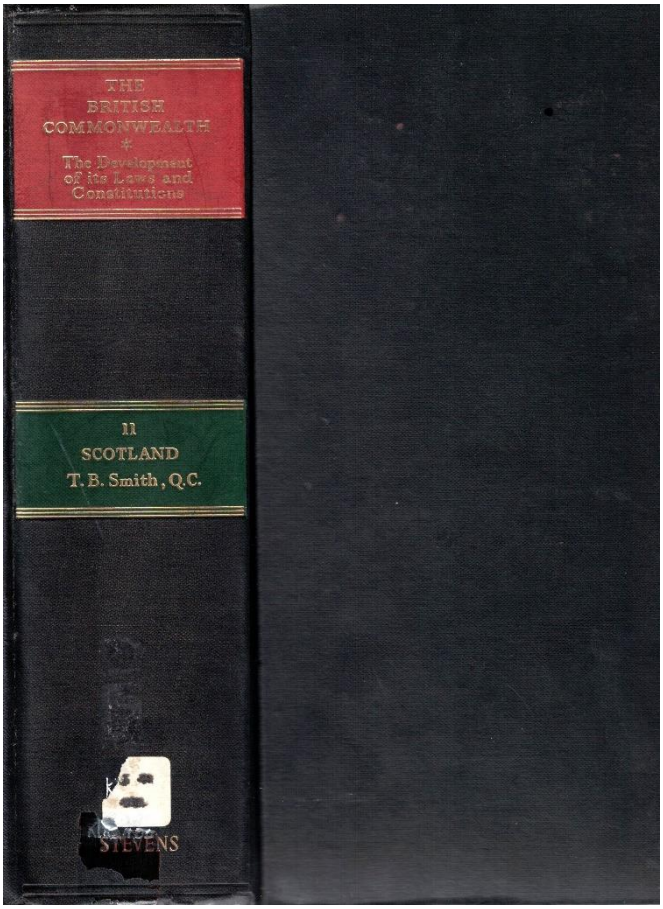
Ian Mitchell's Law-related <u>BOOK RECOMMENDATIONS</u>

14 – Scots Law - Smith



<u>SCOTLAND: the Development of its Laws and Constitution</u>

Author: T.B. Smith

Publication info: Stevens & Son, 1962 (vol. 11 in the series: *The British Commonwealth: the Development of its Laws and Constitutions*) (*available on Amazon, click on cover image for link*)

Descriptor: How the law of Scotland came to be as it is today.

Reviewer: Ian Mitchell, 16 July 2018

Reason to read: None at all for ninety percent of this huge book, but the first 115 pages are fascinating for anyone interested in the constitutional position of Scotland today. T.B. Smith (Prof. Civil Law at University of Edinburgh) was the most influential writer on Scots legal history for a long time. He was superseded recently by D.M. Walker, whose multi-volume *Legal History of Scotland* will be the subject of a future review. He is especially interesting on the Declaration of Arbroath, the Treaty of Union and the long debate about the sovereignty of the people versus that of parliament. But there is an awful lot more of interest besides those subjects.

Main talking points:

1. The idea that "the king can do no wrong" was originally an English rather than a Scottish principle, but was taken over by the Stuarts long before James VI went south to London. However, if a medieval king acted beyond his powers, there was no *legal* remedy, only force. But the idea did legitimize rebellion; some would say it contributed to the instability of the kingdom in Stuart times. Though it encouraged righteous revolt, it offered no protection to those who rebelled. If they lost, the royal wrath would fall upon them, whatever the law. Even if resistance was a right, which is highly arguable, it was not a remedy. (see pp. 50-1)
2. "In *Scotland's most important ancient constitutional document*, the Declaration of Arbroath, sent by the Barons of Scotland to Pope John XXII in 1320" (p. 50, emphasis added), the right to depose the

king was maintained, but *only if he were guilty of handing the country over to the English* (Bannockburn having taken place seven years before). No other right to resist is mentioned or implied.[1]

3. Professor Smith is non-committal on the old dispute about whether sovereignty lies with parliament or the people. He quotes a historian who says that as early as the reign of James III the Scottish Estates "did not admit the irresponsibility of the sovereign." (p. 51) He refers to George Buchanan, James VI's tutor, who took the same line with his pupil: absolute sovereign power was not, he said, part of the law of Scotland. But there are no documents which corroborate this claim. Smith comments: "As much possibly depended on might as on right, but there seems to be little doubt about the constitutional principle." (p. 51) He puts this in context by going on to say: "Even during the long period when the powers of the Estates were circumscribed by the appointment of Lord of the Articles, who alone had the right of initiating legislation which parliament often obsequiously 'registered', royal power did not go unchallenged. … The Wars of the Covenant were the answer to pretentions of absolute sovereign power."

Thought(s) provoked:

1. Winnie Ewing was talking through her best, garden-party hat when she said, at the opening of parliament in 1999, that the old Scottish parliament had been "suspended" and that it was now being "re-convened". The old Scottish parliament was *extinguished* by the Treaty of Union, as was the English parliament. A *new* parliament was created in Westminster in 1707, and another one in Edinburgh in 1999. The old parliament was not a good precedent for the new one. Apart from a brief period after the crushing of the Stuarts in 1690 (Battle of the Boyne), it was a pusillanimous body, which did little more than act as a rubber stamp for royal power, arguably not dissimilar to the current unification of executive and Cabinet in "the Scottish Government."
2. The Union between England/Wales and Scotland was the act of two sovereign, independent states. The language of the Treaty is full of references to things like "for all time coming". Amendment was not envisaged. Professor Smith is eloquent about the number of times that the Treaty has been abused by the British parliament. But, he says, however often that happens it does not make it legal. For a *legal* separation to arranged between England/Wales and Scotland it would, he implies (though does not state directly), be necessary for the two Treaty parties to agree to abrogate it. One side alone cannot do that, in international law or in any form of solemn contract. However, that has not been possible since 1 May 1707, as on that date the two contracting parties ceased to exist.[2]

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[1] Some critics think Smith occasionally over-egged the pudding when differentiating between Scots and English law. See, for example, the review published in the *Louisiana Law Review*, vol. 24 (1963) p. 149 at 152, 155. Smith's point is: "The law of Scotland has too often gone awhoring after strange gods, and the time is ripe to return to the juristic altars of our fathers." (p. 616)

[2] My own reading of this is that Westminster went beyond its Treaty obligations in offering Scotland *by itself* a referendum on independence in 2014. To be fully legal in Treaty terms (which the English rarely acknowledge, as Smith says), the settled will of *both* people would have to be established. Thus, given the current fashion for referendums, Scotland and England *both* need to hold one, on the same date but completely separately, with a result that is binding *only if they come to the same conclusion* (whatever it is). If the two outcomes are different, the *status quo* continues indefinitely. Anything else, it seems to me, would be a violation of the spirit of a Treaty whose letter has been obsolete in this sense for 311 years.

Incidental interest: The Treaty of Union (the full text of the Scottish Act of Union, which ratified the Treaty, is reproduced in an appendix) was supposed to be largely unchangeable, and in some actually is unchanged to this day. It constitutes a skeletal written constitution for the United Kingdom which was created by it. (see p. 55) Smith takes the side of Lord Cooper, the then Lord President, in his oft-quoted Opinion in *MacCormick v Lord Advocate* (1953), the Nationalist bombing case provoked by the new Monarch's being referred to on Scottish pillar boxes as EIIR rather than EIR. Though he dismissed the case, Lord Cooper famously questioned "why it should have been supposed that the parliament of Great Britain must inherit all the peculiar characteristics of the English parliament but none of the Scottish parliament, as if all that happened in 1707 was that Scottish representatives were admitted to the parliament of England. That was not what was done." (p. 57) Smith points out that this is in pretty direct contradiction of Dicey's view of the constitution—see Recommendation 05.

Surprising points: Remember this sort of thing pre-devolution? "Though the British legislature is vigilant to protect the red deer and salmon in Scotland, in November 1961 the Secretary of State had to repeat again the sorry excuse that parliamentary time was not available for legislation to modernise the Scottish law of intestate succession." (p. 71)

Negative issue(s): None at all if you think constitutional law important.

Style: About as readable as it could be, given the subject matter.

Amusing bit(s): Fifty-five years on, this sentence is worth remembering: "The law of conspiracy is invoked to cover such political crimes as… conspiring to coerce the government to set up a separate government in Scotland." (p. 176)

Author: Thomas Broun (later Sir Thomas Broun) Smith was a prize-winning scholar at Oxford, then an officer in the Gordon Highlanders for nine years from 1937 (i.e. he volunteered *before* Munich; after which he was wounded in Italy, mentioned in despatches and ended up as Lieut.-Colonel). He became both a barrister in England and an advocate in Scotland, following which he was appointed Professor at Aberdeen University, then at Edinburgh, with visiting lectureships in between at Calcutta, Harvard and Tulane, New Orleans (Louisiana, like Scotland, has a "mixed" legal system). He served for seven years on the Scots Law Commission. He was one of the most influential writers about Scots Law in the twentieth century.

Link(s): None – he was a bit early for all that!

Overall recommendation level: VERY HIGH INDEED

About the reviewer: Ian Mitchell is the author of four books, including *Isles of the West* and *The Justice Factory*. He is writing a multi-volume study of Russian and Western constitutional history to be called *Russia and the Rule of Law*. He lives in Campbeltown and can be contacted at ianbookrec@gmail.com.
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