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A Short Commentary on the Law of Scotland, by T. B. Smith, Q.C., D.C.L., LL.D., F.B.A., Professor of Civil Law in the University of Edinburgh.
(Edinburgh: W. Green & Son, Ltd. 1962. xx and 865 and (appendices, tables and index) 112 pp.)

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"(3) If police practices of this nature are to be legally sanctioned, what limitations should be imposed?"

"(4) With respect to police arrest statutes generally, should more freedom be granted to the police in recognition of their contentions that existing laws are obsolete and hamper police attempts to meet the public demand for adequate police protection?"²

The impact of the book in its entirety is highly effective. Although at times individual papers, particularly in the foreign law section, seem to be unduly concerned with the minutiae of rule, and lose contact somewhat with broader policy considerations, generally the book successfully pursues its objective — "the quest for balance." The inclusion of foreign law commentaries is certainly appropriate, for, as suggested by Justice Black in his concurring opinion in *Rochin v. California*,³ the search for the balance "implicit in the concept of ordered liberty"⁴ is not the exclusive concern of the people of the English-speaking world. This fine book is an articulate witness to the magnificent contribution which Northwestern University's School of Law has long made in the areas of evidence and criminal procedure, and thus a most appropriate outgrowth of its centennial celebration.

George W. Pugh*

A Short Commentary on the Law of Scotland, by T. B. Smith, Q.C., D.C.L., LL.D., F.B.A., Professor of Civil Law in the University of Edinburgh. (Edinburgh: W. Green & Son, Ltd. 1962. xx and 865 and (appendices, tables and index) 112 pp.)

Also published as:

Scotland: The Development of its Laws and Constitution, by T. B. Smith, Q.C., D.C.L., LL.D., F.B.A., Professor of Civil Law in the University of Edinburgh. (London: Stevens & Sons, Ltd. The British Commonwealth—The Development of its

2. POLICE POWER AND INDIVIDUAL FREEDOM — THE QUEST FOR BALANCE 9 (Sowle ed. 1962).

3. 342 U.S. 165, 175-76 (1952).

4. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

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Laws and Constitutions, Vol. 11. 1962. xx and 865 and (appendices, tables and index) 112 pp.)

Scotland and Louisiana, Quebec and South Africa have this in common, that the basic Romanism of their law, variously mediated, has been materially affected by that of England, dominant or irredentist. Of the four, Scotland is the most precarious. Like South Africa, it has failed to give definitive form to its law by means of codification, but whereas that Republic has control of its own courts and a law-making body apt to do the will of the nation, Scotland's statutes come from a legislature where Scots are outnumbered 559 to 71, and its civil appeals go to a tribunal where a majority of the judges are strangers to the law they profess to administer. Scotland is not, then, in matters of law, clearly the master of her fate.

The situation, indeed, is so critical that one is weakly tempted to regard the cause as lost. There are very good grounds for not doing so. Secondary grounds are that the law of Scotland, based on principle rather than precedent, is fitter for progress than English law; that Scotland should have a system whose morality is overt rather than surreptitious; that a world largely divided between the civilian and the common law should retain some examples of their interaction; and, on aesthetic grounds, that "either oil or water is preferable to the unsatisfactory emulsion which results from attempts to mix the two."¹ The principal reason, however, concerns the continued existence of the Scots as a distinguishable nation. That they presently feel themselves to be different from the English is an undeniable social fact, although they have no separate language in which to express and confirm their distinctiveness. This being so, it would surely be sad to allow to disappear from the Family of Nations a group which has contributed to civilization, *inter alia*, the first significant Declaration of Independence, an endless stream of missionaries, colonists and administrators, some great moral philosophy, a familiar beverage, and one Very Romantic Queen. But since a group which can individuate itself only with reference to history is sure to founder in fainéant archaism, it is essential that some vital institutions remain to which the Scottish consciousness may attach itself. There are only two candidates — the Church of Scotland, already threatened from within by the ecumenical movement, and the Law of Scotland,

1. LORD COOPER OF CULROSS, *SELECTED PAPERS* 191 (1957), cited in SMITH, *COMMENTARY* 666.

which has been increasingly darkened by the malign shadow from the south. On Scotland's law depends her soul.

In such a crisis it is proper for the committed scholar to appear as the herald, to speak in the imperative rather than the indicative, and to sound the call to arms even by means of a Commentary on the Law. Indeed, a commentary is an ideal medium, directed as it is to the young on whose eventual stance the case depends. Since it is the law as it is which is in imbalance, such a commentary should not be expected to give a balanced view of it. It will be manifesto scholarship, but it need be none the less scholarship and may be all the more interesting for that reason. The cry of the manifesto will be not revolution but return. "Scotland has too often gone awhoring after strange gods, and . . . the time is ripe to return to the juristic altars of our fathers."² So Professor Smith puts it, and admirably sustains his case in an excellently exciting and illuminating book. If it fails to have effect, the cause was already lost.

Readers of this Review may well be surprised at the appearance of a single-volume commentary on the whole law of a jurisdiction. There are both historical and contemporary justifications for books of this type. They derive from the publications of the institutional writers (Stair, Erskine and Bell for private law) whose works have primary authority in Scotland; and they are used as a guide by students following the compendious course in Scots Law offered by the Universities of Scotland. In fact, since this publication is to be complemented by a volume on Industrial and Mercantile Law by Professor Gow of McGill University, Professor Smith does not deal at any length with such topics as insolvency, corporations, and the particular contracts, but he does include, in addition to valuable chapters on the history and sources of Scots law and illuminating notes on the legal profession and education in Scotland, such parts of constitutional law as are specifically referable to Scotland, criminal law and procedure, family law, succession, property, and obligations.

This book, as the dual form of its publication indicates, is directed both to students in Scottish Universities and to readers abroad who want to discover what Scots law is about. Since readers of both classes will in any case have to refer to the standard treatises for a full treatment of any specific point of

law in which they are interested, a work like this should not try to be a pocket Corpus or a portable library. Nor need space be devoted to subjects in proportion to their practical importance. The first essential is that it should be interesting, the second that it should deal in sufficient detail with those topics which are central to the system, not in the sense that they provide the bulk of litigation but in that they neatly illuminate the method and genius of the law. In both essentials Professor Smith triumphs.

Examples of such topics are the generalized principle of liability for fault in delict (as opposed to the directional duty in *Bourhill v. Young*,³ and the rule that pecuniary damage inflicted by non-physical means is non-compensable (*Candler v. Crane, Christmas*,⁴ now overruled by *Hedley, Byrne v. Heller*⁵)), the generalized principle of unjustified enrichment, the *ius quaesitum tertio*, the principle of abuse of rights exemplified in property relations by the law of *aemulatio vicini*, and the unilateral promise or pollicitation. Each of these crucial subjects is treated with great care and lucidity; thus in summing up the differences between the Scots law of error and the English law of mistake the author observes "Civilian systems are less concerned with the dishonesty of defenders than with the vitiated consent of pursuers seeking relief on such terms as the courts may think just."⁶ This is fine. However, the author is so keen to maximize the differences of Scots law that he tends to emphasize the principle at the expense of pointing out the limits of its application. So he takes a very wide view of the obligation of recompense, which certainly needs to be carefully restricted, and he suggests no exceptions to the principle that a person causing damage by *culpa* should respond in damages. While it is true that fundamental principles must be restated when they show signs of being submerged by specific decisions, students need some indication of how these principles work in practice. *Petere fontes* is fine; but we also need a view of the course of the river. In one case at least, the author does not draw all the consequences from the principle he adopts; he embraces the doctrine of subjective test of intention in homicide, but would convict the man whose unreasonable mistake prevented the formation of that intention.

3. [1943] A.C. 92 (Scot.).

4. [1951] 2 K.B. 164 (C.A.).

5. [1963] 3 WEEKLY L. REV. 101 (H.L.).

6. P. 810.

The Louisiana lawyer will be particularly interested in the chapter on trusts, in which Professor Smith clearly shows that this institution is not dependent on a bifurcation of jurisdictions nor yet on a splitting of ownership; Scotland's very flexible trust developed from the principles of mandate and deposit plus change of title, and appears to use the principle of unjust enrichment for such tracing of trust property as is permitted. He will note, too, that the legislature succeeded as early as 1449 in transforming the personal contract of lease into a real right by means of an act for the relief of "paur tennentes." The author's observations on the law of defamation should also be of interest in a civilian jurisdiction which has had some trouble with that delict; Scots law recognizes an action for solatium based on insult (which need not be published to third parties) as well as one based on injury to reputation for patrimonial damage (which must be proved). Further, the author sees the possibility of basing an action for invasion of privacy either on the nominate delict of *contumelia*, or on the general principle of liability for harm caused *animo injuriandi*.

In a work which gives a conspectus of such a large part of the law, structure is extremely important. The rival publication, *Glog & Henderson's Introduction to the Law of Scotland*, contains forty-nine equiparated chapters in no rational order, but Professor Smith has obviously given a great deal of thought to the matter, and the result, though unorthodox, has much to recommend it. Thus he contrives to produce a "general part" to the private law in which he distinguishes contract from conveyance and acts (juristic and illicit) from facts, as well as discussing good faith (which, however, does not appear in the Table of Contents). In the main body of private law succession appears sensibly between family law and property, trusts between property and obligations. The last category is treated in the order quasi-contract, strict liability, delict and voluntary obligations. It might be suggested that quasi-contract (restitution and recompense) should come at the end, both because it is really subsidiary remedy and because it is difficult (especially if it operates after the reduction of a contract relatively null) to understand its function until the area of operation of voluntary and delictal obligations has been traversed. Despite such trivial objections, the author is to be congratulated for his efforts and for their success. Even in codified countries students often have difficulty in seeing the legal system as a map rather

than a list; for Scottish students it must hitherto have been impossible.

The author is very insistent on terminology, sometimes with good reason, sometimes without. Thus it is irksome to find him interpolating "(sc. delictual)" after the term "tortious" in a United Kingdom statute; nor need he have added, either in text or footnote, the explanation "*anglicé* execution" quite every time he refers to diligence, especially as he leaves the difficult sentence "Housebreaking is not itself a point of dittay" without elucidation; nor can any good come of trying to describe breach of statutory duty as "quasi-delict." On the other hand, he is wise to discourage the use of the terms "void" and "voidable" in contractual matters, since their use would facilitate the continued importation of English cases which use those terms with un-Scottish results; again, "culpa" in the sense of fault must be distinguished from that use of the word negligence which signifies a complete cause of action in tort; and it is interesting to learn how the Scottish *actio injuriarum*, used by the relatives of one wrongously killed by the defender, differs from the process of the same name used by the Romans. The author's fascination by terms will provide collateral pleasure for the reader who enjoys Sir Walter Scott. He will be delighted to discover the servitude known as "Fuel, Feal and Divot," still the cause of unneighborly dispute in the Crofting Counties; he will learn to disapprove murmuring judges, stouthrief and hamesucken (visiting a man's home to beat him up), and to distinguish spuilzie from tailzie. For all his pride in his heritage, however, Professor Smith must not be taken for Gothic; he advocates a modern use of the fertile old principles, and it is for their unprogressive effect that he condemns the accretions from abroad.

Professor Smith would resent the charge that he is unbiased; no missionary is. Too obvious a tendentiousness, however, may weaken what is otherwise well said. For example, although he does admit the confusion of Scots law on the constitution of formal obligations and the formal means of proving other obligations, he might, without weakening his case, have admitted that England has dealt much more satisfactorily than Scotland with the question of the liability of a hospital for its medical staff. *Odium Anglorum* is a proper adjunct of Scots pride, but while it usually provokes noble wrath, it occasionally leads the author to self-defeat, petulance or disingenuousness. Thus,

instead of claiming that the Scots lawyer is "impenitently unversed in the English law," he could often strengthen his differentiation of the Scots law by using his Oxford training to explain the English law rather than damn it. Again, it was monstrous of Viscount Montgomery to refer to parts of Scotland as "the tribal areas"; but the correspondence column of a newspaper is a fitter place for the rebuke he merits than page 592 of the present Commentary. Lastly, when the author says that "civil jury trial . . . has outstayed its welcome"⁷ he really should have referred to the recent Scottish Commission which voted to retain it.

These are minor criticisms. The book is a remarkable one, and will appeal to all who oppose the view that lawyers are conscripts to dullness, and that the tartan of a colorful personality must never peep from the dun of the academic. The further merits of this book may be inferred *ex contrario* from the indecorous and savage review by one of the author's colleagues printed in 26 *Modern Law Review* 466 (1963).

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7. P. 588.

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