containing the Meaning of Words*, and *Institutiones juris Anglicani, ad methodem et seriem institutionum imperialium compositae et digestae*, were each cited or quoted once, on criminal matters and servitudes respectively.¹²⁵ François Hotman was cited once. Spottiswoode either cited or quoted from Jacques Cujas twelve times in quite varied areas of the law; among these, references to Cujas' *Paratitla in quinquaginta digestorum seu pandectarum* and his *Observationum et emendationum libri XXVIII* can be recognized.¹²⁶ The work of the German professor and judge of the *Reichskammergericht*, Joachim Mynsinger von Frundeck, *Apothelesma sive corpus perfectum scholiorum ad quattuor libros institutionum iuris civilis* was referred to or quoted from no less than eleven times in quite a number of different titles of the *Practicks*.¹²⁷ The *Consilia* of Ioannes Petrus Surdus were relied on three times.¹²⁸

It is obvious that, for preference, Spottiswoode cited relatively contemporary, indeed modern, Civilian works on substantive law and that, among the authors he preferred, Humanists tended to predominate.¹²⁹ One can trace citations of older authors: Baldus was cited five times and Jason de Mayno once.¹³⁰ All of these citations occurred, however, in quotations, all but one clearly from Craig's *Jus feudale*. There is no reason to believe that Spottiswoode had directly consulted them in compiling the relevant titles of his *Practicks*. Actual use appears to have been made of Bartolus. He was once noted as having been followed by the Court of

¹²² *Id.* at 308.

¹²³ *Id.* at 131.

¹²⁴ *Id.* at 181.

¹²⁵ *Id.* at 78, 309.

¹²⁶ *Id.* at 131 (*feus*), 132 (*fiscus*), 183 (*jurisdictio*), 184 (*jurisdictio*), 225 (*de pactis*) (4 times), 229 (*de pignoribus*) (twice), 237 (*de praescriptione et usucapione*), 346 (tutors and curators).

¹²⁷ *Id.* at 81 (*dolus & fraus*), 82 (*actio Pauliana*) (three times), 109 (exceptions), 241 (probation) (twice), 275 (*rei vindicatio*), 310 (servitudes), 318 (summons and libel) (twice).

¹²⁸ *Id.* at 29, 185, 251.

¹²⁹ He mentioned Craig's favourite Humanist, Hotman, only once, however, and that occurred in a lengthy quotation from Craig: *id.* at 131 (on *feus*) quoting Craig (note 14), l.ix.27.

¹³⁰ Spottiswoode (note 14), at 127, 207, 252, 256, 353.

Session in 1583 in a decision on arbitration and he seems once to have been directly quoted.¹³¹ He was likewise cited, along with texts of Roman law, in a discussion of a case the Court decided in 1632, in accordance with Roman law, on how long a rental should last; the Court so decided to make a clear precedent for itself for the future.¹³² On the other hand, two mentions of him came in quotations from Craig and another was made in what also seems to be a lengthy (unattributed) quotation.¹³³ Thus, in contrast to Sinclair's *Practicks*, Spottiswoode's work largely ignored the older authors as well as the Canon law. While at one level, preference for modern literature is, of course, to be expected, it is Spottiswoode's focus on Humanists that is interesting. As with Craig, it suggests a different attitude to the sources of the *ius commune*.

Spottiswoode's *Practicks*, however, resemble those of Sinclair in two ways: first, in the citation of decisions of other jurisdictions of continental Europe of the *ius commune*;¹³⁴ and secondly, in the copious citation of works on Romano-Canonical procedure. Taking these in turn, we can note Spottiswoode's quotation from or citation of: Matthaeus de Afflictis, *Decisiones Neapolitanae* (once);¹³⁵ Nicolas Boerius, *Decisiones Burdegalenses* (once);¹³⁶ Guido Papa, *Decisiones Parlamenti Dalphinalis Gratianopolis* (five times);¹³⁷ Jean Papon, *Recueil d'arrests notables des cours souverains de la France* (twenty times).¹³⁸ The obvious contrast to Sinclair, however, was in the absence of citation of decisions of the *Rota Romana*. Spottiswoode's citations to the decisions of other jurisdictions had a more secular cast. The works on procedure, however, did include those relating primarily to ecclesiastic courts and here there was a strong correspondence with the citations recorded by Sinclair: Johannes de Ferrariis, *Practica libellorum papiensis* (six times);¹³⁹ Petrus Jacobi, *Practica aurea libelli* (eleven times);¹⁴⁰ Ludovicus Gomez, *Commentarii in iudiciales regulas cancellarius* (twice);¹⁴¹ and Joseph Mascardus, *Conclu-*

¹³¹ *Id.* at 14, 182.

¹³² *Id.* at 354.

¹³³ *Id.* at 69, 132, 292.

¹³⁴ Like Sinclair, he cited *Consuetudines Ducatus Burgundiae fereque totius Galliae, Barthomomaei a Chassanaeo commentariis illustratae*: Spottiswoode (note 14), 78; Sinclair's *Practicks* (note 30), No. 39.

¹³⁵ Spottiswoode (note 14), 251.

¹³⁶ *Id.* at 237.

¹³⁷ *Id.* at 7, 13 (twice), 237 (twice).

¹³⁸ *Id.* at 5, 13, 14 (four times), 76, 78, 79, 95 (twice), 120, 126, 157, 185, 216 (twice), 225, 227, 349.

¹³⁹ *Id.* at 6 (twice), 7, 83, 246, 303.

¹⁴⁰ *Id.* at 7, 39 (3 times), 236, 241, 245, 310 (4 times).

¹⁴¹ *Id.* at 187, 231.

sionum omnium probationum quae in utroque foro quotidie versantur (once).¹⁴² The last two works were much more modern than the first two.

Spottiswoode, in contrast to Sinclair, had a much richer body of Scottish material available for use: Craig, Balfour, Skene's edition of the statutes, Skene's edition of *Regiam* and the "auld lawes," Skene's *De verborum*, and collections of cases, and he made use of all of these.¹⁴³ Further, given that Spottiswoode drew on his experience as a judge in compiling the *Practicks*, discussion of decisions necessarily loomed very large in his account of the law. The overall picture of Scottish law and legal practice in the first half of the 17th century to be drawn from Spottiswoode's *Practicks* is thus of a legal system where the substantive municipal law was seen as found in statutes, decisions, and authoritative legal writings.

The works of the *ius commune* did not have quite the same overwhelming dominance in Spottiswoode's *Practicks* as in the collection of Sinclair, except in the area of procedure and practice; this said, in many areas of law, there was significant reliance on Roman legal sources, which were extensively cited, and modern authors, including Humanists, on the Roman law. Moreover, where works were cited on substantive issues, they were usually works of Roman law. In this sense, in Spottiswoode's approach to the *ius commune*, Canon law had been overwhelmed by Civil law. Further, one gains the impression that the types of literature of the *ius commune* that most interested Spottiswoode were collections of court decisions and studies of court practice, such as the contemporary work of Antoine Favre, *Codex Fabrianus definitionum forensium, et rerum in sacro Sabaudiae Senatus tractatarum, ad ordinem titulorum Codicis Justiniani, quantum fieri potuit, ad usum forensem accommodatus et in novem libros distributus* (cited once)¹⁴⁴ and the *Rerum judicatarum, libri IIII* of Annaeus Robertus (cited eleven times).¹⁴⁵ Even here, one can note that, in the extensive reliance on decisions of other jurisdictions in the *Practicks*, Spottiswoode favored secular over ecclesiastic court reports. It was only in the works used in procedure, on how to draw libels and on the progress of actions through the courts, that Spottiswoode made much use of works that pay much attention to the Canon law. In all, however, what evidently interested Spottiswoode most as a judge and writer of *Practicks* were

¹⁴² *Id.* at 240.

¹⁴³ See Cairns, "Historical Introduction" (note 7), 95–98.

¹⁴⁴ Spottiswoode (note 14), 231.

¹⁴⁵ *Id.* at 156, 212, 228 (three times), 249, 295 (twice), 312, 337.

the works of *practici* in the *ius commune* and the commentators on Roman law. Substantive material on the Canon law held little demonstrable interest for him, though he obviously had some knowledge of it and its literature.

While Spottiswoode had much more Scottish material available to him than Sinclair, there nonetheless were areas of law where, under his headings, Roman law or Civilian authors or case reports from outside Scotland were used exclusively, with no mention of Scottish material whatsoever. An example would be the title on *negotiorum gestio*.¹⁴⁶ There are also some titles, such as those on actions, *dolus* and *fraus*, pacts, and summons and libel, where Civilian or *ius commune* material predominates or is a very major portion of the material collected.¹⁴⁷ There are clearly areas where Scots law was starting to develop on the basis of the Civilian material, while Civilian material was nearly universally used to interpret Scots law directly or by analogy. For example, Spottiswoode reports the pleading in an action of removing, in which the pursuer's triply, based on C.4.65.25, was accepted by the Lords.¹⁴⁸ Another fine example of reliance on Civilian thinking came in *Sharp v. Sharp* (1631), where the pursuers sought reduction of an entail. By a bond, two sons had obliged themselves to entail their land on each other failing heirs male of their bodies. The daughters of one son sought reduction of the entail on the ground it was the product of a "nudum pactum, neque traditione, neque ulla alia re vestitutum" or a "contractus innominatus." The case caused the court considerable difficulty and the judges considered the "Process which was given in by Answers and Replys, &c in writ" for four days, before deciding that the "Bond was not *nudum pactum*, but a perfect stipulation between the two parties, whereof none of them could repent themselves thereafter without the others [*sic*] consent."¹⁴⁹ In this context it is perhaps worth pointing out that Spottiswoode's quotations from Cujas on pacts show an approach that was quite at variance from Canon law and, indeed, later Scots law. *Sharp v. Sharp* has come to be seen as significant in Scots law's move towards the Canon law's position.¹⁵⁰

¹⁴⁶ *Id.* at 224–225.

¹⁴⁷ *Id.* at 1–7, 81–83, 225, 316–322.

¹⁴⁸ *Cunningham v. Cook* (1583); Spottiswoode (note 14), 277.

¹⁴⁹ Spottiswoode (note 14), 331–332. The case is reported (rather more fully) in (1631) M 4299.

¹⁵⁰ Spottiswoode (note 14), 225. On the development of the Scots law, see W. D. H. Sellar, "Promise," in K. Reid and R. Zimmermann (edd.), *A History of Private Law in Scotland* (Oxford, 2000), 2:252, 262–66. Sellar's discussion of *Sharp* is at 257, 260, 265. It is also discussed by G. Lubbe,

For Spottiswoode, as for Craig, the "common law" was coming to appear as the *ius civile* rather than as the *utrumque ius*. Thus, in his title *Dominium. De acquirendo, et amittendo rerum dominio*, he reported a case (the parties were unnamed) in which a pursuer was trying to get a woman to remove under a tack. She claimed a heritable right. The pursuer argued in his triply "by the common Law," citing C.4.65.25, which stated that if anyone had received land or something else under a lease, the property had to be restored before they could litigate over ownership. Accordingly, the "Lords decerned her to flit and remove, without prejudice to her heritable Right *in iudicio petitorio*."¹⁵¹ He noted that *Ballenden v. Mackmath* (1628), a case on *restitutio in integrum*, "was judg'd conform to the common Law." For this he cited D.4.4.19.¹⁵² In the case of *Birkhead v. Nairn* in the title *De Satisfacendo*, Spottiswoode noted that the defender (unsuccessfully) asked the Court to require the pursuer to give caution, "to answer him for what he had to lay to his Charge conform to the common Law." For this C.2.57.1 was cited.¹⁵³

V. Conclusion

The *Relation of the Manner of Judicatores of Scotland* was written at a crucial time in the history of Scots law, when James VI had inherited the throne of England and had proposed various projects of unification, including that of the laws.¹⁵⁴ Commissions to consider a union of the laws were appointed by both Parliaments, with the Scots Commissioners instructed to protect "the fundamentall lawes, Ancient privilegis, offices and liberteis of this kindome."¹⁵⁵ There was a considerable pamphlet debate in which a variety of different views were urged.¹⁵⁶ Some thought that union would be easily achieved as the laws were fundamentally similar; others were much more sceptical, including those

"Formation of Contract," in K. Reid and R. Zimmermann (edd.), *A History of Private Law in Scotland*, (Oxford, 2000), 2:1, 10, and 13.

¹⁵¹ Spottiswoode (note 14), 84.

¹⁵² *Id.* at 300.

¹⁵³ *Id.* at 306.

¹⁵⁴ See, e.g., Levack (note 50); B. Galloway, *The Union of England and Scotland, 1603–1608* (Edinburgh, 1986).

¹⁵⁵ *Acts of the Parliaments of Scotland*, Record Commission (Edinburgh, 1814–1875), 4:263–64, c. 1 (1604).

¹⁵⁶ See *The Jacobean Union: Six Tracts of 1604*, edd. B. R. Galloway and B. P. Levack [Scottish History Society, fourth series, vol. 21] (Edinburgh, 1985). See also A. Wijffels, "A British *ius commune*? A Debate on the Union of the Laws of Scotland and England during the First Years of James VI/I's English Reign," 6 *Edinburgh L. Rev.* 315 (2002).

English lawyers who feared Scots law as Civil law, and hence a threat to the English common law.¹⁵⁷ The passage on the sources of Scots law in the *Relation* was hardly one calculated to assuage English fears about the foundation of Scots law in "imperial" Civil law.¹⁵⁸

Indeed, from 1600, the standard view in Scotland appears to have been that, in a hierarchy of authority, Scots statutes and custom came first and second, to be followed by Civil law in a subsidiary role. As noted, the hierarchy is less simple than it initially appears, since Craig placed Scots law itself in the framework of the law of nature and nations; this meant that natural law and, to some extent, the law of nations, had a higher authority than the *ius proprium*. In so far as the Civil law represented natural law and the law of nations, there was a wide scope for drawing arguments from it in court and in writing treatises. In sum, given the concision and purpose of the *Relation*, its author provided his readers with a reasonably accurate impression of practice in Scotland.

The evidence explored above tends to suggest that a marked shift had started from the older view of the relationship between *ius commune* and *ius proprium* found in Sinclair's *Practicks*; a significant aspect of this shift was the demotion of the part played by Canon law. The work of Spottiswoode marks this clearly; in his *Practicks*, Canonists were generally only valued for their discussions of Romano-Canonical procedure. This tends to support an understanding of what was happening in this period as a rejection of Canon law as a strong part of the *ius commune*, and the development of the idea of the *ius commune* as being overwhelmingly the Roman law. One can confirm this by pointing to the *Major Practicks* of Sir Thomas Hope, a contemporary of Spottiswoode. There Hope wrote that there was an Act of Sederunt of 1592, "beiring that the conventions of parties should be fulfilled albeit not agreeable to the comone law."¹⁵⁹ The term "comone law" must here refer to the Civil law alone, as the Canon law accepted the doctrine of *pacta sunt servanda*.¹⁶⁰

¹⁵⁷ See, e.g., Cairns, "Historical Introduction" (note 7), 78.

¹⁵⁸ This may make it unlikely that Craig was the author.

¹⁵⁹ *Hope's Major Practicks, 1608-1633*, ed. J. A. Clyde [Stair Society, vols. 3 and 4] (Edinburgh, 1937-1938), 1:98. The Act of Sederunt cannot be traced.

¹⁶⁰ See generally, R. H. Helmholz, "Contracts and the Canon Law," in J. Barton (ed.), *Towards a General Law of Contract* (Berlin, 1990), 49. Hope seems generally, however, to have preferred the view of the Civil law: see Hope (note 159), 1:93, 99.

Just as it may well be Protestant beliefs that encouraged reliance on the works of the English civilians, one can speculate that the Reformation and the rejection of the authority of the Pope played a large part in this development. Humanistic theories of sovereignty, such as those of Craig, made Canon law difficult to accept as a source. Here one can note that, in the 1560s, William Skene, in St. Mary's College in St. Andrews, thought it important to move from being *Canonista* to *Civilista*.¹⁶¹ Around 1600, Skene's attitude to the Canon law can perhaps be traced in the marginal notes to his Latin edition of *Regiam*. There he provided a concordance to English law, the new Scottish acts, and the *ius divinum* (in other words the Bible). A preference for the *ius divinum* over the *ius Pontificium* had marked many of the Lutheran reformers associated with Skene's *alma mater* at Wittenberg. Thus, although Skene's declared teacher had in fact held a chair in Canon law, he himself may have seen Canon law as a dangerous overlay to the pure doctrine of the Bible.¹⁶² In the 17th century, the professor of Canon law in Aberdeen had problems with the General Assembly who were suspicious of his classes, until he explained the strictly limited scope of what he taught.¹⁶³

It is also important to note Craig's move towards a strong linkage between state sovereignty and law that led to a need to validate the use of Roman law in Scottish courts by the argument that it was used in so far as it embodied natural law. In the long run, this would lead to questioning the value of it as a source of arguments. A more critical attitude to Roman law was developing in which one may speculate legal Humanism may have played a part, given how popular Humanist authors were in Scotland. Of course, the Humanist approach to Roman law was complex and Spottiswoode continued to consider Roman law as of primary authority over many fields of law; but Craig's natural-law approach undoubtedly pointed the way forward. This has the consequence that we should understand the fifty years or so around 1600 as marking an important shift in Scots law. The sphere of Canonist sources was now strictly limited, a limitation reinforced by the Reformation of religion. Scottish sources — primary and

¹⁶¹ J. W. Cairns, "Academic Feud, Bloodfeud, and William Welwood: Legal Education in St Andrews, 1560–1611," 2 *Edinburgh L. Rev.* 158, 168–70 (1998).

¹⁶² Witte (note 18), 197–204, 222; G. Strauss, *Law, Resistance, and the State: The Opposition to Roman Law in Reformation Germany* (Princeton, 1986), 217–23.

¹⁶³ J. Spalding, *Memorialls of the Trubles in Scotland and in England, 1624–1648* [Spalding Club, vols. 21 and 23] (Aberdeen, 1850–1851), 1:166.

secondary — were developing in significance, scope, and number. Natural law was starting to move towards the dominance it had achieved in Scottish legal thinking by 1700. Indeed, as a Scottish legal literature started to develop in the 17th century, it was to take Craig's hierarchy of sources as its starting point. This all suggests that it may be fruitful to draw on the idea of the *usus modernus Pandectarum* (as christened by Samuel Stryk somewhat later) to provide an interpretative framework for understanding the developments in Scots law through the 17th century.¹⁶⁴ The era of the Roman-Scots law was on its way. It was this fertile creation of a specifically Scottish *usus modernus*, in which natural law played an important role, that allowed Lord Stair to write his *Institutions of the Law of Scotland*, first printed in 1681. This pictured Scots law as a coherent, logical, and organized whole, integrated as a hierarchical series of norms, justified and made obligatory by a higher authority. The basic source material of the municipal law consisted of the statutes and decisions of the courts; the traditional Scottish reliance on the *ius Civile* was justified by the authority of natural law and its equitable principles were being progressively incorporated into the national law. Stair's work is indeed compatible in this respect with other institutional works of the era of the *usus modernus Pandectarum*, marking the formation of national laws in Europe.¹⁶⁵ Thus, for Scotland, the move away from the medieval *ius commune* towards the *usus modernus Pandectarum* started in the later 16th century under the impact of Humanism and the Reformation, and is clearly identifiable and symbolized in Craig's great Humanist work and confirmed by Spottiswoode's *Practicks*.

¹⁶⁴ F. Wieacker, *A History of Private Law in Europe*, trans. T. Weir (Oxford, 1995), 159–95; K. Luig, "Usus modernus," in A. Erlner and E. Kaufmann (edd.), *Handwörterbuch zur deutschen Rechtsgeschichte* (Berlin, 1971–1998), vol. 5, cols. 628–36.

¹⁶⁵ Klaus Luig, "The Institutes of National Law in the Seventeenth and Eighteenth Centuries," 1972 *Jur. Rev.* 193.