



T. B. SMITH

Lafayette

Thomas Broun Smith 1915–1988

THOMAS BROUN SMITH, a Fellow of the British Academy, was born in Glasgow on 3 December 1915, and died, Sir Thomas Smith QC, BA, BCL, DCL, (Oxon) LLD (Edin.), LLD (Glas.) LLD (Abn) LLD (Capetown), FBA, FRSE, in Edinburgh on 15 October 1988. He was a member of a family gifted with abilities above the ordinary, and during his career mixed academic and professional distinction with a strong spirit of public service, in war as well as in peace. He was elected a Fellow of the British Academy in 1958, at a time when he was moving from the chair of Scots Law at the University of Aberdeen to the chair of Civil Law at the University of Edinburgh. It is understood that he was the first Scottish lawyer to be so honoured.

Tom Smith or T. B., as friends and acquaintances sometimes knew him, was in a variety of ways a remarkable man, and most remarkable for his outstanding ability to inspire the most able amongst his students as well as many colleagues in the teaching and practice of the law. Throughout his career he was a perfectionist and a firm believer in resort to fundamental legal principles and the conceptual approach to the teaching, presentation and development of law. He was thus a Scottish legal academic, teacher and writer of the old school, although in a style that was highly individual. It is no surprise that very early in his career he attracted the attention and support of Lord Normand and Lord Cooper, both of them Scottish legal practitioners and judges of high distinction who were devoted, though with different attributes and characteristics, to the law of their native land. It followed naturally from Tom Smith's philosophical approach to law that he deplored the excessive pragmatism of the machinery for legislation in the United Kingdom as well as the too frequent importation into the law of Scotland by judicial decision as well as by legislation of rules, often derived from the powerful Anglo-American systems of law, which he saw as inimical to the sound deployment and development of Scots Law. He identified these dangers not only in civil law areas, such as the law of Obligations which was always to him a major

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interest, but also in the fields of criminal law, particularly in the domain of serious crime, and of the law of evidence, in both of which he felt it essential to defend the simple and principled approach of the Scottish system.

Sir Thomas, as Tom Smith became in 1981 in recognition of his outstanding services to the Law of Scotland, never departed from his deeply-held legal philosophy, but, although a stout and sometimes controversial defender of the Law of Scotland, he was anything but a narrow legal nationalist. As his whole career demonstrated he had studied with industry other systems of law, including that of England, and, it appears, had a deeper comparative understanding of the Anglo-American systems and a clearer appreciation of their strengths and defects than many of those who had spent their working lives within these systems. It is, indeed, not given to the ordinary run of lawyers to study effectively systems of law other than their own, but Tom Smith was able to achieve this by virtue of unusual and discriminating powers of intellect and memory, assisted practically by extensive travel and contacts with a constantly widening circle of colleagues and friends in almost every Continent and in a variety of jurisdictions. Industry came naturally to him, and he was a master of concentration. However, despite his academic attainments, he was, as has been said elsewhere, never an arid intellectual. He enjoyed life, while at certain stages suffering some of its deepest sorrows as well as periods of serious ill-health. He enjoyed teaching those who responded with enthusiasm. He got much pleasure from reading, particularly of history, and he relished travel, conversation and the company of friends. Behind a manner, which was occasionally pontifical, and a personality sometimes complex, there lay a lively sense of humour and a ready wit. His nature was sensitive, and he could be easily hurt. But he was patient and forgiving, and he did not bear grudges, although he abhorred disloyalty in all its forms.

Tom Smith spent his schooldays at the High School of Glasgow and subsequently at Sedbergh. One gains the impression that he spent his time at school gathering prizes, but he also claimed to have played vigorous Rugby Football. All in all he was an unlikely product of an English public school, but there can be no doubt that his ability to work with concentrated and sustained effort was inculcated and developed at an early stage of his life. His knowledge of Scottish history was exceptional, although one suspects that most of it was picked up elsewhere than at school. At any rate, his early education, coupled with his native intellect and wit, enabled him to go up to Christ Church in 1934 with a Boulter Exhibition. In due course, three years later, he attained a first in the School of Jurisprudence and an Eldon Scholarship. While at Oxford he made a wide and catholic

circle of friends, a number of whom attained eminence in later life in various parts of the world. He kept these and later friendships, made in many countries, in constant repair. He did not confine his attention to the fortunate and successful, and, as he went through life, often came to the assistance in a very practical way of some who had fallen by the wayside. At Oxford he put both term-time and vacations to good use. He retained a loyal and lasting affection for his College, signalled by wearing a battered Christ Church tie, and greatly enjoyed returning there as he grew older. Despite the imminence of European war, which some of the more intelligent undergraduates of his time saw looming, Oxford in the 1930s was on the whole a happy place. It is obvious that Tom Smith profited greatly from his years there. It was also then that he first met his future wife.

After Oxford, and having worked briefly in the office of a well-known firm of London solicitors, Tom Smith was in 1938 called to the English Bar by Gray's Inn, of which in later life he became an Honorary Bencher. Meanwhile, as well as eating his dinners, he had gained a first class of outstanding merit and a Certificate of Honour in the English Bar Finals. Significantly, he had also joined the London Scottish in the proud rank of Private. After his call to the English Bar he joined a busy set of Chambers, but very soon afterwards he was, on the outbreak of what he always called 'Hitler's War', mobilized and not long afterwards received a commission. He first sighted the enemy at close quarters during the retreat to Dunkirk, and, having with the aid of another junior officer and some ill-armed British other ranks, successfully defended a road bridge near Abbeville, found his way in charge of an exhausted body of men to the beach near La Panne. At a late stage of the Dunkirk evacuation he was fortunate enough to get back to the United Kingdom. He liked in later life to recount some tragi-comic events in which he played a part during this disastrous campaign. Indeed, as with many others, his experiences during the War often came back to him in later years.

Some months before these events he had in February 1940 married Ann Tindall, who had been a contemporary at Oxford and who in later years was an academic colleague at Edinburgh University. They shared, during a long married life, many joys and some deep sorrows, and had to endure the sudden death of a brilliant son, who was just about to go to Christ Church, and the lingering and ultimately fatal illness of a lovely daughter. These devastating events must be mentioned, because they left a mark on Tom Smith at a time when he was at the height of his powers and because they affected him for the rest of his life.

As the war wore on, Tom Smith duly returned to active service in Italy and other parts of the Mediterranean area, eventually reaching the rank

of Lieutenant-Colonel with a Mention in Despatches. This did not end his Army service since subsequently, while occupying a Chair at Aberdeen University, he found time in his capacity as Lieutenant-Colonel, Territorial Army, in the Gordon Highlanders to command for a number of years and with his customary enthusiasm the University OTC.

During 1946 and 1947 Tom Smith was attached in one of the Intelligence Services to the Foreign Office, and thereafter, having taken another look at the English Bar, decided that his future lay in Scotland. As one would expect, the necessary examinations in preparation for the Scottish Bar presented no problems for him and, having disposed of them in short order, Tom Smith passed Advocate, as we say, in 1947. He was by then into his 30s, as were a number of those who joined the Faculty of Advocates in the immediate post-War period. This proved no disadvantage, although it is clear that Tom Smith had by then divined that his future lay in the academic field. After a relatively brief period of practice as a Junior Counsel, he was selected for the chair of Scots Law at the University of Aberdeen, and almost immediately began to make his mark as an academic lawyer not only in Scotland but, quite soon, further afield.

Tom Smith's time at Aberdeen University, which lasted from 1949 to 1958 and which included two substantial periods as Dean of the Law Faculty there, was a very happy and also a very productive period of his career. In addition to his teaching and administrative duties, he began to write extensively. He also, with increasing frequency, travelled widely in other jurisdictions, notably those which, like Scotland, had incorporated into their systems, mainly from sources in continental Europe, principles of the developed Roman or Civil Law, as well as piece-meal offerings or importations, sometimes forcibly transplanted, from Anglo-American sources. These 'mixed systems', as Tom Smith called them, include the laws of Quebec, Louisiana, South Africa, Ceylon and some smaller jurisdictions, as well as the law of Scotland. During the same period Tom Smith widened his experience in other ways, not only in the legal domain but in other, sometimes unrelated, fields. In 1950 he became an Honorary Sheriff at Aberdeen. Four years later his interest in law reform led to appointment as a member of the Scottish Law Reform Committee. He continued to serve in that Committee until 1970, by which time its functions had been absorbed by the Scottish Law Commission. He himself became in 1965 one of the original members of that Commission, and he eventually served the cause of law reform for a continuous period of more than 25 years, making an outstanding personal contribution to the positive development of the Law of Scotland in a wide variety of fields.

In 1956 the University of Oxford conferred upon him the degrees of

BCL and DCL, recognition by his former University of his published work which meant much to him. In the same year he became a Queen's Counsel in Scotland, evidence that he never divorced himself completely from work in the Courts, as was later demonstrated for example, by his appearance in the litigation concerning ownership of the St Ninian's Treasure, found in Shetland where some Norse law survives. In this litigation he unearthed, with typical industry, some forgotten enactments in the Legal Code of King Magnus Hakonsson 'The Lawmender', a medieval Scandinavian Monarch. Tom Smith also considered it the duty of an academic lawyer to engage in Opinion work when time permitted, and during this period of his career began to demonstrate his grasp of Scottish constitutional law and history, upon which he was later to write with specialized knowledge. His deep study of the Union Agreement of 1707 had already led him to take a more than passing interest in what was known as the 'E II R' case, concerning the Queen's title. In 1957 he was appointed Chairman of the Aberdeen Valuation Committee, and also a member of the Scottish Committee on Prescribing Costs, both of which appointments involved diverse duties of a very practical, though hardly academic, nature. He became in the following year a Trustee of the National Library of Scotland. 1958 was also the year from which, as has been said, his membership of the British Academy dated. Towards the end of his time at Aberdeen he was able to do some more extensive travelling and, along the way, performed in response to invitations the functions of Ford Visiting Professor at Tulane Law School and Visiting Lecturer at the Universities of Capetown and Witwatersrand. These appointments were evidence of his interest in and considerable knowledge of 'mixed systems' of law, one of which had derived principles from the French Codes and the other from Roman-Dutch sources. On both there had been grafted rules of Anglo-American origin.

A list of Tom Smith's many publications in the United Kingdom and abroad at this and later stages of his career can be found elsewhere, most conveniently in Parts 1 and 2, July 1982, of the *Juridical Review*, the *Law Journal of the Scottish Universities*. They are too numerous for reference in their entirety in a memoir such as this. While at Aberdeen University, he published two works of substance, 'Doctrines of Judicial Precedent in Scots Law' in 1952 and 'The Development of the Laws and Constitution of Scotland' in 1955. The approach to judicial precedent was a subject often in Tom Smith's mind, and it is a misfortune that his views on this subject have, so far as concerns the Scottish Judiciary, usually fallen on deaf ears, with the result that English influences have often continued even now to be given undue weight. Some opportunities for systematic and principled modernisation of Scots Law by the Scottish superior courts, both civil and criminal, have in consequence been missed.

In 1958 Tom Smith moved to the chair of Civil Law at Edinburgh, and for a decade made a courageous but belated attempt to move the teaching of that subject at Scottish universities from the abstract study of ancient Roman rules to the developed principles of the Civil Law, which had entered Scottish Private Law from continental Europe mainly by way of the advanced legal education of Scottish lawyers, most particularly in French and, later, Dutch universities during the 16th, 17th and 18th Centuries. The great Scottish Institutional Writers, notably Stair, Erskine, Bell and Hume, of whose existence Tom Smith was wont to remind Scottish students and practitioners, had also played a part in this process. This gallant endeavour by Tom Smith to modernize the teaching of the Civil Law and to preserve the Private Law of Scotland from being torn at many points from its roots must on the whole be regarded with some sorrow as a failure, though he did have some successes. In retrospect, it is not difficult to share Tom Smith's view that the return in Scottish Universities to the teaching of undiluted Roman Law has proved even in the short term to be disastrous, and that the damage so done to Scottish legal education is likely to be lasting.

Early in his period as Professor of Civil Law at Edinburgh Tom Smith had conferred upon him by the University of Capetown an Honorary LLD, to which later in his career were added a succession of LLD's at other Universities, including Aberdeen in 1969 and Glasgow in 1978. He had also received, in 1963, an LLD from his own University of Edinburgh. Meanwhile he had in 1960 become an Honorary Member of Council, Louisiana State Law Institute, and had acted for some months as a Visiting Professor at Harvard Law School. These two opposites illustrate recognition of the standing he had gained as a comparatist and are also evidence of his broad and catholic approach to law as an academic subject. There were at later stages to be further illustrations of his considerable and growing reputation as a teacher and writer outside his own country.

Tom Smith had long felt anxiety about the paucity of modern writing by Scottish lawyers on central legal subjects, particularly during the period of the War of 1939–45 and its aftermath. The absence of scholarly works in many areas of the Law of Scotland had become a very serious disadvantage not only in Scottish legal education but also in professional practice. Some leading text books were long out of date, indeed so long out of date in many cases that the publication of new editions was likely to prove impracticable. With encouragement from the highest quarters most notably Lord Normand, and with the promise of financial support from the Carnegie Trust, Tom Smith promoted the idea of creating an institution which would encourage the writing and publication of scholarly works on Scottish legal subjects, the object being to fill the many obvious

gaps where no text-books existed or where the existing text-books were out of date. With this objective there was formed in 1960 the Scottish Universities Law Institute, of which Tom Smith became the first Director, a post which he held for the next fourteen years. During that time, and since, great progress has been made in reinforcing the literature of the Law of Scotland, and, although some of the work has inevitably been uneven, the quality of the text-books so produced has on the whole done the Institute and its first Director great credit. Starting almost from nothing, Tom Smith devised a system and pattern of production which has stood the test of time. The amount of personal labour involved in the task, including the urging on of authors and their supervising committees, placed great strains on Tom Smith, but he appeared able, without obviously losing patience, to undertake this laborious but rewarding task in addition to his other heavy commitments.

In addition to the inspiring and urging on of others, Tom Smith continued during this period to write with great industry on his own account. In 1961 he delivered the Hamlyn Lectures, later published under the title 'British Justice: The Scottish Contribution'. These were, in the truest sense, teaching lectures, clear in language and thought, delivered by a comparatist to 'the Common People of Great Britain and Northern Ireland', as the Trust Deed expressly directed. In the second paragraph of the Prologue to these Lectures Tom Smith expressed, in a style typical of him, one aspect of the philosophy which motivated him throughout his career in the law

The law of the sister kingdom of England has in earlier series of Hamlyn Lectures had its full measure of praise already; and the tributes paid to that original product of English genius were well merited. Let me at the outset make one thing very clear. Though my great purpose in life has been to serve the law of Scotland in Aberdeen and Edinburgh, I have also had the privilege of studying the English law at Oxford under great teachers such as Goodhart and C. K. Allen; and I have shared in the corporate life of that Inn of Court which the present Lord Chancellor and his predecessor, the Earl of Birkenhead, F. E.—the greatest of all legal Smiths—have adorned. These English legal influences I remember with gratitude; and I should be both ungrateful and unscholarly were I to compare Scottish and English law in any spirit of chauvinism or national intolerance. Such behaviour may in the past have been in order—as we shall see—for certain legislators at Westminster or for certain judges in the House of Lords when adjudicating on Scottish appeals. It would be unfitting for a Scotsman of integrity nurtured in the cosmopolitan Civilian traditions of Scots Law. Much in English culture and English law I admire, but like my forebears I cannot brook with patience those periodic manifestations of arrogance or ignorance whereby—in the supreme confidence that they know what is best for us—certain southern

mandarins have sought to subvert valued and valuable Scottish institutions. Nor do I find the reflection comfortable that Scotsmen and Scots lawyers, who should have known better, so often proved willing accomplices. Moreover, even though comparisons may certainly be invidious, I must sometimes make them. I shall not conceal from you my conviction that an impartial arbiter would often prefer, or have preferred, solutions of Scottish law to those of English law. Further, it may be noted that when Scots law has influenced English law this has always proceeded on serious comparative evaluation, and thus has almost invariably been beneficial to the receiving system. Conversely, though English influence has been beneficial in certain fields of Scottish jurisprudence, the introduction of English solutions into Scots law has too often been prompted—not by comparative method—but by a policy of unconscious or deliberate anglicisation, and has certainly not always resulted in improvement.

One could wish that those responsible for legislation applying to Scotland and for the development of the law of Scotland by other means would heed these words of wisdom and truth, spoken now from the grave. No excuse is made for quoting them at length, since they express so clearly and emphatically thoughts which occur to many Scotsmen of intelligence, and not only lawyers.

Many of those who listened to Tom Smith's Hamlyn Lectures found them intensely interesting and stimulating. At some points, no doubt, he tilted at windmills, but most of his assaults were very well-aimed. He was bound to have some fun with Lord Cranworth, whose famous—or infamous—observation that 'if such be the law of England, on what ground can it be argued not to be the law of Scotland?' formed part of the reasoning, if such it can be called, by means of which the House of Lords, reversing the Scottish Court, forced into the law of Scotland the unjust English doctrine of common employment. That doctrine had to be expunged from the law of both countries by a United Kingdom statute nearly a century later, but in the meantime had wrought much unfairness. Tom Smith was also well entitled to dwell upon the Occupier's Liability (Scotland) Act 1960, which in effect overruled two House of Lords' decisions imposing English solutions in Scottish appeals, since he played a part in the preliminaries to the legislation. These assaults did not take away from the positive influence and instruction of the Lectures, and it is interesting that in the part of the Lectures devoted to 'Patterns of Criminal Justice' Tom Smith included some pungent, and, it may be thought, prophetic, observations on the admissibility of evidence elicited from the accused himself. The whole passage is revealing, not least the comment on the requirement in Scottish Criminal Law that a confession by an accused person should be corroborated by other evidence. One part of the passage was, and will remain, topical. Its importance requires no emphasis,

and any weakening of the principle enshrined in it is a recipe for miscarriages of justice.

It must, however, be stressed that there is no such danger, as in English law, of an accused in Scotland being convicted solely upon his own confession. A confession of guilt short of a formal plea of guilty will not suffice for conviction. The doctrine of corroboration applies generally in Scottish criminal evidence, and it is a fundamental rule that no-one can be convicted on the evidence of one witness, and that each material link in the chain of evidence against an accused must be derived from two separate sources.

Legislation along these lines for England thirty years ago might have saved criminal justice in that country from a number of recent disasters. Tom Smith suggested later in the same lecture that many aspects of Scottish law and procedure were deserving of consideration on their merits, as had already been done, for example, in the area of Diminished Responsibility. He suggested in particular that 'our system of public prosecution, our standards of fairness to the accused and our rules regarding pre-trial disclosure of defences might well make a wider contribution to British justice'. Some faltering steps have been taken along this road since the lectures were delivered, and it is, after all, a proper function of academic lawyers to stir up action by legislators and courts. Tom Smith was of this opinion, and was always prepared to accept the consequences.

In the following year, 1962, Tom Smith published two works, one a relatively slim volume and the other very substantial. These were 'Studies Critical and Comparative', considered by many to have been amongst Tom Smith's finest work, and certainly amongst the most typical, and 'A Short Commentary on the Law of Scotland'. The Short Commentary, although it contained some brilliant and original thinking, was rather uneven and indeed close to being a disappointment from such an author, perhaps because it had of necessity to be completed in some haste to fill a teaching gap. However, when the volume is read again at a distance of thirty years, some harsh judgments expressed at the time of its publication do not bear examination. 'Studies Critical and Comparative' was in the main a collection of papers, addresses, essays and articles delivered and published in various parts of the world during the 1950s and early 1960s. They were devoted to a great variety of legal and constitutional subjects, but again illustrate Tom Smith's abiding interest in the 'mixed systems' of jurisprudence. The article entitled 'Public Interest and the Interests of the Accused in the Criminal Process—Reflections of a Scottish Lawyer' was in substance read in the Graduate Seminar of the Tulane University Law School when Tom Smith was Visiting Professor of European Law at that University in 1957–8. Like his Hamlyn Lectures it contained much that was

penetrating and prophetic on the subject, and illustrates the interesting movement of his mind between the conservative, the liberal, and the pragmatic which sometimes produced a shattering objectivity. One passage out of many must be quoted, since it illustrates not only Tom Smith's wide learning and imagination, but also his anxiety that there should be no whittling down of sensible principles designed to protect the innocent merely because they may on occasion assist the guilty.

The opportunities for exerting pressure on a suspect to confess are greatest when there is no judicial supervision, no legal representation and no public scrutiny. If an accused at his trial seeks to retract a confession allegedly extracted by third-degree methods, his word will stand alone against several police witnesses who may be expected to deny improper pressure. It is well known that in the totalitarian states extra-judicial pressure by brain-washing can eventually convince even the accused that he has committed the most improbable offences, but when a confession has been extorted by less thorough third-degree methods it is likely to be retracted at the trial. The accused may, nevertheless, by then have damaged his position irreparably. Scots law wisely makes it legally incompetent to convict on evidence only of the accused's own confession. To hold otherwise might encourage the police to short-circuit their inquiry. An extreme example was given nearly a century ago by an officer familiar with Indian police methods. He observed, 'There is a great deal of laziness in it. It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes, than to go about in the sun hunting up evidence.' The objection, however, to the extorted confession, which may be unreliable, is not necessarily that it is objectively worthless as evidence but rather that society declines to tolerate conviction even of the guilty by such means.

It is very easy to be wise after the event, but it takes intellect and imagination to foresee it and courage to publish what the majority in this country hope is unthinkable, until it actually happens.

In 1963 Tom Smith became Chairman of the Council of the Stair Society, an association concerned with Scottish legal history, which has published over the years a series of volumes devoted to various aspects of that subject. His approach to the Chairmanship, which he held for five years, was a scholarly blend of the lawyer and the historian. Meetings went smoothly under his benign control, and successful publication continued. In the following year, further to illustrate his versatility and also his capacity to practise the law from the Bench, he was appointed an Honorary Sheriff of the Lothians and Peebles. Almost at the same time he was chosen to be a member of the Academic Advisory Committee for the Universities of St Andrews and Dundee. These two universities had, since beginning separate existences, experienced some difficult problems not only in administrative matters but also in academic fields. It can be seen

that by this time Tom Smith was carrying a heavy load of extremely varied work. When asked to take on new duties his instinct was always to say 'yes'.

When the Scottish Law Commission came into existence in 1965, Tom Smith's career reached a watershed with his appointment as one of the original Scottish Law Commissioners. He had, when the legislation which eventually created the English and Scottish Law Commissions as separate bodies was in course of preparation, realized that the intention of Government was to institute a single law reform body, initially for England and Wales though possibly absorbing Scotland later. Tom Smith had reacted to this idea of a single body in the way one might expect. He rightly suspected a policy of anglicization, and was partly instrumental in inducing at a relatively late stage a Government change of mind. This did not increase his popularity in certain influential legal and bureaucratic circles in Scotland, and it must be confessed that the advent of the Scottish Law Commission received from existing institutions a wind less fair than that at first accorded to its English counterpart. Until 1972 Tom Smith's appointment as a Commissioner was part-time, but in that year he was appointed a full-time Commissioner and remained in that capacity until his retirement in 1981. He thus continued, under greatly increasing pressure, a career in law reform which had begun in 1954 with his appointment to the Scottish Law Reform Committee.

Tom Smith brought to the exacting and laborious work of law reform deep learning and enormous industry. The responsible functions which he performed in the Commission were very much to his taste, and he was a charming, helpful and loyal colleague, attracting the trust and affection of colleagues and staff alike. He could be determined, but never belligerent, in argument. As with all who labour as advisers in the field of systematic law reform he suffered some disappointments, not least in his own chosen fields of the law of Obligations and Property Law. He was by nature a co-operator and, although he was always concerned by advice and encouragement to improve the quality of the Commission's work, purely destructive criticism was not to his taste. It was a relief to him when the ill-starred and ill-fated joint Contract Code project of the English and Scottish Commissions ran into the sand, since, with his specialized knowledge and understanding of both the Scottish Law of Obligations and the English Law of Contract and the Property Law of both countries, he clearly foresaw that the proposals and form of the various English drafts and the nature of any likely legislation would fit very ill the development of the law of Scotland in important legal and commercial areas. He was never a lover of the original Sale of Goods legislation or its method of enactment so far as concerned Scotland. He also understood very clearly

how deeply and widely the English law of Contract was permeated with rules derived from medieval forms of action and from the doctrine of Consideration.

Tom Smith never really came to terms with the political and bureaucratic methods by which responsibility for legislation on Scottish matters, particularly those affecting central principles of Scots law, was, and is, divided up and shared out between Departments of Government and their off-shoots, not only in Scotland but also in Whitehall. These methods most certainly do not encourage or have as their result the prompt, satisfactory and systematic reform and development of the Law of Scotland, nor do they usually give the necessary impetus to legislative reform of the law in general. Government Departments, particularly those in Whitehall, and the Westminster Parliament itself seldom welcome Scottish legislation, even if this merely involves 'putting a kilt' on United Kingdom legislation, to use the contemptuous draftsmen's jargon sometimes expressed in the context of Scottish application clauses and other such devices. 'Scotland-only legislation' is particularly unpopular with those who prepare legislation as well as with those who run the business of the Westminster Parliament, and it is obvious that legislation for systematic reform of the law of Scotland must often fall into this category. Tom Smith did not find these attitudes acceptable or even comprehensible. His long study of the 1707 Union of the Scottish and English parliaments, which led him to some conclusions inconsistent with those of Dicey and his followers, did nothing to reconcile him to a state of affairs which he deplored. Nor did he relish the behind-the-scenes manoeuvring and the employment of unsatisfactory expedients which are often necessary if Scottish law reform legislation is to be obtained within a reasonable time-scale, or indeed at all.

The result was that Tom Smith was happier working away within the four walls of the Scottish Law Commission than he was when involved in the sometimes tawdry work of influencing committees, persuading politicians and bureaucrats or actively promoting legislation. This is not to say that he did not enjoy moving in the great world outside, particularly when this involved travel to other jurisdictions, international discussions, and contacts with jurists in continental Europe, America, Africa, India and elsewhere. He also greatly enjoyed, it should be added, his visits to Gray's Inn, of which as has been said he became an Honorary Bencher, and the renewal and formation of many personal friendships with members of the legal profession in England. He was greatly admired, even by those who disagreed with some of his opinions, for his intellectual power and honesty and his deep learning. Although he was to the end uncompromisingly Scottish in outlook, he was also a citizen of Europe and the world. Indeed as a Scots lawyer he feared the journey into Europe less than he

did the undue influence of Westminster and Whitehall. As a comparatist, he viewed the journey of Scotland into Europe as a return journey, but he nevertheless advised Scots lawyers not to deliver themselves bound into the hands of the Philistines. This was reminiscent of earlier warnings to the same audience that they should guard against encroachment on Scots law by 'the Common Law Cuckoo', in this context an English migrant, and should turn away from following 'Strange Gods' imported from Anglo-American systems of law.

Although Tom Smith in his capacity as a Scottish Law Commissioner accomplished a power of work in his special subjects of Obligations and Property Law, his work on general law reform stretched far beyond even that wide field. His extensive legal knowledge and experience and the scope of his reading outside the law often enabled him to give very positive assistance to colleagues and staff of the Commission who were wrestling with problems of their own outside his particular field. He exercised great influence in both formal and informal discussions, his help was often of inestimable value, and his knowledge of arcane by-ways of law, history and science was a constant source of wonder to those who watched him at work. To take just one example, his contribution to the Commission's work on the crime of Incest, in which there were many potential hazards and pitfalls, was outstanding. His interest in and knowledge of Criminal Law and the Criminal Process, as evidenced by his Hamlyn Lectures and other writings, was unusual for a Scottish academic lawyer of his generation. His knowledge of the Law of Obligations extended into many of the by-ways of Delict. Negligent misrepresentation was a particular interest, and it was fascinating to watch his approach to the problems of Liability for Antenatal Injury. In many ways he contributed generously to the work of others in the Commission, and his approach was almost invariably positive. He attracted respect and affection from both inside and outside the Commission, and during a fairly lengthy period towards the end of his time as a full-time Commissioner he carried out with distinction and success many of the Chairman's duties. If his views sometimes entered the domain of what he wished the law of Scotland could be rather than what it was occasionally doomed by statute and judicial decision to be in fact, this can hardly be said to be a wholly improper or unsound posture for a reformer of the law. But his underlying approach to reform of the Law of Scotland was wherever possible to let it develop from its existing roots and principles, and to eschew legislation except in cases where reform could not be achieved by any other means.

Before and during his seven years as a part-time Scottish Law Commissioner Tom Smith continued to perform his academic duties with vigour and success. Between 1965 and 1968, during his final years in the

Chair of Civil Law at Edinburgh, he was Dean of the Faculty of Law at that University. In 1968 he moved to the Chair of Scots Law there, often regarded as the premier chair of law in Scotland. Before taking up these new duties he had acted as Visiting Lecturer in the Law Faculties of Amsterdam, Leiden and Utrecht, a considerable tribute to his standing as a Civilian and Comparatist. He was also in 1968 admitted Advocate of the Lesotho Bar. In 1969 he was made an Honorary Foreign Member of the American Academy of Arts and Sciences, and in 1970 an Honorary Fellow of the American Society of Legal History.

When Tom Smith in 1972 became a full-time Scottish Law Commissioner, he gave up his Chair of Scots Law and was appointed an Honorary Professor of Law in the Scots Law Department of Edinburgh University. In this latter capacity he instructed in his own time advanced students in law reform and other subjects: Before taking up his full-time duties in the Commission, he had acted as a Visiting Professor of Law at Louisiana State University, a further illustration of his interest in the 'mixed systems' and of his reputation in international circles. Almost immediately after becoming a full-time Commissioner he acted at intervals over a period of two years as Chairman of the Unidroit Committee of Experts on the Uniform Law for the Protection of Good Faith Purchasers of Corporeal Moveables, meeting at Rome, and, at a series of meetings at Strasbourg during the period from 1974 to 1977, as a member of the United Kingdom Delegation to the Council of Europe Committee of Experts on Penalty Clauses. 1976 found him once more at Rome for a meeting of the Second International Congress of Private Law, when he joined in the discussion of private and public aspects of the Law of International Trade. In 1978 he was a member of the United Kingdom Delegation to the Uncitral Committee which met at New York to formulate a draft Convention on International Sale of Goods, and the same year found him in Budapest attending the Tenth International Congress of Comparative Law. This international work involved him in much travel, which as ever he greatly enjoyed, and lengthy discussions, some of which he had begun to find tiring. He was in his element and renewed many friendships at the Fourth, Fifth and Sixth Commonwealth Law Conferences, in 1971 at New Delhi, in 1977 at Edinburgh and in 1980 at Lagos respectively. He attended the New Delhi Conference in his capacity as the then President of the Society of Public Teachers of Law in Britain and Ireland. To the Edinburgh Conference he presented a paper on 'Law Reform: The Contribution of Legal Literature', and to the Lagos Conference, on the invitation of the Nigerian Bar Association who were the sponsors, he delivered a Keynote Address on 'The Reception of the Common Law in the Older Commonwealth'. Immediately after the Fifth Commonwealth Law Conference, he attended

a Conference of Commonwealth Law Reform Agencies held at Marlborough House, London, at which there was a large attendance and a very full discussion of law reform matters.

In 1977 Tom Smith became a fellow of the Royal Society of Edinburgh, and in the same year a *Membre Titulaire* of the International Academy of Comparative Law. He was also in that year honoured by appointment as Tagore Law Professor at the University of Calcutta. In this last capacity he visited India, where his wife had spent her early youth and where he and she had many friends, to deliver the Tagore Law Lectures under the title 'Property Problems in Sale'. These Lectures, which were published in the following year, were typical of Tom Smith's thinking and rank with his finest work. They illustrate the width and depth of his learning and are a remarkable source of enlightenment in the study of the difficult problems in transactions of sale to which they relate. These include the passing of risk, the effects of illegal transfer, the distinction between sale and security, and the protection of good faith purchasers, all subjects to which he had devoted years of thought.

In the same year Tom Smith had been invited to deliver, under the auspices of the Institute of Constitutional and Parliamentary Studies in New Delhi, the Third B. L. Rau Memorial Lectures. He chose as the title for these Lectures, which were delivered during a break on his way to Calcutta, 'Basic Rights and their Enforcement'. They were published in the following year. It is of particular interest that in the opening paragraph of the first of these Lectures Tom Smith made a public declaration of his own approach to British politics: 'Since I must touch on some current political issues in Britain it may be appropriate to stress that I do not, and never have, identified myself with any political party. I find particularly distasteful the sour confrontation of the present Labour and Conservative Parties and their preference for recriminations against each other rather than for self criticism and constructive co-operation over major problems.' In saying this, he no doubt had in mind the then current debates on Scottish devolution, and also the hesitant movement of the United Kingdom into Europe. These Lectures, however, ranged over much wider issues, and contain much that is perceptive and topical on general constitutional questions, basic rights and the Rule of Law. He looked particularly at India, the United Kingdom, the United States of America, and Canada, seeking guidance from the experience in these countries of advanced federal and other forms of merged government. He considered once more the Scottish-English Union of 1707, quoting the following words of Lord Normand: 'Scotland made for the sake of the better future of our island as a whole a complete sacrifice of her national sovereignty to the newly formed Kingdom of Great Britain. England no doubt necessarily

made the same sacrifice, though English historians are curiously reluctant to claim that honour for their country.' Tom Smith added to this the thought that many English constitutional lawyers had similar blind spots, and was unable to resist a final dig at Dicey which may be quoted as typical of the style of droll irony which the lecturer sometimes employed: 'Dicey was, in my opinion, a man of dubious judgment on Irish home rule, the status of women and the sovereignty of Parliament. He once observed "In every part of the world where British interests are at stake I am in favour of advancing these interests even at the cost of war." As he was a rather feeble person he clearly did not envisage personal participation in such martial exploits.'

On a more serious note Tom Smith made some illuminating references to the journey of the United Kingdom into Europe and prospects of federalism. Certain members of the United Kingdom parliament, he observed, 'still seem to console themselves with illusions of legislative omnipotence especially in relation to the legal order of the European Community of which the United Kingdom is now part'. On federalism, with the Union of 1707 in mind, he had this to say:

A federal or confederal solution might well have proved more satisfactory, as the Scottish Commissioners thought at the time of the Union. Lord Acton observed 'A greater democracy must either sacrifice self-government to unity or preserve it by federalism . . . The combination of different nations in one state is as necessary a condition of civilised life as the combination of men in our society.' However, as Dicey remarked, English enthusiasm for federation stops at the English Channel.

At the end of the second of these Lectures Tom Smith expressed in felicitous terms parts of his own legal philosophy:

Those of us who are lawyers think—and rightly think—of our function in exalted terms. Especially in times of social disequilibrium our skills and ethic are required. Plato saw lawyers and physicians as discharging a similar role—one healing the ills of the state and the other the ills of the body. There will be ample scope for our skills for the foreseeable future—but let us hope not too much. May I in conclusion quote Professor Gilman's paraphrase of Justice Holmes 'The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.' This seems a perceptive assessment, but we all have too recent experience of the shaking of the foundations to underestimate the importance of the Rule of Law for the security of basic rights both of individuals and of nations or states.

Tom Smith's B. L. Rau Memorial Lectures are in no sense ephemeral. They are a tribute to wide reading and deep thought, and their content

will remain topical as well as instructive at a time when the United Kingdom is confronted with choices both on Devolution and on Federalism. The Tagore Lectures are a fitting monument to Tom Smith's outstanding expertise in areas of Private Law which he had long pondered while his lectures on 'Basic Rights and their Enforcement', delivered on the same visit to India, encompass much of his mature thought on questions of Constitutional and Public Law.

When the lengthy service of Tom Smith as a Scottish Law Commissioner was coming to an end in 1981, he was created a Knight Bachelor in recognition of his services to the law of Scotland. About the same time he became a Professor Emeritus at the University of Edinburgh. However, any idea that he would now rest from his labours was wholly misconceived. Indeed, one of the most important tasks of his career and working life in the law still lay before him. This was in effect a grand and comprehensive restatement of the Law of Scotland in a series of volumes, containing articles by many selected authors, to be entitled 'The Laws of Scotland: Stair Memorial Encyclopaedia'. Nothing comparable had been attempted in Scotland for half a century. Tom Smith was not only the initiator of the idea of this great work, but, in his capacity as General Editor, was both producer and director. Typically, he sought no remuneration. To this self-imposed labour Tom Smith, despite periods of ill-health, devoted much of his time during the years which remained to him. He was still working actively on the Encyclopaedia, which will be a fitting memorial, until a few days before his death on 15 October 1988 in his 73rd year. Of this great endeavour a Scottish judge of long experience has said:

The time was ripe for such an enterprise and it was fortunate indeed that the time also brought forth the man. In addition to realising the urgent need for such a comprehensive restatement of our native law Smith saw that the continuing development of the EEC would lead to the development of what in time could become a Common European Jurisprudence, at least in those fields of activity, commercial and social, which were affected or controlled by the Community. In these fields Scots Law, with its roots in the Civil Law and its flexibility, Smith realised, could and, as he thought, should, have a part to play. Into the task of securing the necessary support and enlisting contributors Smith embarked all his energies and enthusiasm. It was fortunate that he lived long enough to see his efforts rewarded and publication in orderly fashion begun and continuing steadily.

In evaluating Tom Smith's career as a whole the same writer added:

Smith will undoubtedly be remembered not merely as a brilliant scholar, or even as a vigorous and combative writer on so many aspects of the Law of Scotland, but also as one who in effect brought that law back into the mainstream of legal development within the community of Europe. For this alone, he and his work will continue to be acclaimed.

From such a source this is high praise indeed, and no less the judgment from the same lips that Tom Smith was 'the foremost legal scholar of his age and generation in Scotland'. Many lawyers, in a variety of jurisdictions, would say 'Aye' to this.

It is inappropriate, however, when taking leave of this dear man and his memory to conclude merely with a professional and academic judgment. Tom Smith was a man of many parts, endowed with intellect far above the ordinary, a delightful companion and colleague, brilliant and fascinating in conversation, with a wide circle of friends and acquaintances at home and across the world. He was a man of courage in both peace and war. He rose above periods of serious ill-health. He recognized and regretted his own weaknesses. As with most men his life passed through dark passages. Normally cheerful and humorous, he maintained a façade of good cheer to the outside world even when his own inner feelings must have been desolate. He was a true comrade to those in trouble. During his terminal illness he faced death with gallantry. He is remembered with deep affection and respect by many contemporaries of his own and other generations, notably by those whom he instructed and inspired, and he has left a gap impossible to fill.

THE HON. LORD HUNTER