Laws and Languages: Some Historical Notes from Scotland

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I would like to begin by thanking the Ius Commune Research School for a generous invitation to my Scottish colleagues and me to attend this meeting in Utrecht. The opportunity to join you on this occasion is an extremely welcome one, and I hope that it may be a basis upon which future co-operation and collaboration between us will grow. So far as the Scots are concerned, this is a further renewal of the links that have long bound our country to the Low Countries in matters of law. It is well known, I think, that these links were probably at their strongest in the seventeenth and early eighteenth centuries, when generations of Scottish students made their way to the law schools of Leiden and Utrecht, leading to a major Roman-Dutch influence on the development of Scots law in that period. But such links do in fact have a longer history still; when the University of Louvain was founded in 1425, Scots were amongst its earliest students and their ranks include a number of figures which were to play a major role in Scottish law and government in the fifteenth century. Going still further back into the Middle Ages, we can find extensive settlement from Flanders occurring in twelfth- and thirteenth-century Scotland: much of it mercantile in nature and so extremely important in east-coast Scottish towns such as Berwick, Dundee and Aberdeen, but also including a significant feudal or military dimension in areas such as Clydesdale in the south and Moray and Garioch in the north-east. This explains

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1 Professor of Private Law, University of Edinburgh. This is the text of a paper delivered at Utrecht on 29 November 2001. Parts of it are extracted from a previously published paper, ‘Linguistic Communities in Medieval Scots Law’, in Communities and Courts in Britain 1150-1900, ed. C.W. Brooks and M. Lobban (London and Rio Grande, 1997). I am grateful for the help provided in preparing this text by my colleagues George Gretton and Niamh nic Shuibhne, and by my father, John MacQueen.


4 See the contributions of L. Toorians (‘Twelfth-century Flemish Settlements in Scotland’) and A. Stevenson (‘The Flemish Dimension of the Auld Alliance’) to Simpson (ed.), Scotland and the Low Countries 1124-1994. Garioch, which comes from the Gaelic gairbheach, ‘rough, rocky place’, is today pronounced ‘geery’, but possibly not so in medieval times.
why to this day ‘Fleming’ remains a common Scottish surname, although it does not explain a fourteenth-century charter of Thomas earl of Mar in favour of his faithful and beloved clerk John of Mar, canon of Aberdeen, giving him lands in Garioch ‘with all its rightful customs and just pertinents etc, together with lege Fleminga which is called "Fleming lauch’.’

This suggests that as late as the mid-fourteenth century there still survived in north-east Scotland a community with sufficiently distinctive local traits or customs to be identified as Flemish. At present, however, there seems no way to tell what these traits or customs may have been, or what they may have contributed to the development of Scots law. However, some traces of Low Country links may have been left in the Scots language, words such as ‘golf’, ‘scone’, ‘croon’ (sing softly), ‘dowp’ (buttocks), ‘pinkie’ (little finger), ‘redd’ (tidy up), ‘mutch’ (woman’s cap), ‘loun’ (rogue, lad), ‘callant’ (lad) and ‘bucht’ (sheep-pen) apparently having been borrowed from Dutch at different times before 1600.

It was thought about these medieval matters and the connections between the Low Countries and Scotland in the development of the ius commune, old and new, that first provided me with the theme I wish to develop a little today. The thoughts were further reinforced a few weeks ago in the appropriate setting of Maastricht when I was a member of a panel of about ten persons, six of whom were Germans, three Dutch and one (me) a Scot; yet our language for the purposes of the panel was English, an issue about which I was reproached - quite rightly - later in the conference when discussing the meaning of the word ‘principles’. That in turn brought to mind a debate that has occasionally surfaced in the proceedings of the Commission on European Contract Law, where the language is generally English but French is also officially allowed. How far is a common language a prerequisite of a common law? If so, how far does the choice of language then dictate the substantive outcome of the rules to be the common law?

Scotland may not appear to be the most obvious place in which to start such a discussion; the rich linguistic complexities of the Low Countries, and the intense political and legal debates to which they give rise, might seem much more likely to prove fertile territory for exploration. Yet Scotland is not so monoglot as might be thought from a distance. Certainly English is the dominant language of public and private discourse, but the Scots vernacular, springing ultimately from the Old or Middle English of the Anglo-Saxons who were penetrating south-east Scotland from the seventh century on, has a good claim to be something more than a variant or dialect of standard modern English, in terms of both vocabulary and syntax, even before one begins to take its regional differences into account. Then there is Gaelic, the language of the Highlands and Islands, now mostly confined to the Western Isles as a first tongue but also enjoying something of a revival in cities such as Edinburgh and Glasgow (there is a Gaelic-speaking playgroup near where I live). Finally, there are the diverse languages of the immigrant communities, in particular Urdu. Sometimes the languages, or their supporters, come into political conflict reminiscent of

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5 *Reg. Mag. Sig.*, vol. 1, app. 1, no. 128; see also ibid., app. 2, no. 1297. The lands granted were called ‘Cruceristoun’ (identified as modern Courtestown, near Leslie, Aberdeenshire, in K.J. Stringer, *Earl David of Huntingdon 1152-1219: A Study in Anglo-Scottish History* (Edinburgh, 1985), p. 84).


7 Note that in the modern *New Testament in Scots* by W.L. Lorimer (Edinburgh, 1985) the Devil alone speaks in standard English.
the late medieval ‘Flyting of Dunbar and Kennedie’ (a lively exchange of linguistic abuse across the Scots/Gaelic divide). For example, Scottish Nationalist Party proposals for a Gaelic Language Bill, imposing upon public bodies in Scotland a duty to prepare, publish and implement a Gaelic Language Plan, were followed recently by complaints from a Scottish Parliament cross-party group on the Scots language, that ‘there are people, including MSPs, who speak very disparagingly about both Scots and Gaelic, but Scots in particular.’ Gaelic (but not Scots as distinct from standard English) is one of the official languages of the Scottish Parliament, and a debate on a ‘Programme of Action for Scots and Gaelic in the European Year of Languages’ was conducted with some contributions (including the Ministerial response) in the latter tongue on 7 September 2000.

In December 1993 and again in April 1994 Scottish judges made headlines and generated newspaper correspondence column controversy by threatening to hold accused persons guilty of contempt of court for using the word ‘aye’ rather than ‘yes’ when seeking to answer a question in the affirmative. In particular Sheriff Irvine Smith, who has a well-earned reputation as a legal historian and also as a superb speaker at Burns suppers and other post-prandial occasions, is reported to have advised one hapless individual that the word ‘ay’ in Scots means ‘always’ rather than ‘yes’. Rightly or wrongly, it appears that in general the language of Her Majesty’s courts in Scotland is to be the Queen’s English. This is borne out by other recent case law: in 1982 and 1985, for example, accused persons were denied the right to be tried in Gaelic with an interpreter, when each was also able to speak in English. We may note that, exceptionally, the Scottish

8 See The Poems of William Dunbar, ed. P. Bawcutt, 2 vols. (Glasgow, 1998), no. 65. The Scots-speaking Dunbar calls the Gaelic-speaking Kennedy an “Iersche brybour baird” (i.e. a Gaelic-speaking vagabond minstrel) and adds ‘Thy trechour tung has tane an heland strynd - Ane lawland ers wald mak a better nois’ (i.e. your treacherous tongue has a Highland character; a lowland arse would make a better noise). For Kennedy Gaelic is ‘all trew Scottis mennis lede [speech], the gud langage of this land’, while ‘treasoun broght Inglise rumplis [tails] in’ to Scotland. He notes that Scotland fought England because ‘Scottis lordis could nocht obey Inglis lawis.’


10 See The Scotsman, 9 Jan. 2002, for the complaints.


14 Note, however, that Australian researchers have argued that the Queen’s pronunciation of English has lapsed somewhat in the course of her long reign, with her vowel sounds becoming less ‘upper-class’ and more akin to the standard accent of southern England; J. Harrington, S. Palethorpe and C.I. Watson, ‘Does the Queen Speak the Queen’s English?’, Nature, 408 (2000) 927.

15 Taylor v Haughey 1982 SCCR 360, commented on by A.C. Evans, ‘Use of Gaelic in Court Proceedings’, 1982 Scots Law Times (News) 286. See also Aitchison v Wringe 1985 SCCR 134. It is also doubtful whether this approach will survive the UK’s 2001 accession to the European Charter for Regional or Minority Languages,
Land Court must by statute include at least one Gaelic speaker amongst its members. In July 2001 the Sheriff Principal of Grampian, Highland and Islands, inspired by the recent UK ratification of the European Charter for Regional or Minority Languages, laid down that the sheriff courts in Stornoway and Lochmaddy in the Western Isles, and Portree in Skye, would allow party litigants to address the court, or witnesses to give evidence, in Gaelic in civil (but not criminal) proceedings, provided that notice of two weeks was given (to allow for the provision of an interpreter). Sheriff’s might, however, veto the right to speak in Gaelic if they considered that otherwise the proper administration of justice would be hampered. Of course there may always be a dash of lawyers’ Latin (or code mixing, as linguistic discourse would have it) to bring linguistic variety in court proceedings and in legal writing and teaching; although in June 2001 the Appeal Court of the High Court of Justiciary had to consider a claim that use of the maxim *omnia rite et solemniter acta praesumuntur* in proceedings arising from the eleven-times repeated failure of an individual known as Robbie the Pict to pay the toll exigible to cross the Skye Bridge infringed Robbie’s right to a fair trial under Article 6 of the European Convention on Human Rights. The court rejected the argument, presented by Robbie in person, that he was entitled to have the proceedings conducted in a language that he could understand, because ‘it was clear from the appellant’s presentation of his argument that he did fully understand the maxim’.

We therefore seem rather far in modern practice from the linguistic diversity (or, reverting to the terminology of linguistics, language contact) which, as I shall now argue, characterised the practice of law as it became the common law - or ius commune - of the medieval kingdom of the Scots. The development of Scottish common law began in the twelfth century, and from the start its language of record was Latin. The law centred on land, and the charters and other documents which recorded grants and transfers of land were generally in Latin, although over time documents in Scots became more common. Only in 1847 did statute discussed below note 14 and text accompanying note 63. In present practice, if an accused or witness has no English (a not uncommon occurrence in practice), an interpreter will be provided by the Crown, or the appropriate party. This is not always free from difficulty; see *Mikhailitchenko v Normand* 1993 SLT 1138, and A.-S. Vassenaix, ‘Court Interpreters in Scotland’, 1996 *Scots Law Times* (News) 197. The expense may be borne by legal aid if the Scottish Legal Aid Board can be persuaded that it is justified. See for example *Montes v HMA* 1990 SCCR 645.

16 Scottish Land Court Act 1993, s. 1, replacing the Small Landholders (Scotland) Act 1911, s. 3, as amended by Agriculture (Scotland) Act 1948, s. 70(1).

17 For the text of the Act of Court, see 2001 *Scots Law Times* (News) 194. For the language charter (ETS No. 148), enacted 5 November 1992 and ratified by the UK 27 March 2001 (entering into force 1 July 2001), see <http://conventions.coe.int/>.


19 2001 GWD 20-764. On Robbie the Pict see <http://www.pictphd.demon.co.uk>.

20 At para. 4.

21 For an interesting analysis of the deployment of the Latin charter in Gaelic Scotland and a challenge to the idea of the ‘Celtic charter’, at least in Scotland, see D. Broun, *The Charters of Gaelic Scotland and Ireland in the Early and Central Middle Ages*, Quiggin Pamphlets on the Sources of Medieval Gaelic History 2 (Cambridge,
provide that henceforth Crown writs would be in English rather than Latin.\textsuperscript{22} The ‘brieves’ or writs with which many forms of process before the medieval courts were commenced were also in Latin, as were the earliest records of the courts themselves. The assizes, statutes and other legislative acts of the twelfth to the fourteenth centuries have all come down to us in Latin, although it needs to be borne in mind that the surviving manuscripts in which they are recorded are all of significantly later date than the material itself and may not therefore reflect absolutely faithfully the original texts. And finally, by and large the treatises and other writings of the medieval common law were composed in Latin as well.

On the face of it, the Latinity of the Scots common law began to be eroded only in the later fourteenth century. It is at this point that we begin to find formal documents in Scots as well as Latin. The Scots of such documents was ‘closely modelled upon the Latin forms which had been current for three hundred years and more’; thus, for example, ‘Till al that thir present lettres seis or herys’ is the Scots of Universis hac presentes literas visuris vel audituris.\textsuperscript{23} The sciatis or noveritis with which many formal Latin documents open became ‘Be it kenned’ in Scots ones. Latinisms can also be observed in Scots word order - verbs at the end of sentences, adjectives following nouns - and in the use of plural forms of adjectives and pronouns.\textsuperscript{24} The Latin treatises of the law - Regiam Majestatem, Quoniam Attachiaienta, Leges Burgorum, Leges Forestarum and Statuta Gilde - began to be translated into Scots around this time.\textsuperscript{25} Some of the vernacular technical terms that become apparent from these translations were evidently derived from the Latin: ‘brieve’ or ‘brief’ for writ is from breve, while ‘spuilzie’ seems to come ultimately from the canonist actio spolii. Court and other records were certainly being kept in Scots rather than Latin by the fifteenth century, although the latter was retained for some processes, most notably those involving the use of royal brieves.\textsuperscript{26}

But it is not simply the case that Latin material and material which had formerly been kept in Latin was now presented in Scots instead. The language of legislation shifted also, and evidently this was not simply a matter of translating existing texts or well-known formulae. Thus in 1397 and 1399 legislation of the council general was recorded in Scots,\textsuperscript{27} although it was to be

\textsuperscript{22} Lands Transference Act 1847 (10 & 11 Vict, c. 51), s. 25. See also P. Gouldesbrough, Formulary of Old Scots Legal Documents, Stair Society vol. 36 (Edinburgh, 1985), chs. 11-15.


\textsuperscript{25} For references see H.L. MacQueen, Common Law and Feudal Society in Medieval Scotland (Edinburgh, 1993), pp. 93-4 and relevant notes.

\textsuperscript{26} Sheriff Court Book of Fife, ed. W.C. Dickinson (Scottish History Society, Edinburgh, 1929); Court Book of the Barony of Carnwath, ed. W.C. Dickinson (Scottish History Society, Edinburgh, 1937).

\textsuperscript{27} Acts of the Parliaments of Scotland (APS), ed. T. Thomson and C. Innes (Edinburgh, 1844-1875), i, pp. 570, 572.
another twenty-five years before parliamentary acts ceased to be laid down in Latin. The use of Scots in 1397 was ‘probably to ensure accurate proclamation and wide understanding’; an important point to which I shall return.

Latin was far from disappearing completely from the law. The ‘Education Act’ of 1496, which required the eldest sons of barons and freeholders to attend the schools of ‘art and jure’ and study the laws in order that they might be better judges in the sheriff and other local courts, also provided that such sons should first obtain ‘perfite Latin’ at the grammar schools, without which, presumably, academic study of the laws would have been at least difficult. As already noted, Latin retained a central role in conveyancing documentation until the nineteenth century; and when John Millar of Glasgow University gave up teaching Roman law in Latin in the later eighteenth century, it was something of a revolution. Indeed, even at the present day there is a widespread although erroneous popular belief in Scotland that a qualification in Latin is a necessary prerequisite for admission to a law degree and to become a lawyer. This may owe something to the centrality of Roman law in the Scottish legal tradition, naturally encouraging a Latinity in lawyers’ habits of thought and modes of expression that often manifested itself in the vernacular writings of the early modern period when authors moved quite naturally from Scots to Latin and back again within the course of a sentence.

But the rise of Scots to take its place in the law of Scotland alongside and often in place of Latin should not be seen in the simple lineal terms hinging round the late fourteenth century which the sketch just given may suggest. The written record, although obviously important and significant in its own right, may obscure the role which Scots had already long enjoyed within the legal system, and it also may not do justice to the full complexity of legal linguistic developments. In particular, it may conceal the interaction between legal documents (texts, records and writings required in the course of court procedure) and the spoken languages of those participating in legal process, whether in court or elsewhere.

We must take account of at least three vernaculars in medieval Scotland, of which Scots is only one. The others are Gaelic and, less obviously, French. (Probably we should add Flemish to this list, in the light of my earlier remarks about Flanders). The origins of the Scots common

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28 See APS, ii, passim.


30 APS, ii, p. 238 (c. 3). The Act is generally linked to the foundation of King’s College, Aberdeen, in 1495, and the ‘laws’ referred to are probably the Civil (or imperial) laws; see H.L. MacQueen, ‘The Foundation of Law Teaching at the University of Aberdeen’, in The Civilian Tradition and Scots Law, ed. D.L. Carey Miller and R. Zimmermann (Berlin, 1997), at p. 68.


law lie, it seems to me, somewhere in the great twelfth-century incursion of French-speaking Anglo-Normans under the patronage of kings who were said by contemporaries to ‘be rather Frenchmen in race, manners, language and outlook . . . [and to] hold only Frenchmen dear and never to love their own people’. The result was a society in which, like others on the frontiers of medieval Europe, various languages must have come into contact with one another in the law courts and other fora. In the twelfth century it was not uncommon for royal charters to have a racial address to all the king’s subjects, ‘Franci, Anglici’ and, north of Forth, ‘Scoti’. This seems to refer to the various languages of the king’s subjects - French, English (to be understood as the early form of what we have so far called Scots), and Gaelic. Certainly the law was centrally concerned with the feudal land-holdings of the Anglo-Norman incomers and their descendants, and it borrowed heavily from the common law of England, which was in later centuries to develop its own remarkable vernacular, ‘law French’. There is some written evidence that French was also one of the languages of early Scots law, and this, it is suggested, must reflect oral use of that language in legal business. The earliest evidence of which I am aware is the so-called Leges inter Brettos et Scotos. In the edition of the Leges printed in the first volume of the Acts of the Parliament of Scotland (published in 1875), three parallel texts are given, going across the page from left to right in Latin, French and Scots. The earliest is in fact the French text, which comes from the earliest surviving Scottish legal manuscript, the Berne MS, which is to be dated c.1270.

There are several points of interest and importance about this particular text, some of which I have dealt with elsewhere. Here its language is the important point. The text deals with compensation payments due when particular persons are slain or injured. These payments are variously referred to in the French, Latin and Scots texts as cro, galnes, enach and gelchach or kelchin. These are evidently not French words, and nor are thayn and ogettheyrn, which also appear in the text as indicators of personal status affecting the amount of compensation recoverable. All but the Anglo-Saxon thayn come from the Celtic tradition and have parallels in


36 APS, i, pp. 663-65.

37 The MS is in the National Archives of Scotland, call no. PA 5/1. A digital version is available at <http://www.stairsociety.org>. The text of the ‘Leges inter Brettos et Scotos’ is at f. 61r-v.

Wales and Ireland. They were evidently untranslatable not only into French but also into the later Latin and Scots.

Behind the texts that have come down to us, it would seem, there lies a text originally in a Celtic language or languages. If this is right, then we have to explain why it was seen fit to provide a French version. Perhaps it owed something to the integration of the Anglo-Norman settlers and their descendants into the native society of western and northern Scotland in the twelfth and thirteenth centuries, for example through marriages between men of French descent and the daughters of Gaelic earls such as that of William Comyn with the heiress of Buchan early in the thirteenth century or, over sixty years later, that of Robert Bruce of Annandale with Marjorie, already countess of Carrick. Or perhaps its production should be linked with the Francophile tendencies of at least some parts of Gaelic-speaking society. This can perhaps be best illustrated by the careers of some of the lords of Galloway in the twelfth and thirteenth centuries. Although without doubt Gaelic-speaking and exercising a Gaelic form of lordship within their territory, they made grants of land in feudal form from the mid-twelfth century on, married into families of French descent, and founded Cistercian abbeys at Dundrennan around 1142 and at Glenluce in 1192. Lachlan, who held the lordship from 1185-1200, preferred to call himself by the evocative Frankish name of Roland, and may also have been under French influence when he named his heir Alan. It has been suggested that the *Roman de Fergus*, a French romance on the career of the first known lord of Galloway, was commissioned by one of his descendants, although there is dispute as to whether it was Roland or Alan (d. 1234), or perhaps even Alan’s daughter Dervorguilla Balliol (d. 1290), founder in 1273 of another Cistercian abbey, Sweetheart (Dulce Cor) near Dumfries, as well as of Balliol College, Oxford. The Balliol possibility is particularly interesting in the present context, since the Berne MS may also have Balliol links.

A practical purpose for the French translation of the *Leges* is supported by the fact that the text in the Berne MS certainly does not seem to have been merely the work of an antiquarian

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or a romantic Celtic revivalist. There were *ogettheyrns* in thirteenth-century Scotland, while some of the other terms used, such as *cro* and *thayn*, still survived as current terminology for existing institutions as late as the fifteenth century. Underlining a contemporary perception of utility, the text in its Latin version was to be incorporated within *Regiam Majestatem*, perhaps around 1318, to be translated later into Scots along with the rest of that work.

The broad pattern here suggested is a move from the Celtic vernacular through French into Latin and finally into Scots as the text’s relation to legal developments changed. And even this cannot be the whole story, given the presence of Anglo-Saxon elements suggesting further inter-mingling of languages at some stage, presumably early, in the development of the text. Even a superficial analysis such as this suggests the complexity of the linguistic situation in medieval Scotland and its law. There were various linguistic communities which of necessity interacted; and that interaction encompassed law and legal business. Dr John Bannerman has traced the relationship between Gaelic, Scots and Latin, and it is clear from his study, and from the words I have ventured here about the *Leges inter Brettos et Scotos*, that all three interacted from the twelfth century on, especially in legal contexts, where perhaps a particular stimulus was encounters between the languages in the courts. Nor is the picture one of the decline of Gaelic in the face of Scots and Latin; it can be argued that the fourteenth century saw the increasing respectability of Gaelic terms, or at any rate Scotticised versions thereof, appearing in otherwise Latin documents of the greatest formality. Indeed there is some fragmentary evidence that legal documents which in other parts of Scotland would have been cast in Latin or Scots were in the Highlands drafted in Gaelic until a late period. Moreover, within the framework of the later medieval common law there operated significant figures who must have been at least bi-lingual in Scots and Gaelic. I have not come across evidence for the use of interpreters in the medieval Scottish courts comparable to those found in other multi-lingual contexts in Europe, but it may

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42 Liber Cartarum Prioratus Sancti Andree (Bannatyne Club, Edinburgh, 1841), p. 349; and Barrow, ‘Witnesses’, pp. 10, 19 n. 76 for *ogettheyrns*.


not have been necessary very often. One other intriguing possibility for the earlier medieval period in this connection is the *judex* or *breitheam*, a figure often found playing a significant if somewhat obscure role in the king’s courts under the presiding royal official. Clearly men of Gaelic origins, they may well have acted as interpreters in court proceedings and so helped in the integration of the old Celtic with the new Anglo-Norman order.50

A statute of 1318, written in Latin, nevertheless shows that legal technicalities were already being expressed in Scots when it uses the evidently untranslatable Scots phrase, ‘*wrang and unlauch*’.51 This seems to refer to an action alleging breach of the king’s peace, equivalent to, although not a translation of, the *vi et armis* of English writs of trespass, and opening up certain delictal rights and remedies in the courts. We can find it in use in the burgh court of Aberdeen in 1317, the year before the statute, when in two actions of defamation the Latin record shows the defendants through the mouths of their forespeakers denying ‘*wrang et unlaw*’.52 I would argue that these pleadings were in Scots, and that the recording clerk could find no Latin in which to express what the forespeakers actually said. Other thirteenth-century evidence reinforces this argument for the existence of a vernacular technical term. About one hundred years before the two cases in Aberdeen, the beneficiary of a lay charter was granted jurisdiction in ‘*merchet et blodwit et unlah*’,53 while around 1270 the jurisdiction of a lay tenant of Paisley abbey was said to include ‘*placitis de wrang et hunlawe*’.54 It is true that we have record of legislation of 1230 referring to ‘*querelae de iniuria et non racione*’,55 apparently providing us with at least a Latin equivalent of *wrang and unlauch*; but the earliest version of this act is in a fourteenth-century manuscript and may therefore represent a tidied-up edition rather than what the original actually said. Whatever, the act seems to support the argument that *wrang and unlauch* was a well-established legal concept for most of the thirteenth century.

The earliest undeniable instance of vernacular pleading is in a case before the king and parliament in 1391. The Latin notarial instrument in which this pleading is recorded tells us that Sir Thomas Erskine spoke in the vulgar tongue as follows or at least in similar words:56

> My lorde the kyng, it is done me til understand that thare is a certane contract made bytwene Schir

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50 This is the suggestion in Bannerman, ‘Scots Language’, pp. 11-14. For the *judex*, see Barrow, *Kingdom of the Scots*, pp. 69-82, and Sellar, ‘Celtic Law and Scots Law’, pp. 3-4.

51 See APS, i, pp. 466-74; a better edition of the Latin text can be found in RRS, v, pp. 405-14.


53 British Library, Loans 29 (Portland MSS, Welbeck), no. 355 (a reference which I owe to Geoffrey Barrow, who kindly provided me with a copy of his transcript and notes).

54 *Registrum Monasterii de Passelet* (Maitland Club, 1832), p. 52. Mr W.W. Scott will publish in the forthcoming *Miscellany* volume of the Scottish History Society another charter of the mid-thirteenth century referring to jurisdiction in ‘*wrang et unlauch*’.

55 APS, i, p. 402 © xi).

56 APS, i, p. 578. I have normalised punctuation and capitalisation.
Malcolme of Dromonde and Schir John of Swynton apon the landis of the Erledome of Marr and the Lordship of Garvyauch, of the quhilkes erldome and lordship Issabell the said Schir Malcolms wyf is verray and lauchfull ayre, And failliand of the ayrez of hir body the half of the fornemyt erldome and lordship perteignys to my wyfe of richt of heretage. Therefore I require you for Goddis sake as my lorde and my kyng as lauchful actornay to my said wyfe that, in case gif ony sic contract be made in preiudice of my saide wyfe of that at aucht of richt and of lauch perteigne til hir in fee and heritage failliand of the saide Issabell as is before saide, that yhe grant na confirmacion thare apon in hurtyn of the commone lauch of the kynryk and of my wyvis richt, swa that sic contract gif ony be make na preiudice no hurtynyng to my fornemyt wife of that at scho aucht to succede to as lauchful ayre.

The king responded, apparently also in Scots:

To the qwhilk our lorde the kyng answerit, saiand that he had weel herd and undirstand his request, and said that hym thocht his request was resonable. And said als that it suld nocht be his wil in that case, no in nane othir, outh to do or to conferme that suld ryn ony man in preiudice of thair heritage attour the commone lauch, and namely in outh at rynyt the said schir Thomas or his wyfe in sic manner.

There is nothing in all this to suggest that Erskine was taking an unprecedented or unfamiliar step. The language is assured and confident, and makes use of legal phraseology: ‘contract’, ‘verray and lauchfull ayre’, ‘ayrez of hir body’, ‘richt of heretage’, ‘lauchful actornay’, ‘of richt and of lauch’, ‘fee and heretage’, ‘confirmacioune’ and ‘commone lauch’. It is exactly what we should expect of a language in which it was commonplace to express legal concepts and plead legal points.

How, it may be asked, had this come about? Scots has a long history before its emergence in the relatively clear light of literature and government and legal record, a history that can be derived from materials such as place-names and charters. It was the first and in many cases perhaps the only language of the bulk of the people who inhabited what in the twelfth and thirteenth centuries were the central parts of the kingdom of the Scots, Lothian and the eastern littoral. There is nothing in all this to suggest that Erskine was taking an unprecedented or unfamiliar step. The language is assured and confident, and makes use of legal phraseology: ‘contract’, ‘verray and lauchfull ayre’, ‘ayrez of hir body’, ‘richt of heretage’, ‘lauchful actornay’, ‘of richt and of lauch’, ‘fee and heretage’, ‘confirmacioune’ and ‘commone lauch’. It is exactly what we should expect of a language in which it was commonplace to express legal concepts and plead legal points.

How, it may be asked, had this come about? Scots has a long history before its emergence in the relatively clear light of literature and government and legal record, a history that can be derived from materials such as place-names and charters. It was the first and in many cases perhaps the only language of the bulk of the people who inhabited what in the twelfth and thirteenth centuries were the central parts of the kingdom of the Scots, Lothian and the eastern littoral. It has been observed:

The Old English or Middle English linguistic tradition amongst lowland Scots was deeply and conservatively entrenched by the later middle ages and much less affected than the equivalent English tradition by the experience of many generations of speaking and writing French. ... For every case where English usage adheres to Old English (e.g. ‘writ’) while Scots usage prefers Latin or French (e.g. ‘brieve’) there must be nine or ten where the reverse is true - such as judgement/doom, mortgage/wadset, homage/manre(n)).


If legislation, briefs and charters were drawn up in Latin, they had nonetheless to be communicated and proclaimed to the people whose lives the documents were to affect. Michael Clanchy has shown how in England public matters such as legislation, papal communications and royal writs might be proclaimed in both their written Latin and in a vernacular translation. Here was the means, it may be suggested, by which Scots developed a technical legal terminology. Charters were to be seen and heard (visuris vel audituris); legislation such as that of 1318 was to be read and proclaimed publicly in the king’s courts and in other places where the people were accustomed to gather, briefs were to be read to the court before cases began. But the listening audience, be it the populace at large, an assize, or the tenants of an estate, had to understand what was being said, and vernacular translations, in Scots and perhaps in Gaelic too, must have been essential to this process, given that the great bulk of the population knew little or no Latin. In 1312 a lease drawn up in Latin was interlined with ‘a kind of running commentary or gloss in the Scots vernacular’, translating technical terms in the document, this may exemplify what was in fact common practice from an early date with Latin documents, facilitating their understanding by the people affected by their terms.

By the second half of the fourteenth century, I would suggest, Scots had long been the regular language of the law outside certain matters of form, and the emergence of this language in legal documents and records simply reflected a well-entrenched fact. But this legal language, like the common law which it recorded and expressed, was the product of multiple influences, direct and indirect, in which other languages played a large and by no means a contested role.

What lessons should be drawn from this early history of the common law of Scotland for the development of the new European ius commune? It seems - and contemporary experience shows the same pattern - that a common language is not a prerequisite of a common law. But there is a tendency, based as much upon convenience and communication as upon anything else, which leads to the growing use in practice and daily legal intercourse of a single language, accessible to if not spoken by the mass of the people. But in Scotland, at least, this growing use


60 This is the formula in the preamble to the 1318 legislation (RRS, v, p. 405), which is addressed to justiciars, sheriffs and burgh officials.


62 Literacy in medieval Scotland has been little studied, but see Grant, Independence and Nationhood, pp. 101-6, and Simpson, Scottish Handwriting, pp. 6-12.

63 Liber Ecclesie de Sco (Bannatyne and Maitland Clubs, Edinburgh, 1843), no. 144, facsimile between pp. 104-5; see also the editor’s introduction at p. xix and his footnoted list of the terms translated with their translations. The quotation is from Barrow, ‘Manuscript Production’, at p. 137.

64 Observe the pressure within the European patent system to reduce from the present costly multiplicity of official languages in the European Patent Office to a more manageable amount, such as three or even one. It is said that if the UK had not joined the European Patent Convention and the European Communities, it would have been much easier to adopt English as the language of European patents. On the other hand, if expensive, the European patent system is undeniably successful despite the supposed Tower of Babel in Munich.
in practice of the common tongue never amounted to a monopoly; Latin maintained a place in the law alongside, first, Scots, and then standard English, into the twentieth century; and even now, in the twenty-first, like Scots, it has not wholly disappeared from the lexicon and vocabulary of the lawyer. Moreover, in the Middle Ages, the Scots which grew to be the language of ordinary usage in law was influenced, to a greater or lesser extent, by the languages which had preceded it and from which it grew; just as, one suspects, the English of Scots lawyers is not altogether that of their English brethren. Perhaps then there is something in the notion, eloquently given voice in English by Ewoud Hondius in his speech at the conclusion of the conference where this paper was given, that the English in which the modern European ius commune is typically being expressed will develop - or has already begun to develop - its own characteristics as a language of law, drawing subliminally from the great reservoir of the tongues and laws of Europe.\textsuperscript{65}

In 1992 there was established at Strasbourg the European Charter for Regional or Minority Languages, a treaty of the Member States of the Council of Europe which aims to protect and promote the historical regional or minority languages of Europe by setting out a number of objectives and principles underpinning its approach, and then laying down specific measures to encourage the use of the languages in public life. This includes the administration of justice in the languages in criminal, civil and administrative proceedings (Article 9(1)) and, perhaps more significantly from our point of view, support for the validity of legal documents and provision for translation of key legal texts drawn up in the languages (Article 9(2), (3)). It is of interest to note that, at the date of writing, only Belgium, Greece, Ireland and Portugal of European Community Member States have neither signed nor ratified the Charter, while France, Italy and Luxembourg have still to ratify.\textsuperscript{66} The UK has acceded, however, and we have already touched upon the Charter’s impact in the sheriff courts of the Western Isles of Scotland. My view would be, with the Preamble to the Charter, that the languages of Europe contribute profoundly to the maintenance and development of Europe’s cultural wealth, traditions and common heritage, and that this includes law, in the past, the present and, perhaps above all, the future. Diversity is not the enemy of basic unity; recognition of this fact is the key to the success of the European ideal. The principles of the Charter, currently applicable only to those languages that are not official languages of the State (Article 1), may yet have a still wider role to play.

\textsuperscript{65} Note, however, the publication of French and Italian translations of the \textit{Principles of European Contract Law}, by Denis Tallon and Carlo Castronovo, respectively. Other translations are in the pipeline.

\textsuperscript{66} \url{http://conventions.coe.int/}. 